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Received May 17, 1894.

NEW ENGLAND REPORTER.

Feb 12

VOLUME V.

35

ALL CASES DETERMINED

IN THE

COURTS OF LAST RESORT,

As Follows:

MAINE. SUPREME JUDICIAL COURT.

NEW HAMPSHIRE, SUPREME COURT.

VERMONT, SUPREME COURT.

MASSACHUSETTS, SUPREME JUDICIAL COURT.

RHODE ISLAND, SUPREME COURT.

CONNECTICUT, SUPREME COURT OF ERRORS.

WITH NOTES, REFERENCE AND CITATION TABLES, ETC.

JAMES E. BRIGGS,

EDITOR.

ROCHESTER, N. Y.

THE LAWYERS' CO-OPERATIVE PUBLISHING COMPANY.

1887.

Entered according to Act of Congress, in the year eighteen hundred and eighty-seven, by
THE LAWYERS CO-OPERATIVE PUBLISHING CO.
In the Office of the Librarian of Congress, Washington, D. C.

Rec. May 17, 1894

E. R. ANDREWS, Printer, Rochester, N. Y.

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J. E. B.

NEW ENGLAND REPORTER.

VOLUME V.

Composition of the courts reported, during the period covered by this volume.

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HON. JOHN A. PETERS.

ASSOCIATE JUSTICES,

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HON. ARTEMAS LIBBEY,

HON. CHARLES DANFORTH,

HON. LUCILIUS A. EMERY,

HON. WILLIAM WIRT VIRGIN,

HON. ENOCH FOSTER,

HON. THOMAS H. HASKELL.

NEW HAMPSHIRE—SUPREME COURT.

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ASSOCIATE JUSTICES,

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HON. ISAAC N. BLODGETT,

HON. ISAAC W. SMITH,

HON. ALONZO P. CARPENTER,

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ASSISTANT JUDGES,

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HON. H. HENRY POWERS,

HON. WHEELOCK G. VEAZEY,

HON. RUSSELL S. TAFT,

HON. JOHN. W. ROWELL,

HON. WILLIAM H. WALKER,*

HON. JAMES M. TYLER.†

MASSACHUSETTS—SUPREME JUDICIAL COURT.

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HON. MARCUS MORTON.

ASSOCIATE JUSTICES,

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HON. CHARLES ALLEN,

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JUDGES,

HON. ELISHA CARPENTER,

HON. DWIGHT LOOMIS,

HON. DWIGHT WHITEFIELD PARDEE,

HON. SIDNEY BURR BEARDSLEY.

* Resigned September 14, 1887.

† Appointed September 18, 1887.

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ERRATA.

NEW ENGLAND REPORTER, VOLUME V.

- Page 161, right column, line 24 from foot, for "satisfied" read "ratified."
- 246, in second line of third headnote, for "grantor" read "guarantor."
- 268, right column, for 7th line read "Mr. J. F. Piper for defendant. Mr. H. C. Bliss, Asst. Atty-Gen., for the Commonwealth."
- 274, left column, for line 21 read "Mr. A. G. Waterman, Atty-Gen., for the Commonwealth."
- 444, right column, in title of case, for "James H. JACKSON" read "Thomas H. JACKMAN."
- 564, left column, line 21, for "Norton" read "Morton."
- 579, right column, line 25, for "Moore" read "Morse," and for "Norton" read "Morton."
- 630, right column, line 21 from foot, for "§ 2008" read "§ 2006."
- 743, left column, line 28, for "West." read "New Eng."

If the reader will immediately make the above corrections with pen and ink, he will confer a favor.

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* Resigned September 14, 1887.

† Appointed September 16, 1887.

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Y. L. R. V. V.			

NEW ENGLAND REPORTER.

(Each case shows its date of decision.)

RHODE ISLAND. SUPREME COURT.

Henry M. ANTHONY *et al.*
v.
Jonathan BOYD *et al.*

Petition for rehearing in a suit to set aside conveyances of realty as in fraud of creditors,—decided in favor of complainants, and reported, 1 R. I. L. ed. 215 (3 New Eng. Rep. 867),—denied on the facts.

(Providence—Decided July 30, 1887.)

ON respondents' petition for a rehearing. Denied.

This is a bill in equity, brought by the executors of Alfred Anthony, a judgment creditor of William and Charles A. Boyd, and by the administrator of the estate of William Boyd, seeking to reach property standing in the name of Virginia Boyd, wife of Jonathan, as in fact the property of William Boyd. The original opinion, granting complainants the relief asked, and in which the case is fully stated, is reported in 1 R. I. L. ed. 215 (3 New Eng. Rep. 867).

Messrs. George J. West, John F. Lonsdale and James M. Ripley, for respondents, for the petition:

"Renewed statements" of a former fraud do not constitute a new fraud.

Adams v. Sage, 28 N. Y. 110; *Potter v. Titcomb*, 22 Me. 300, 306, 307.

There is no allegation in the bill of any change in the belief of the complainants produced as to the fraudulent character of the original transaction.

Hence, as the complainants can recover only *secundum allegata et probata*, we might rest here, as having pointed out a fatal defect in the case, as presented by the complainants in their bill.

Tillinghast v. Champlin, 4 R. I. 173; Story, Eq. Pl. § 257.

The fourth assignment of error is as follows: "That the court find that the complainant's testator was misled by misrepresentations made by the defendants, and acted upon faith in the truth of such misrepresentations."

This finding of the court involves two distinct propositions: First, that the defendants made false representations; second, that the complainant's testator was misled by such false representations.

We have already seen (1) that there were no false representations except those involved in and connected with the original transaction of holding the property in Chicago in Jonathan's name; and (2) that the repetition of

those misrepresentations in the settlement which was made constitutes no ground for relief. It remains to consider the allegation that the complainants were misled by the representations made, and that they acted upon faith in the truth of them.

It is elementary law that, however false fraudulent representations may be, no relief can be had against them unless the party so applying for relief has believed in the truth of them, been misled by them, and been induced by belief in the truth of them to act to his own disadvantage.

Fraud has been defined to be any kind of artifice by which another is deceived. If, indeed, a man upon a treaty for a contract makes a false representation, whether knowingly or not, by means of which he puts the party bargaining under a mistake upon the terms of bargain, it is a fraud, and retrievable in equity.

Mod. Ch. marg. pp. 256, 262.

And in the next place, the party must have been misled to his prejudice or injury.

Story, Eq. Jur. § 203.

Another element of a fraudulent misrepresentation, without which there can be no remedy, legal or equitable, is that it must be relied upon by the party to whom it is made, and must be an immediate cause of his conduct which alters his legal relations.

Pom. Eq. Jur. § 890.

The third requisite necessary to render a misrepresentation fraudulent is that it must be reasonably relied on by the other party, and this obviously includes two subdivisions: (1) the party must have a right, as a reasonable being, to rely upon the representation; and (2) he must, in point of fact, so rely upon it.

Bisp. Pr. Eq. § 215. See also *Clapham v. Shillito*, 7 Beav. 146, 149, 151; *McBean v. Fox*, 1 Ill. App. 177, 182; *Bryan v. Hitchcock*, 43 Mo. 527, 531; *Slaughter v. Gerson*, 80 U. S. 13 Wall. 379, 388, 385 (20 L. ed. 627); *Hagge v. Grossman*, 81 Ind. 223; *Bowman v. Carithers*, 40 Ill. 90; *Taylor v. Guest*, 58 N. Y. 262, 266; *McShane v. Hazlehurst*, 50 Md. 107, 119.

This doctrine that the complainant, in order to be entitled to relief, must have been misled by the fraudulent representations complained of, is absolute, unqualified, and without exception. It has, indeed, been held that where the parties stand in a fiduciary or confidential relation, or where the party making the representations has, from the circumstances of the case, the knowledge of the facts which the other party cannot have, the latter may be justified in relying upon the representations without investigation; but he can never in any case recover unless he does believe the representations, is deceived by them, and relies upon them. In any case, if he once commences to investi-

gate, he is not justified in abandoning such investigation, and relying upon the representations, even though the other party is in a better condition to know the facts than himself.

Pom. Eq. Jur. §§ 892, 893 a, q. 1.

That the complainants in this case did commence to investigate, and did investigate, and, as a result of such investigation, formed the belief that the representations now complained of were false, is shown by the allegations of their bill.

The fact that the party complaining had "full knowledge of the facts" has been used in several cases; but this fact does not alter or modify the doctrine in the slightest degree, but is simply a matter of evidence in the particular cases in which it is used, and pertinent and material as showing that the party complaining was not misled. Whether he had "full knowledge of the facts" or not, if he is not misled, he cannot complain,—the question controlling the decision of the case and the ultimate object of inquiry being: Did he believe the representations, and was he induced to act by a faith in their truth?

See *Brooke v. Rounthwaite*, 5 Hare, 306; *Glasecock v. Minor*, 11 Mo. 657; *Smith v. Richards*, 88 U. S. 13 Pet. 26, 39 (10 L. ed. 42).

When the courts refer to this question of knowledge (which we have seen is a mere matter of evidence as to whether the complaining party was misled), they make use of the expression "full knowledge of the facts," or of the expression "knowledge of the facts constituting the fraud." Fraud itself is a conclusion of law.

Story, Eq. Pl. § 251 a, and cases cited.

The case of *Baker v. Spencer*, 47 N. Y. 562, is quoted by the court in its opinion herein (3 New Eng. Rep. 870), and we understand the present case to have been decided against the defendant upon its authority. An examination of the case, as reported in the court of appeals and in the supreme court (58 Barb. 248), discloses that the referee had found, as a matter of fact, that the plaintiff did believe and rely upon the statements of the defendant; and that the supreme court did not, and the appellate court could not, disturb that finding. This is sufficient to distinguish the case from the present one, and that with reference to the very point now under discussion. But there is an additional feature in the case which distinguishes it from the present, and that is that the fraudulent representation complained of to annul the compromise was a different fraud from that which the plaintiff suspected at the time of the compromise, and only came to the plaintiffs' attention after the compromise.

47 N. Y. 565.

"It is a general rule," says the Court of Appeals in New York, in *Gould v. Cayuga County Nat. Bank*, 86 N. Y. 75, 79, 80, "laid down in the text-books and reported cases, that a party who seeks to rescind a contract into which he has been induced to enter by fraud must restore to the other party whatever he has obtained by virtue of the contract (*Cobb v. Hatfield*, 46 N. Y. 533). He cannot retain anything he received under the contract, and yet proceed in disaffirmance thereof. The rule is laid down in *Evans v. Gale*, 17 N. H. 573, as follows: 'If one has been induced to make a contract to pay

money or to deliver anything by such means that he is entitled to rescind the transaction, he must, in order to do so, first restore to the other party whatever may have been received in exchange for the money or other thing he seeks to recover back, and to which he would become entitled as his own property immediately upon the rescission of the act, whose proper effect would have been to vest it in the other party.' The reason of the rule, as stated by *Chief Justice Shaw* in *Thayer v. Turner*, 8 Met. 550, is that 'the plaintiff, as far as it is in his power, shall put the defendant *in statu quo*, by restoring and re-vesting his former property in him without putting him to an action to recover it, before he can exercise his own right to take back the property sold or bring an action for it.' And as stated by *Chief Justice Parsons* in *Kimball v. Cunningham*, 4 Mass. 502, 'the vendee shall not compel even the fraudulent seller to an action to recover back the property he has parted with in the exchange.' The effect of the avoidance of an agreement on the ground of fraud is to place the parties in the same position as if it had never been made; and all rights which are transferred, released, or created by the agreement are re-vested, restored, or discharged by the avoidance."

See *Bigelow*, Fr. 408, 409; *Clough v. London & N. W. R. Co.* L. R. 7 Exch. 26, 37; *Buich-y-Plum L. M. Co. v. Baynes*, L. R. 2 Exch. 324, 326; *Michigan C. R. R. Co. v. Dunham*, 30 Mich. 128; *Allison v. Connor*, 36 Mich. 283; *Smith v. Brittenham*, 98 Ill. 188, 197; *Potter v. Titcomb*, 22 Me. 300, 305-307; *Graham v. Meyer*, 99 N. Y. 611, 615; *Bassett v. Brown*, 105 Mass. 551, 556-559.

Messrs. Charles Hart and William G. Roelker, for complainants, *contra*.

Stiness, J., delivered the opinion of the court:

We think the first and second assignments of error, upon which the petition for a rehearing is based, are not well taken. The answer does not set out that Virginia J. Boyd bought the land sought to be reached by this bill as an innocent purchaser for value, but avers that her husband, Jonathan Boyd, was to make the advance of \$10,000 stipulated to be paid to Alfred Anthony in the agreement made about the Chicago land; and that the mortgage held by said Anthony was to be transferred to Jonathan, and the mortgage held by the Jackson bank foreclosed under his direction. The testimony, put in the most favorable light for the defendants, supports the averment of the answer, and shows that if Virginia's money went into the transaction, it went in as a loan to her husband. It does not show that she received the conveyance of the land in payment of that loan, but, inferentially, the loan was paid in cash, and the parties treated the land as William's and not hers. If Jonathan's money was advanced, it was repaid to him; if it was Virginia's money, it was repaid to her husband, who acted as her agent in the matter,—the same person from whom it had been received. It was not money put out for the purchase of this land, for it was not part of the arrangement that it should go to her. The court is of opinion that the finding that she was not an innocent purchaser for value was correct.

The third ground for the petition assumes that the court held, in its opinion in this case, that renewed statements of a fraud constitute a new fraud, which will avoid a compromise of that same fraud. Such is not the fact. The opinion distinctly stated that the fraud which entitles the complainant to relief was perpetrated at the time of the agreement. It arose in this way: The Chicago property had been transferred by William to Jonathan Boyd on account of a pretended indebtedness. Two creditors did not believe this was an honest transfer, and attached the property as William's. Then came the negotiations which led to the agreement in which the Boyds insisted upon and renewed previous statements about the large debt due from William to Jonathan, and also stated that Jonathan was to increase that debt by a further advance of \$10,000, for all of which his only security was to be the mortgages on the land in Providence and Chicago. The idea that was carried was that William had nothing, and that Jonathan was doing all this. It now appears that the Chicago property and its proceeds belonged to William, and that Jonathan did nothing more than to loan his brother \$10,000 for a short time, which sum was repaid in February, 1881; and that William held, and in part disposed of, the property in Providence as his own. The misrepresentation upon which the court thinks relief should be granted relates to the property in Providence, which is the subject of this bill; not that in Chicago. The defendants seem to mistake, in this respect, not only the opinion of the court, but the purpose of the bill. The bill does not seek to set aside the transaction about the Chicago property, but only that about the mortgages, upon statements then and there made. Anthony, for instance, gave up his mortgage, believing the property it covered was to go to Jonathan in payment of the debt which his brother owed him, and the money he was advancing. It appears there was no such debt as was claimed, and that the temporary loan was repaid out of the proceeds of the very property which was claimed to belong to Jonathan, and that the Providence property was held as William's and not as Jonathan's property. The statement about the debt was one element of the misrepresentations; but there were other misstatements sufficient to open the transaction on the ground of fraud, even assuming it to be a compromise. The court treated the arrangement as a compromise, because it was so put by the defendants; and it was not necessary to decide whether it was so or not, for even as a compromise it could not stand. It was, in fact, the releasing of an attachment and security for a consideration, and upon certain statements with reference to the indebtedness, the proceeds of the pending sale, the advance of a further sum, and the future ownership of the property in Providence. Whether this amounts to a compromise,—the creditor retaining the entire balance of his debt,—it is not necessary to say. Whatever it may be termed, when it appears that the release of the mortgage security was brought about by false statements about the indebtedness to Jonathan, therefore made and then repeated; by further deceptive statements as to a payment by Jonathan, which was but a pretended or nominal

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payment by him, or a temporary advance soon returned from the proceeds of the mortgage which was represented as going to Jonathan for the relinquishment of his claim on the property attached; and by the statement that Jonathan was, on this account, also to have the Providence property for such debt and payment, when, in fact, William was to have it and did have it, except in name, all along,—the court thinks such a transaction should be opened.

As to the fourth ground. The complainant's representative in this transaction testifies that he was misled, and the court thinks this is true. Even though he and his testator doubted whether William could owe Jonathan what they said he did, had he known that William was to have the \$14,000 mortgage on the Chicago property, out of which he was to pay Jonathan for the loan of \$10,000, and then to have the Providence property besides, it is difficult to believe that he would have released his attachment, or, at any rate, have given up his mortgage security without full payment.

The fifth ground of the petition is covered by what has been said above. The original fraud was the conveyance of the Chicago property by William to Jonathan. That has been settled. But in doing so the complainant's testator was induced, not only by old statements repeated, but by new misrepresentations, to part with valuable security for his debt.

This fraud has never been compromised. Although it grows out of the former transaction, it is distinct and independent. To hold what the defendants claim, the court would have to say to the complainants: "Notwithstanding in settling a fraud you were induced to part with security by deceit and imposition, you are now estopped from setting up this new fraud in order to regain what was wrongfully obtained from you."

As to the sixth point: Undoubtedly "it is a general rule that a party who seeks to rescind a contract into which he has been induced to enter by fraud must restore to the other party whatever he has obtained by virtue of the contract." The rule, however, has no application to this case. Whatever was paid in this matter was, in reality, paid by William. As the respondents have paid nothing on account of this transaction which they have not already received back, there is now nothing to restore to them. They held the property as William's, and for his benefit, and they have no claim upon it as against his creditors.

The petition for rehearing upon all the grounds alleged must be denied.

PETITION OF William D. LAKE in Richmond v. Howland.

1. An officer, after his term of office has expired, will be allowed to amend his return on an execution, and to conform his return to the facts, if no new rights have arisen from the defect or error of the return made.
2. The amendment relates back to the time of the original return.
3. Statement of the evidence which satis-

fied the court that an amendment should be allowed.

(Newport—Decided February 20, 1886.)

THIS was an application of Lake, a deputy sheriff of the county of Newport, addressed to the Court of Common Pleas, for permission to amend his return on an execution. The application was heard by the Court of Common Pleas,—Durfee, *Ch. J.*, and Matteson, *J.*,—and the following opinion given thereon, wherein the facts are set forth.

Mr. William P. Sheffield, for petitioner.

Durfee, Ch. J., delivered the opinion of the court:

This is a motion for leave to amend a return on an execution. The execution issued on a judgment recovered by Preston B. Richmond, tax collector, against Edward W. Howland, in the court of common pleas, in Newport, in May, 1881. It was served by the petitioner, as deputy sheriff, by levy upon all the right, title, and interest of said Howland in two parcels of land in Little Compton. A sale under the execution took place pursuant to notice, February 13, 1882. One of the parcels advertised to be sold first was sold for \$100, "which sum," the return states, "not being sufficient to pay and satisfy this execution, I then and there sold 17.2775 acres of the second-named and described lot of land, at \$20 an acre, being for the sum of \$345.55, to Charles W. Howland, of said town of Little Compton, who was the highest bidder, for the further and full satisfaction of this execution." The second lot contained about 40 acres. The deed given purported to convey the 17.2775 acres on the north side of the lot. The motion states that the petitioner sold the 17.2775 acres from off and along the northerly side of the lot; and prays leave to amend the return so that the same shall correspond with the fact by inserting therein, next after the words "not being sufficient to satisfy this execution," the words following, to wit: "I then and there proceeded to sell, and did sell, from off and along the northerly side of the said secondly-described parcel of land," so that the return will accord with the conveyance. The motion is verified by the petitioner's affidavit.

Several objections are urged to the motion. The first is that the petitioner no longer holds the office which he held when the levy and sale were made, being then deputy sheriff under one Henry Crandall, whereas he is now deputy under the successor of said Crandall. The question is whether a sheriff or his deputy can be permitted to amend a return after the expiration of his office. Courts are in the habit of allowing their officers to amend their returns almost as a matter of course, for the purpose of sustaining proceedings before them, upon being satisfied that the amendment is according to the fact, unless new rights have arisen founded on the error or defect; for the amendment does not change the fact, but only supports it by new evidence. The amendment duly made operates by relation from the time of the original return. The law to this extent is too familiar to require any citation of authority. We think it is also perfectly well settled that an officer may be permitted to amend after his term of office has

expired. *Adams v. Robinson*, 1 Pick. 461; *Blaisdell v. Steamboat Wm. Pope*, 19 Mo. 157, 159; *Morris v. Trustees of Schools*, 15 Ill. 286; *Howell v. Albany City Ins. Co.* 62 Ill. 50; *Dwiggins v. Cook*, 71 Ind. 579; *Gay v. Caldwell*, Hardin (Ky.), 68; *Scruggs v. Scruggs*, 48 Mo. 271. In the two latter cases the amendment was allowed after the lapse of several years. In *Avery v. Bowman*, 89 N. H. 393, a sheriff was allowed to amend the return of a deceased deputy after his term of office had expired. The first objection cannot be allowed.

The second objection is that the officer does not show a case which entitles him to amend. We think it is very clear from the officer's deposition that he has no distinct recollection that the part of the lot to be sold was designated for sale before the auction began. He seems to have faith that the north part was offered, but no recollection. If the motion rested wholly on his testimony it could not be granted. But in support of the motion we have, in the first place, the sheriff's deed. In *Scruggs v. Scruggs*, *supra*, an amendment was allowed after the lapse of twenty years, solely by reason of the sheriff's deed. Moreover we have the testimony of Charles Howland, the purchaser, who testifies here, as he has testified in a former case, that the north part of the lot was put up. His memory, however, seems to be somewhat impaired by age, and is not very vivid. We have also the testimony of William B. Richmond.

This witness attended the sale for the purpose of becoming a purchaser; and he testifies that it was because it was announced, when the sale was about to begin, that the land sold was to be a strip taken from along the north side, that he refrained from bidding.

The announcement was a disappointment to him, and he had therefore very good reason to remember it. We think his testimony is entirely trustworthy. We have against it only the testimony of the auctioneer, a person employed to cry the bids.

He testifies that he did not hear the announcement, but admits that a statement was made by Mr. Sheffield, who was present as counsel, which he did not hear, and to which the officer assented. He does not know what the statement was.

The sale was in a small room, with only a few present, and the auctioneer, having no responsibility, had no reason to give attention until he was called upon to render his services. We do not think his non-recollection is entitled to any weight as against the positive recollection of a witness who had so much reason to recollect as William B. Richmond.

The third objection is that a sale of a strip along the entire length of the lot was inequitable, and therefore an amendment to support it should not be allowed. We think, however, that such an objection is more properly triable in a suit to set the sale aside,—if there be ground for such a suit,—when all parties can be heard and the equities between them duly adjusted.*

Wilcox v. Emerson, 11 R. I. 501.

The amendment proposed is not detrimental to the right of any third person, and cannot be refused on that account.

Amendment allowed.

* See *Howland v. Pettey*, 1 R. I. L. ed. 291 (4 New Eng. Rep. 927).

CONNECTICUT.
SUPREME COURT OF ERRORS.

George A. HAYDEN, Trustee of the Insolvent Estate of Fredrick A. Wheeler,

v.

ALLYN & BLANCHARD CO.

1. A conclusion drawn by the trial court, from the facts in evidence, can always be reviewed by the appellate court.
2. The burden of proving that a transfer of property was in violation of the insolvent law is upon the one attacking the transfer.
3. To render a transfer of property by a debtor void, under the insolvent law, it must affirmatively appear that the transfer was made with a view to insolvency.
4. That the person making the transfer was actually insolvent, and knew that he was so, is not enough to show that a transfer of property was made "with a view to insolvency."
5. The fact that the debtor returned to the vendors thereof certain goods which he had bought and found himself unable to pay for, with the object of escaping insolvency, will not warrant the conclusion that such transfer was void, under the statute.
6. The term "insolvency," in the statute, means insolvency in its technical sense, i. e., proceedings in insolvency.

(Hartford—Filed September, 1887.)

APPEAL by defendant from a judgment of the Court of Common Pleas in Hartford County in favor of plaintiff in an action for damages for a transfer of property in violation of the insolvent law. *Reversed.*

The action was tried by the court, Bennett, J., who made the following finding of facts:

Allyn & Blanchard Co. is a partnership composed of N. B. Allyn, O. H. Blanchard, C. G. Lincoln, and R. N. Seymas, located at Hartford, and dealing in groceries at wholesale.

Between November 20, 1885, and February 10, 1886, they had sold and delivered goods to the value of \$382.31 to Frederick A. Wheeler, of Hartford, a retail dealer in groceries and meat; and on March 11, 1886, he was owing them \$332.04.

Wheeler's place of business consisted of two stores adjoining and connected by an arch through the partition wall; in one he conducted the grocery business, in the other the meat business. He had one clerk.

Charles A. Fowler was employed by defendants as their city agent in soliciting orders for goods, and collecting accounts due the firm. The first bill of goods sold Wheeler, November 20, 1885, amounted to \$223.89, a part of which were sold on thirty days' time, and a part on sixty days. On that day Wheeler was put on Fowler's list of customers, and thereafter Fowler continued to visit Wheeler regularly twice a week in common with all other customers on his list. After said account became due,

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Fowler began to dun Wheeler, and continued to do so upon his regular visits as often as once or twice a week, until March 1, 1886.

During that time Wheeler made two payments; January 1, \$100; and March 1, \$50. From November 20, 1885, to February 10, 1886, Fowler continued to sell goods to Wheeler to any amount he chose to order, and upon the regular credit given by the defendants to their customers.

On February 1 Wheeler took an inventory of his business, which showed \$750 of assets, and \$500 debts.

About the middle of February Wheeler made a statement of his assets and liabilities to Fowler, as shown by said inventory, and at the same time represented to Fowler that a friend in Springfield either owed him or was about to lend him sufficient money to pay all his debts. Fowler reported these statements to the defendants the same day.

In the latter part of February Wheeler had a further talk with Fowler about his business affairs, and then said that his meat business was profitable, but that his grocery business was not; that he contemplated a change in his business arrangements, and wanted either to obtain a partner, or sell out his grocery department; that he would buy no more goods of Allyn & Blanchard until he had paid their bill in full; and asked Fowler if his firm would take back the goods on hand, which he had bought of them. Fowler told Wheeler that he had no authority to take the goods back, but advised him to consult the defendants.

On March 1 Wheeler went to defendants' store and paid defendants \$50 on account, and at the same time had a talk of an hour or more about his business affairs with Allyn, one of the defendants. He stated that he did not have the money to pay his debts then due, and could not turn his goods fast enough to meet his obligations; that all his creditors were asking for payment, but the defendants were pressing him the most; that defendants were his largest creditors, and the only one that he owed more than \$100. Wheeler asked the defendants to take back his stock of groceries on hand which he had brought of them, and credit the amount on his account, stating if they would do so he could close out his grocery business, thereby reducing his expenses by surrendering the lease of one store and discharging his clerk. He thought in that way he could go on with his meat business. Allyn suggested that instead of returning the goods he should try and borrow \$400, or get a partner, or sell out his grocery business, but that, if he did not succeed in any of those efforts, they then would take back the goods. Wheeler went away to make an effort to carry out Allyn's suggestion.

On March 11 Wheeler telephoned to Allyn & Blanchard Co. that he wished them to take back the goods that day. Allyn received the message and asked him to come to the store. Allyn was about leaving for New York, and spoke to Blanchard about the matter, stating that Wheeler would come to the store for the purpose of returning goods and fixing up his account. About two o'clock Wheeler came and saw Blanchard, and stated that he wished to fix up his account by returning the goods. Blanchard did not wish to take back the

goods, and suggested that he could sell them to someone and pay them the proceeds. Wheeler stated that he had tried to sell them, but could not find a customer; and, as he had no money, he did not know how they could get payment unless they took back the goods. He thought if he could fix up their account, he could go on in business, as his other creditors were not pressing him. Seyms was also present at this time, and suggested to Wheeler that he thought Woodward & Co. would buy the goods. Seyms and Wheeler then went to the store of Woodward & Co. to find Woodward. Woodward & Co. were successors to Seyms & Co., retail grocers, and also were customers of Allyn & Blanchard Co. to the extent of \$500 per month.

Seyms stated to Woodward that he wanted him to buy the stock of groceries belonging to Wheeler. When Woodward wished to know why he wanted him to buy, Seyms said: "You go down and buy them; it is all right;" meaning, by that, that if Woodward bought the goods, and lost anything by reason of so doing, he would make his loss good. Woodward agreed to buy the goods at the price at which they had been billed to Wheeler by Allyn & Blanchard Co. Woodward bought them simply on the suggestion of Seyms, but expected to use them in his business. Seyms, Wheeler, and Woodward went at once to Wheeler's store, and the goods were then delivered to Woodward. The whole amount of goods delivered was \$184.26. It was agreed between Seyms and Wheeler that the proceeds should be turned over to Allyn & Blanchard Co., and credited on their account with Wheeler. There were two loads of the goods. The first load was taken and deposited in the store of Woodward & Co. After the second load was on the wagon, Woodward told Seyms that he could not take the goods, because he thought if it should become known to his customers that he had bought a second-hand stock, and put in with his own stock, it would injure his trade.

Woodward decided not to take them, and then Seyms ordered the second load, then on the wagon, to be taken to the store of Allyn & Blanchard Co., and it was so delivered. On the next day the other load was also delivered at the store of Allyn & Blanchard Co., and all the goods became a part of their stock. In the evening of March 11 Seyms and Wheeler met at Woodward's store to close up the transaction. Woodward gave Woodward & Co.'s check for \$184.26 to Wheeler, payable to his order, which Wheeler indorsed and delivered to Seyms. Seyms gave Seyms & Co.'s check for \$184.26 to Woodward, payable to Woodward & Co.'s order. The next day Seyms turned over Woodward & Co.'s check, indorsed by Wheeler, to Allyn & Blanchard Co., and the amount of \$184.26 was credited on their account with Wheeler. Then Allyn & Blanchard Co. gave their check for \$184.26 to Seyms, payable to his order, and in a day or two afterwards Allyn & Blanchard Co. cashed their check for Seyms, who put the amount to the credit of Seyms & Co., and that completed the transaction.

Wheeler continued his business for a few days afterwards, when his store was attached 500

by a creditor and closed up. March 18 a creditor's petition was filed in the probate court praying that Wheeler be adjudged an insolvent, and on March 25 he was so adjudged.

The plaintiff, George A. Hayden, was appointed his trustee in insolvency, and was duly qualified. The whole estate of Wheeler, as inventoried and returned by the trustee, is \$138.40.

The plaintiff made demand before the bringing of this action of Allyn & Blanchard Co. for the goods taken from Wheeler's store, which was refused. The value of these goods is found to be \$184.26.

March 11, 1886, Wheeler was in failing circumstances. He was owing debts upwards of \$500, and was unable to pay them in the ordinary course of business. His creditors, some of them, were pressing for payment. His business affairs were in so critical a condition that an attachment put on his store closed it up, and was followed at once by proceedings in insolvency.

At the time the transfer of goods was made, Allyn & Blanchard Co. knew of Wheeler's inability to pay his debts in the ordinary course of business, and that such transfer of goods was the only way he could meet his debts to them. They also knew that Wheeler's hope of being able to go on in his business, after such adjustment of their claim, rested on the fact that his other creditors were not pressing him for payment.

At the time of said transfer of goods Wheeler did not intend to go into insolvency.

Upon the facts set forth it is found that said transfer of goods was not made in good faith in the regular course of business, and was made in view of insolvency, and with intent to prefer a creditor, Allyn & Blanchard Co., and with the knowledge of such creditor that it was so made, within the meaning of the Insolvency Act of 1885, pp. 491, 492, §§ 95-99.

Mr. Lewis Sperry, for defendant, appellant:

The Insolvent Act of 1885 is precisely the same as the Act of 1853. Insolvency known to a party is not enough, as matter of law, to bring a case within the statute.

A conveyance by a debtor in failing circumstances to a creditor, expecting at the time to continue in business, and not intending to go into insolvency, is valid.

Bloodgood v. Beecher, 35 Conn. 469; *Hall v. Gaylor*, 37 Conn. 550; *Utley v. Smith*, 24 Conn. 290; *Croswell v. Allis*, 25 Conn. 301; *Quinebaug Bank v. Brewster*, 30 Conn. 559.

Preference is not known to the common law. *Smith v. Skeary*, 47 Conn. 54.

The finding that the debtor did not make the conveyance with a view to insolvency would seem to be conclusive of the case.

Bloodgood v. Beecher, 35 Conn. 482, 483; *Hall v. Gaylor*, 37 Conn. 552.

A conveyance made with a view to insolvency has in contemplation a closing of insolvent's affairs.

Bloodgood v. Beecher, *supra*.

Whether there has been a change of possession of personal property following a sale is a mixed question of law and fact. An open, visible, permanent change is required to make the sale valid as against vendor's creditors.

Mead v. Noyes, 44 Conn. 489.

Mr. Joseph L. Barbour, for plaintiff, appellee:

The validity of the transfer of property by the debtor to defendant was simply a question of fact.

Seymour v. Hoadley, 9 Conn. 420; *Weeden v. Hones*, 10 Conn. 50-54; *Seeley v. North*, 16 Conn. 98; *Ulley v. Smith*, 24 Conn. 312; *Quin-ebaug Bank v. Brewster*, 30 Conn. 560-564; *Robertson v. Todd*, 31 Conn. 555-557; *Hamilton v. Staples*, 34 Conn. 323; *Bloodgood v. Beecher*, 35 Conn. 481, 482; *Hall v. Gaylor*, 37 Conn. 550.

The supreme court will not interfere with such finding of fact.

Beckwith v. Windsor Mfg. Co. 14 Conn. 605; *Shelton v. Hoadley*, 15 Conn. 538; *Norwich & W. R. R. Co. v. Kay*, 22 Conn. 606; *Knapp v. White*, 23 Conn. 541; *Ulley v. Smith*, *supra*; *Croswell v. Allis*, 25 Conn. 312; *Goodman v. Jones*, 26 Conn. 267; *Sisson v. Roath*, 30 Conn. 16; *Graves v. Lockwood*, 30 Conn. 279; *Robertson v. Todd*, 31 Conn. 558; *Shelton v. French*, 33 Conn. 496; *Hamilton v. Staples*, 34 Conn. 323; *Bloodgood v. Beecher*, 35 Conn. 469; *Hall v. Gaylor*, 37 Conn. 553; *Brady v. Barnes*, 42 Conn. 517-524; *Thomas v. Mullain*, 44 Conn. 146.

Loomis, J., delivered the opinion of the court:

This case turns upon the question whether the transfer of goods by Wheeler, the insolvent debtor, to the defendant was made in such circumstances that it was void as against Wheeler's creditors. The court below has found the facts in detail with regard to the whole transaction, and upon the facts so found held the transfer to be void under the insolvent law. The conclusion of the court upon the subject is thus stated in the finding: "Upon the facts set forth, it is found that said transfer was not made in good faith in the regular course of business, and was made in view of insolvency, and with intent to prefer a creditor, the defendant company." Upon this conclusion the court held the transfer void, and rendered judgment for the plaintiff, the trustee in insolvency, to recover the value of the property.

If this had been a conclusion of fact from the evidence before the court, it could not be reviewed; but it is very clearly an inference of law from the facts specifically found. The evidence had exhausted itself in producing the facts thus found. Nothing remained but for the court, in the exercise of its legal judgment, to draw its inference from the facts. This the judge himself distinctly states in saying that "this conclusion is upon the facts set forth."

In such a case the conclusion of the court can always be reviewed by the appellate court. An erroneous conclusion is an error of law and not an error in an inference of fact.

The question therefore is whether the facts presented show clearly that the transfer was in violation of the provisions of the insolvent law, and therefore void as against creditors. Clearly the burden of proof on this point rests upon the plaintiff. Aside from the ordinary rule that a plaintiff must make out his case, there is a presumption that a transaction is legal unless brought clearly within some prohibitory or 1 Conn.

invalidating statute or rule of law. At common law such a transfer would be valid; and it is rendered invalid, if at all, only by the provisions of our insolvent law. Gen. Stat. p. 378, § 1.

The provisions of that section are clearly and authoritatively summarized in *Ulley v. Smith*, 24 Conn. 290, where the court says: "Three things are necessary to make the deed of an insolvent debtor fraudulent and void under the statute of 1853: (1) The grantor must be in failing circumstances; (2) The deed must be made with a view to insolvency; and (3) the deed must be made with an intent to prefer one creditor over another."

In this case the facts show that the debtor was in fact in failing circumstances; and, if what he did was in view of insolvency, the transfer of this property must be regarded as having been made to give to the defendant a preference over his other creditors. The whole question therefore is whether the transfer was made "with a view to insolvency."

Upon this point it is not enough that a debtor was actually insolvent, and that he knew that he was so. This is consistent with the intention and hope on his part to work out of his embarrassment and continue his business. In this case it is expressly found that the debtor, "at the time of the transfer of the goods, did not intend to go into insolvency." It is also found that, at the time of the negotiation resulting in the transfer of the goods, "Wheeler asked the defendant to take back the stock of groceries which he had bought of it, stating that, if it would do so, he could close out his grocery business, thereby reducing his expenses by surrendering the lease of one store and discharging his clerk; and that he thought that in that way he could go on with his meat business." And on the day when the transfer was made, it is found that Wheeler stated to the defendant "that he thought, if he could fix up its account, he could go on in business, as his other creditors were not pressing him."

It is also to be noticed that this was not a payment to a particular creditor out of money representing goods which he had sold, which goods had been purchased of his various creditors, but was simply a return to the defendant of goods which he had bought of it, and which he had found himself unable to retain and pay for. This last fact is not of itself decisive, and perhaps not very important; but it tends to show that the debtor's object was not to rob his other creditors for the sake of paying the defendant.

We think the mere fact that the debtor "did not intend to go into insolvency" is not of itself decisive of the matter. He might have seen that insolvency was inevitable, but have intended to wait for his creditors to move against him. It is enough if he knew that he could not escape insolvency, and was acting in its presence and in expectation of it. But we think that it appears from the finding that he entertained a hope of so arranging his business, after the return of the groceries to the defendant, as to go on with his meat market; and that his object in making the transfer was rather to escape insolvency than to go into or be overtaken by it. When we consider that it must affirmatively appear that the debtor acted "with

a view to insolvency," it is clear that the finding does not warrant the conclusion that the transfer was void under the statute.

The term "insolvency," as used in the statute, of course means insolvency in its technical sense; that is, proceedings in insolvency. It is very clear that a debtor may be in actual insolvency,—that is, his assets may not be sufficient to pay his debts,—and yet he may be very far from legal insolvency or serious danger of it.

The facts found in the case with regard to the exchange of checks between Seyms & Co., Woodward & Co., and the defendant, are in themselves suspicious, and seem to indicate an impression on the part of all parties that the transaction might not bear the light; but we cannot, looking at the matter as a question of law, consider this sufficient to neutralize the other facts found, to which we have alluded; while it would not be sufficient for them merely to neutralize those facts; they must predominate and determine the character of the transaction.

The view of the matter which we have taken is sustained by repeated decisions of this court, giving construction to the section of the insolvent law in question. *Utley v. Smith*, 24 Conn. 290; *Quinebaug Bank v. Brewster*, 30 Conn. 559; *Bloodgood v. Beecher*, 35 Conn. 469; *Hall v. Gaylor*, 37 Conn. 550.

There is error in the judgment appealed from, and a new trial is granted.

In this opinion the other Judges concurred, except **Carpenter, J.**, who dissented.

Edwin G. POTTER

v.

Silas A. WAITE *et al.*

In an action for trespass committed upon a particular acre in a tract of land, defendants claimed title to the *locus* from one Westcott, now deceased, who, defendants claimed, had held title to an acre in the tract; and the question was whether that was the acre in question or not. A witness for plaintiff testified that Westcott, while (as defendants claimed) title to an acre was in him, had said: "I don't suppose I own the pines" (referring to the *locus*); "Potter" (the plaintiff) "claims them." On cross-examination the witness testified that Westcott gave him to understand that there was a dispute between him (Westcott) and Potter as to the ownership. *Held*, that the declaration of Westcott was to some extent adverse to his interest and in disparagement of his title, and was admissible, as against the defendants, for what it was worth.

(Windham—Filed August, 1887.)

A PPEAL by plaintiff from a judgment of the Superior Court for Windham County in favor of defendants in an action for a trespass to land and cutting and carrying away wood. *Reversed.*

The question presented and the facts connected therewith are stated in the opinion.

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Messrs. J. H. Potter and C. E. Searls, for plaintiff, appellant:

The principles governing the admissibility of the testimony in question are analogous to and in keeping with those governing the admission of declarations of a party in interest against his interest and in disparagement of his title, and, like such admissions, are binding upon all those privy in estate with the declarant.

1 Greenl. Ev. §§ 109, 189; Best, Ev. ed. 1883, § 519; 3 Field, Lawyer's Briefs, §§ 364-366; *Beers v. Hawley*, 2 Conn. 467; *Williams v. Ensign*, 4 Conn. 457; *Norton v. Pettibone*, 7 Conn. 319; *Higley v. Bidwell*, 9 Conn. 447; *Hill v. Bennett*, 28 Conn. 883; *Deming v. Carrington*, 13 Conn. 874.

It is said that the grantor cannot, by such declarations, impeach directly his own deed or record title, but the statement of Westcott did not tend directly or even indirectly to impeach his title. The point at issue was, "Where is the sawmill lot, and how bounded?"—not, "Had Westcott a deed of the sawmill lot?"

The books also speak of the declarant as being in possession of the tract. If possession is an essential to the admissibility of a declaration against interest, it will be noticed in this case that the possession required is not of the tract cut over, but of the sawmill lot. Westcott was in possession of that lot as one in the chain of title from Ransom Perkins, and his declaration, made as one in possession of that tract, was, as we have said before, to the effect that the sawmill lot to which he claimed title, and of which he was then in possession, did not include the land from which the pines were cut.

We submit, therefore, that the declaration of Westcott was that of an owner in possession, made while thus owner and possessor, against his own interest, and was in substance that the tract cut over was not included within the limits of the land covered by the deed from Ransom Perkins to Young.

Messrs. John J. Penrose and John M. Hall, for defendants, appellees:

I. The testimony of Gallup was not admissible for the purpose for which it was offered. It was offered in the court below by the plaintiff for the sole purpose of contradicting the deed of Ames, trustee, to Westcott. The evidence for this purpose is obnoxious to the objection: (1) that it is hearsay; (2) that, being parol, it is not admissible to contradict a deed (*Benedict v. Gaylor*, 11 Conn. 332; *Elliott v. Weed*, 44 Conn. 23); (3) because the parol declarations of a person having title are inadmissible to defeat that title (*Jackson v. Shearman*, 6 Johns. 20; *Jackson v. Cary*, 16 Johns. 306; *Watson v. Watson*, 13 Conn. 85).

If not admissible for the purpose for which it was offered, it is not admissible for any other.

1. The finding must show that the questions raised by the assignment of errors were raised in the court below.

New Haven Sav. Bank v. McPartlan, 40 Conn. 92.

2. No errors will be considered by the supreme court of errors except such as appear on the record.

It must further appear on the record that

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the question was distinctly raised as a question of law in the trial, and was decided by the court adversely.

Rules of Practice; Practice Acts, p. 258, § 2. See also *Lee v. Stiles*, 21 Conn. 505.

The record shows that Gallup's evidence was not offered in the court below for the purpose of proving Westcott's declarations in disparagement of his title, but solely "to establish the claim that the trustee's deed was not legally sufficient to convey the said one acre of land now in controversy to said Harry Westcott."

II. But if it be now claimed that this evidence should have been received as the admissions or declarations of Mr. Westcott, adverse to his title, the words of Mr. Westcott were: "I don't suppose I own the pines; Potter claims them. There is a dispute between me and Potter as to the ownership of the pines."

No fact is admitted. No one has been misled. Not even an opinion is expressed. There is nothing but a bare supposition, and a dispute about the title to certain pines,—even what pines does not appear. This cannot be tortured into an admission of an adverse title in Potter.

Gallup neither states the language nor the substance of the so-called admissions, but merely his own impressions or understanding of them. This is not permitted.

Dennis v. Chapman, 19 Ala. 29; *S. C.* 54 Am. Dec. 187; *Phelps v. Hartwell*, 1 Mass. 72; *Atkins v. Sanger*, 1 Pick. 192.

Beardsley, J., delivered the opinion of the court:

Upon the trial of this case it appeared that the defendants cut and carried away the wood growing upon about an acre of land, part of the 96 acres described in the complaint, and that they did so by the license and permission of one Nathaniel Westcott, who claimed to be the owner of it; and the question was whether the title to the acre of land was in the plaintiff or Westcott.

It was admitted that in 1806 Ransom Perkins, then owning the 96 acres of land, including the acre in question, conveyed about an acre, part of the 96 acres, to George Young and others. The defendants claimed that the acre so conveyed was that upon which they entered and did the acts complained of, and that by successive conveyances the title to the same became vested, in 1849, in one Henry Westcott, who died in 1882, and by his will devised it to Nathaniel Westcott, their licensor.

The plaintiff claimed that the land in dispute was not that which was conveyed by Ransom Perkins to George Young and others, but that he had the title to it, derived from Ransom Perkins; and in support of this claim he called Amos J. Gallup as a witness, who testified that in a conversation with Henry Westcott, about ten years before his death, Westcott proposed to him to make him executor of his will, and to give him authority to sell all his woodland; that Gallup then said to him, "If you sell all your woodland it will bring a handsome sum," and that Westcott replied, "I don't suppose I own the pines; Potter claims them;" that by "the pines" he understood him to mean the piece of land which was cut over by Waite and Stanton, and that by Potter he

understood that he meant the plaintiff in this case. Upon cross-examination he testified that Westcott gave him to understand that there was a dispute between him and Potter as to the ownership of the pines. This evidence was ruled out by the court, upon a general objection made by the defendants to its admissibility.

The finding does not show upon what ground the evidence was excluded. There being no finding on the subject, we must assume that the witness properly understood the declaration of Westcott as referring to the land in question, and the question therefore is whether it was admissible against the defendants.

The witness testifies that the declaration was made about ten years before the death of Henry Westcott. According to the claim and evidence of the defendants, Westcott then had the title to the acre originally conveyed to Young.

Whatever title Nathaniel Westcott had to the property, and therefore whatever rights the defendants had as his licensees, were derived from Henry Westcott by his last will. Upon a familiar principle his declarations respecting his title to this property were admissible against the defendants, to the same extent that they would have been against him if he was living and the immediate party to the suit, or as they would be if made by the defendants themselves. *Beers v. Hawley*, 2 Conn. 487; *Williams v. Ensign*, 4 Conn. 457; *Norton v. Pettibone*, 7 Conn. 819; *Higley v. Bidwell*, 9 Conn. 447; *Hill v. Bennett*, 23 Conn. 368.

This principle is recognized in England and in most if not all the States of the Union. Henry Westcott's declaration, as testified to: "I don't suppose I own the pines, Potter claims them,"—though connected with his statement, testified to on cross-examination, that there was a dispute between them as to the ownership,—was to some extent adverse to his interests, and tended to the disparagement of his title, and evidence of it should therefore have been admitted.

While such evidence, standing alone, would not be sufficient to establish a title to the land in the plaintiff, and manifestly should not avail against clear proof of a title in the defendants, yet it should have gone to the jury, to be considered by them, and given such credit and weight as, under the circumstances and in view of the other evidence in the case, they might think it entitled to.

There is error in the judgment appealed from, and a new trial is granted.

In this opinion the other Judges concurred, except **Carpenter, J.**, who dissented.

Francis G. ANTHONY, Exr.,

v.

Phœbe T. ANTHONY et al.

1. Where, by the terms of her deceased husband's will, a widow took about two thirds of the entire income of the personal property, and the use of nearly one half of all the real estate,—*Held*, that the provisions of the will were in lieu of dower.
2. A will gave to the testator's widow "an

income in cash of \$1,200 a year during her life." *Held*, that the sum specified was payable annually, and not at periods during the year.

3. The will further provided: "And, after her (the widow's) death, to divide equally among her legal heirs \$4,000, which shall be theirs forever. *Held*, that, as the class "legal heirs" could come into existence only at the death of the widow, the bequest did not vest at the death of the testator, and could not vest until the death of the widow.
4. The will also provided that, in the case of the death of either of testator's sons, the executor should "pay over to the widow, if living, \$3,000, providing he (the son) leaves no heirs, and in case of heirs, the division to be made to his family the same as before his death, until the youngest child arrives to the age of twenty-one years, at which time the property may be divided equally among the heirs, if the trustee and judge of probate shall think it safe to do so." *Held*,
 - (a) That the word "heirs" here means "children."
 - (b) That the trust created by this portion of the will is valid.
5. *Held*, further, that the presumptions in favor of offspring against intestacy should be called in to aid the inference, to be drawn from a permissive distribution, that the testator intended that his grandchildren should take the fee in his estate from his death.

(New Haven—Filed September, 1887.)

SUIT for the construction of the will of Willis M. Anthony, deceased, brought in the Superior Court for New Haven County, and there reserved for the advice of this court.

The questions presented, and the relations of the parties in interest to the testator, appear from the complaint, which is as follows:

I. Willis M. Anthony, then of said New Haven, died there on the 26th day of December, 1878, seised and possessed of a considerable estate, both real and personal.

II. On the 8th day of March, 1876, he made and executed, in said New Haven, a will dated on said day, which will was in due form of law to pass both real and personal estate, a copy of which will is hereto annexed.

III. After his decease said will was duly presented to the Court of Probate for the District of New Haven, and on the — day of —, 1876, was duly admitted to probate as a will of real and personal estate, and was duly recorded in the records of said court.

IV. The plaintiff, Francis G. Anthony, of said New Haven, was the executor named in said will, and was duly qualified as such to the acceptance of said court of probate, and is now the sole executor of said will. Washington Yale, mentioned in said will, has never qualified as "assistant executor or advisor," as nominated in said will, and no one has ever been appointed in his stead.

V. Said Willis M. Anthony left him surviving a widow, who is the defendant Sarah An-

thony, and two sons, Henry W. Anthony and Leman H. Anthony, both now deceased.

VI. Said Henry W. Anthony died on or about the — day of June, A. D. 1882, testate, without issue, and the defendant Phoebe T. Anthony is the widow and sole devisee and legatee of said Henry W. Anthony.

VII. Said Leman H. Anthony died on or about —, 1886, intestate, leaving him surviving a widow, who is Carrie Anthony, one of the defendants, and a minor son, Willis M. Anthony, another of the defendants, said defendant Willis M. Anthony being now of about the age of 18 years.

VIII. No distribution of said estate has ever been made in the Probate Court of said District of New Haven.

There are no children, or any legal representatives of children, or any brothers or sisters of said defendant Sarah Anthony, now living. The defendants Edward Oviatt, Nathan W. Oviatt, and Sarah Burton are children of a deceased sister of said defendant Sarah Anthony; the defendants J. Hopkins Anthony and Frank G. Anthony are children of another deceased sister of said Sarah Anthony; the defendants Mary F. Scott and Edwin T. Baldwin are children, and A. E. Goodsell is a grandchild, of a deceased brother of said Sarah Anthony; and the defendant Willis M. Anthony is the grandchild of another deceased sister of said Sarah Anthony.

IX. Questions have arisen and claims have been made by the different persons named as defendants in this complaint, relative to the construction and legal effect of certain of the provisions, trusts, and devises contained in said will of Willis M. Anthony, and particularly of the provisions contained in the 2d and 5th articles of said will relating to the residuary estate of said deceased.

1. Is the defendant Sarah Anthony entitled to a dower interest in said estate in addition to the provision for her contained in the 2d article of said will?

2. Is the bequest of "an income in cash of \$1,200 a year, during" the life of the defendant Sarah Anthony, mentioned in the 2d article of said will, payable at the end of each year, or at periods during the current years, at the discretion of the executor?

3. Who are meant by the words "her legal heirs" in the last clause of said 2d article of said will, directing, after the death of said Sarah Anthony, "to divide equally among her legal heirs \$4,000, which shall be theirs forever"? Is said bequest legally operative; and, if so, do such "legal heirs" take *per stirpes* or *per capita*? And did such bequest vest at the death of the testator?

4. Whether any legal effect can be given to any part of § 5 of said will, and if so, what?

5. Whether the provision of said 5th article, —directing the executor "in case of the death of either of them" (that is, the said sons, Henry W. Anthony and Leman H. Anthony) "to pay over to the widow, if living, \$3,000, providing he leaves no heirs"—means the death of the said sons without children, or without persons capable of inheriting intestate property under the statute laws of the State of Connecticut.

6. Who are included in the word "family" in that part of said 5th article directing "a di-

vision to be made" "in case of heirs" to the family of said son so deceased?

7. Is the discretion conferred upon the executor and trustee in the 5th article of said will to continue as to payments to be made to the family of Leman H. Anthony until the said defendant Willis M. Anthony arrives at the age of twenty-one years?

8. Whether the trust created or attempted to be created in said 5th article is valid, legal, and operative, and capable of being carried out in any legal manner; and, if so, how; and whether the trust estate which it was so attempted to create is a valid and subsisting estate.

9. Whether the provision of said 5th article, directing that "the property may be divided among the heirs, if the trustee and judge of probate shall think it safe to do so," is a legal and valid devise of the rest and residue of said estate, and, if a valid and legal devise, who are meant by the words "the heirs" in that part of said 5th article directing that the property may be divided equally among the heirs, if the trustee and judge of probate shall think it safe to do so; or is inoperative and void for uncertainty; and if void and inoperative, whether the other provisions of said article are thereby rendered inoperative and void.

10. The plaintiff is ready and willing to so administer said estate and discharge his duties as such executor thereof, as he shall be advised it is legal and proper for him to do; but he is in doubt as to said several questions, and as to the true construction of the articles of said will to which said questions relate; and, by reason of the conflicting claims of the various parties in interest, and of the claimed uncertainty and ambiguity of said articles of said will, he is exposed to sundry suits by said claimants, and to loss and damage therefrom; and he is advised by counsel that he cannot, with safety to himself and the rights and interests of others, proceed with the execution of said will and the administration of said estate without the advice and protection of this court, in giving a construction to the several articles, clauses, and provisions of said will, in respect to which have arisen said various claims and questions.

The plaintiff claims:

1. An adjudication as to the matters in respect to which said questions and doubts have arisen, and a decree settling the construction of said will, and directing the plaintiff in what manner he shall carry its devises and bequests into execution, so as to enable him to administer upon said estate properly and safely.

2. That the defendants hereinbefore named may be cited in and ordered to set forth their several claims and demands, and to submit the same to the decision of this court.

3. That the sums to be allowed out of said estate to the several parties hereto for their several expenses and counsel fees may be fixed by this court.

The portions of the will sought to be construed are set forth in the opinion.

Mr. James Gardner Clark, for Phoebe T. Anthony:

Phoebe T. Anthony's claims are as follows:

1. That the 5th section of said will is valid and operative.

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2. That the portion of said 5th section of said will, directing the executor, in case of the death of either of the said sons, Henry W. Anthony and Leman H. Anthony, to pay over to the widow of said sons, if living, \$3,000, providing he leaves no heirs, means the death of said sons without children, and that the defendant is accordingly entitled to receive from the said executor the sum of \$3,000, as provided in said 5th section of said will.

Mr. C. R. Ingersoll, for Sarah Anthony:

By the 2d section of the testator's will, Sarah, his widow, is entitled to receive "my life insurance policy of \$2,000, the deposit now in her name in the National Savings Bank, all the furniture and other articles of housekeeping and clothing which I may be possessed of at the time of my death, of which there shall be no inventory taken, to be hers and her heirs' forever. Also the free use or income of my house in Meadow Street, and an income, in cash, of \$1,200 a year during her life."

As, under the different claims, no question arises affecting the operation of this portion of the section, we submit that the executor should be advised that the testator's provision for the widow is to be carried into effect in accordance with the above clearly-expressed intention.

Mr. George R. Cooley, for Carrie Anthony:

1. Although the question of dower cannot, under the facts in this case, seriously affect the interest of this defendant, yet a change of circumstances can be imagined that would make the question of importance to her.

By the very nature of the provisions the testator makes for his widow, as well as the provisions he makes for others, the testator clearly expresses the intention that her portion was to be in lieu of dower.

Aling v. Chatfield, 42 Conn. 276; *Lord v. Lord*, 23 Conn. 831.

2. The 5th section of the will is somewhat obscured by the inaccurate use of the word "heirs."

The provisions made in case of the death of either of the sons, "provided he leaves no heirs, and, in case of heirs," clearly show that by the word "heirs" the testator meant and intended "children." This is not an uncommon error for unprofessional persons to make; and in construing the will the court will substitute the word "children" for "heirs."

Bond's App. 81 Conn. 192; *Schoul. Wills*, 542.

3. The will says, "And in case of heirs (children) the division to be made to his family, the same as before his death, until the youngest child arrives at the age of twenty-one years, at which time the property may be divided," etc.

It is evident that the testator intended as included in the word "family" the widow of the deceased son, for, in the event of no children, he directs a payment of \$3,000 to her. It will not be supposed that the testator designed, in the event of children, to debar the widow from any provision whatsoever. The testator used this word "family" in its comprehensive sense, intending to include all those who, from kinship and relationship to such deceased son, were dependent upon him for support.

Smith v. Wildman, 37 Conn. 387.

This defendant claims, therefore, until her

son arrives at twenty-one years of age, that she is entitled jointly with him to the entire "balance of income," after the payment of the widow's annuity and other proper charges.

Messrs. John W. Alling and James H. Webb, for Willis M. Anthony:

This defendant, the son of Leman H. Anthony, deceased, is the grandchild and only living descendant of the testator. He is also grandnephew and one of the prospective heirs at law of the testator's widow.

The questions propounded relate chiefly to the 2d and 5th sections of the will.

I. As to the widow's right of dower, in addition to the provisions made for her by the will:

The widow has never claimed dower, and does not now make such claim; but, as this is the first question propounded in the complaint, it may deserve passing notice.

The provision for the widow was clearly in lieu of dower. It is true that the mere fact of a testamentary provision will not be deemed to be in lieu of dower, unless it clearly appears that such provision was intended by the testator as a substitute. "But this intention is not necessarily declared in express words; it may be demonstrated by clear and manifest implication."

Alling v. Chatfield, 42 Conn. 276.

"The rule depends essentially on the intention of the testator, and that intention is to be gathered from all the parts of the will taken together."

Lord v. Lord, 23 Conn. 331. See also *Hickey v. Hickey*, 26 Conn. 261.

Although no statutory limitation will bar a widow from claiming her dower if she be entitled to it, yet, if it clearly appears from an examination of the whole will that the testator intended to make a complete provision for his widow, then such complete provision will be held to be in lieu of dower, and the widow will be put to her election under the statute.

II. As to the division of \$4,000 among the legal heirs of the testator's widow, after her death, directed in the 2d section:

This we claim is void for remoteness and uncertainty, and as offending the statute against perpetuities.

It is clear that this bequest cannot vest until the widow's death, and then in persons not now ascertained, but some—and even all—of whom may not have the statutory qualifications to take.

It is not enough that the estate may vest within the statutory period; the bequest, to be valid, must be such that its vesting can by no possibility be postponed beyond the statutory limit.

If the bequest may by possibility violate the statute, it is void, whether it does so in fact or not.

Jocelyn v. Nott, 44 Conn. 55; *Rand v. Butler*, 48 Conn. 299; *Alfred v. Marks*, 49 Conn. 473; *Wheeler v. Fellowes*, 52 Conn. 238; *Farnam v. Farnam*, 1 Conn. L. ed. 36 (1 New Eng. Rep. 812), 53 Conn. 261.

"A residuary bequest carries, not only everything not attempted to have been disposed of, but everything which turns out not to have been effectually disposed of; as void legacies and lapsed legacies."

2 Redf. Wills, 442.

This principle has been repeatedly held by this court, and the above authority is cited with approval in—

Bolles v. Smith, 39 Conn. 217, 221. See also, in support of this, *Crane v. Crane*, 2 Root, 487; *Remington v. American Bible Soc.* 44 Conn. 512, 515; *Bristol v. Bristol*, 1 Conn. L. ed. 201 (2 New Eng. Rep. 759), 53 Conn. 255.

If by any possibility this provision could be sustained as a valid bequest, we submit that the division must be *per stirpes*, and not *per capita*.

Raymond v. Hillhouse, 45 Conn. 473, and cases there cited.

III. As to the 5th section of the will:

In this section the testator makes final disposition of the residuary estate, constituting the greater bulk of his property. Some slight obscurity is caused by the testator's inaccurate use of the word "heirs," but he clearly intended "children," and the section should so be read.

Bond's App. 81 Conn. 192.

In the 2d section, however, the testator clearly uses the word "heirs" in its strict legal sense, as the context shows.

The first inquiry naturally is, In whom did the testator intend the property should vest?

The sons being clearly excluded, it certainly could vest in no one but their children; and no provision in the will, or suggestion of the testator's intent, requires that the vesting should be suspended until the time for division.

It is the policy of the law that the estate should speedily vest, and constructions that suspend the estate are not favored. The trusts which are impressed upon the estate require a postponement of the distribution; and, from the testator's point of view, they would in all probability be fully discharged before the time he appointed for the division had arrived. These trusts do not conflict with the vesting of the estate.

It has sometimes been held that where there is no gift, but only a direction to trustees to pay or divide at some future time, that the vesting in the beneficiary will not take place until that time arrives. But this rule has its exceptions. It has been said that "this rule only applies where, beyond the direction for future distribution, there are no words and no provisions which import a present or vested gift, or indicate such an intent. It does not control where the language of the will, while not expressly saying, 'I give and bequeath,' does yet plainly import a present gift intended to vest immediately, without reference to the clause of distribution. * * * Legal and artificial rules should never control the intention of the testator; they should only be used as aids in discovering that intention."

Farnam v. Farnam, 1 Conn. L. ed. 36 (1 New Eng. Rep. 812), 53 Conn. 283. See also *Neuberry v. Hinman*, 49 Conn. 180.

Henry died leaving no children, and Leman died leaving a widow and one child, Willis M. Anthony, who is the only individual of the class in which we claim the estate vests.

If the testator's widow should be living when this defendant arrives at age, we concede that the trust should be continued until her death, he being entitled to all surplus income.

Bristol v. Bristol, 1 Conn. L. ed. 201 (2 New Eng. Rep. 759), 53 Conn. 280.

IV. Whether or not, when Willis M. Anthony is entitled under the will to the possession of the "property," the trustee or judge of probate can exercise any discretionary power to prevent such possession, we think should not now be argued or decided. 1. Probably the exercise of such power will never be required. 2. The existence of such a discretionary power clearly does not affect the vesting of the estate. 3. Whether the power exists or not should only be tried in a proceeding wherein Willis and the trustee are the only parties.

Farnam v. Farnam, 1 Conn. L. ed. 36 (1 New Eng. Rep. 312), 53 Conn. 291.

Mr. Edward R. Rogers, for J. Hopkins Anthony and Frank G. Anthony:

These defendants are children of a deceased sister of Sarah Anthony, the widow of the testator, and are among the "legal heirs" of said Sarah Anthony.

I. The last clause of the second section of the will is valid and operative, the remainder over to the "legal heirs" of Sarah Anthony taking effect in point of right at the testator's death, but in point of enjoyment at the death of Sarah Anthony, so as to embrace all who are included in that class at the latter time.

The cases in this State which have been held to offend the Statute of Perpetuities, or to be void on the ground of remoteness, have been cases of contingent remainders, in which the persons to whom the gifts over are limited to take effect are uncertain at the date of the will.

Jocelyn v. Nott, 44 Conn. 55; *Rand v. Butler*, 48 Conn. 298; *Alfred v. Marks*, 49 Conn. 478; *Wheeler v. Fellows*, 52 Conn. 238.

Although the statute has in some of these cases been so strictly construed as to make void any devise or grant which may by any possibility offend the statute, whether it in fact does so or not, remainders over to those living at the testator's death, dependent upon a contingency, have been held good as executory devises.

Alfred v. Marks, *supra*. See also *Gray*, *Perpetuities*, § 205; *Jones's App.* 48 Conn. 67; *Farnam v. Farnam*, 1 Conn. L. ed. 36 (1 New Eng. Rep. 312), 53 Conn. 261; *Ackerman v. Gorton*, 67 N. Y. 63; *Nodine v. Greenfield*, 7 Paige, 544; *Williamson v. Field*, 2 Sandf. Ch. 533; 2 Jarm. Wills, 5th Am. ed. p. 408.

Gray on Perpetuities (§ 110), says: "Sometimes a remainder is given to a class of persons, the number of members in which may be increased between the time of creating the remainder and the termination of the particular estate; for instance, a devise to A, for life, remainder to the children of A and their heirs as tenants in common. Here, although it is very certain that each child born, or its heir, will have a share in the estate, that share will be diminished by the share of every other child of A. Each child, nevertheless, on its birth, has a vested remainder. The remainder is said to 'open' to let in after-born children."

See also *Newberry v. Hinman*, 49 Conn. 131; *Dale v. White*, 38 Conn. 294; *Livingston v. Greene*, 52 N. Y. 118; *Doe v. Provoost*, 4 Johns. 61; *Moore v. Lyons*, 25 Wend. 144; *McClure's App.* 72 Pa. 414; *Demarest v. Hopper*, 23 N. J. L. 599; *Re Heaton*, 6 C. E. Green, 224; *Dingley* 1 Conn.

v. Dingley, 5 Mass. 535; *Blanchard v. Blanchard*, 1 Allen, 223; *Bouditch v. Andrew*, 8 Allen, 342; *Shattuck v. Stedman*, 2 Pick. 468; *Loockerman v. McBlair*, 6 Gill, 179; *Walker v. Shore*, 15 Ves. 125; *Raldwin v. Rogers*, 3 De G. M. & G. 649, 656, 657.

It is submitted that the words of the will, "an income in cash of \$1,200 a year during her life, and after her death to divide equally among her heirs \$4,000, which shall be theirs forever," come directly within the above authorities.

II. The sum of \$4,000 is to be divided among the legal heirs of Sarah Anthony, living at the time of her decease, *per stirpes*.

The rule in this State is well settled that when a devise or legacy is given to heirs or representatives, the rules governing the descent of estates, as provided by the Statute of Distributions, will control; and that the words "share and share alike" or "to be equally divided," do not in themselves indicate an intention that the statutory rule is not to prevail.

Raymond v. Hillhouse, 45 Conn. 475; *Heath v. Bancroft*, 49 Conn. 220; *Talcott v. Talcott*, 39 Conn. 186; *Lyon v. Acker*, 33 Conn. 224; *Bond's App.* 81 Conn. 188; *Cook v. Callin*, 25 Conn. 387; *Lord v. Moore*, 20 Conn. 122.

Carpenter, J., delivered the opinion of the court:

Suit for the construction of a will. The material parts of the will are as follows:

"Second. I give, devise, and bequeath to my wife Sarah, if living at the time of my death, my life insurance policy of \$2,000, the deposit now in her name in the National Savings Bank, all the furniture and other articles of housekeeping and clothing which I may be possessed of at the time of my death, of which there shall be no inventory taken, to be hers and her heirs' forever. Also the free use or income of my house in Meadow Street, and an income in cash of \$1,200 a year during her life; and, after her death, to divide equally among her legal heirs \$4,000, which shall be theirs forever."

"Fifth. I give, devise, and bequeath to my two sons, Henry W. and Leman H. Anthony, the balance of income from my estate, after paying expenses and all demands against said estate, to be paid them by my executor and trustee in such sums and at such times as they may think best for the interest of my sons and their families during the lives of my sons; and, in case of the death of either of them, to pay over to the widow, if living, \$3,000, providing he leaves no heirs, and in case of heirs, the division to be made to his family the same as before his death, until the youngest child arrives to the age of twenty-one years, at which time the property may be divided equally among the heirs, if the trustee and judge of probate shall think it safe to do so; it being my desire to place the estate so that it cannot be squandered by the action of my sons."

The first question is, Is the widow entitled to dower in addition to the provision for her contained in the 2d article of the will?

The widow does not claim dower; and it is contended in behalf of other parties that she is not entitled to it. The case shows that by the terms of the will the widow takes about two thirds of the entire income of the personal

property, and the use of nearly one half of all the real estate. We think that excludes dower as such.

The second question,—whether \$1,200 per year is payable to the widow annually, or at periods during the current year, at the discretion of the executor—requires no discussion. The payments should be annually.

The several questions contained in subdivision 3 of paragraph 9 of the complaint need not be separately considered. They are substantially disposed of by the view we have taken of the main question,—whether the legacy of \$4,000 to the heirs of the widow vested at the death of the testator. Its validity depends upon the answer to that question. If it did not vest, it is conceded that the bequest is inoperative, being contrary to the statute against perpetuities.

We think it did not and could not vest until the death of the widow. There is no gift of this sum, except by the provision for its distribution at the death of the widow; and there are no presumptions in its favor, such as presumptions in favor of offspring against intestacy, and the like; and the will contains no words importing a present gift or bequest. Neither is there a class in existence at the death of the testator capable of taking. The class described is clear and definite—the legal heirs. There is no uncertainty or ambiguity; but its numbers can only be ascertained when the time for distribution arrives,—at the death of the widow. In this respect it differs materially from ordinary class gifts to children, nephews, and nieces, etc. The word “heirs” in this place is not equivalent of “nephews and nieces,” and we cannot so interpret it. It is sometimes used in wills as synonymous with “children,” but seldom, if ever, as synonymous with “nephews and nieces.” Such relations may become heirs; so, also, may persons who do not sustain that relation. No one is heir to the living, and presumptive heirs, as the term implies, may never become heirs in fact. So that Mrs. Anthony, while living, has no heirs. At her death, for the first time, the class of persons here described springs into existence. Till then the individuals constituting that class are uncertain; consequently there is no class and no individuals capable of taking.

Under the 5th article of the will, all the parties in interest contend that the word “heirs,” as used in connection with the death of the sons, means “children.” We think that is clearly the meaning of the testator, and that so construing it gives effect to his intention.

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One of the sons, Henry W., having died without children, his widow is entitled to the legacy of \$3,000, subject, however, to this condition,—that its payment shall not impair the income payable to the widow.

The other son died leaving one child, Willis M. Anthony, who is the only living descendant and the sole heir at law of the testator. The income of the estate, subject, of course, to prior bequests, is to be paid to Leman's family, including the widow, till the child becomes twenty-one years old, at which time he takes all the estate not before disposed of, under the will, by purchase, and not by descent. It is true that the only language in the will importing a gift of the principal of the estate to Willis is found in the provision permitting a distribution to him when he arrives at the age of twenty-one years; but it is also true that that is the only disposition of the estate. If it is not given to him, it is given to no one. Hence the presumptions in favor of offspring against intestacy come in to aid the inference to be drawn from the permissive distribution that the testator intended that his grandchildren should take the fee in his estate from his death. In this connection the last clause in the 5th article is significant. He certainly intended that under no circumstances should the fee vest in the sons. Intestacy might have defeated that intention.

The permissive character of the provision for a distribution, instead of a positive direction, is peculiar. It probably emanated from his abundant caution to prevent his estate from being squandered, and to secure it to his descendants. If so,—and in any event,—it should not be permitted to prevent the estate from vesting in the grandchildren.

We think the word “heirs,” in the provision for a final disposition of the estate, is used in the same sense in which it is twice previously used in the same article, and means “children.”

This view of the case renders it clear that the trust contemplated for the benefit of the family of Leman H. Anthony is legal and operative, and must continue during the minority of Willis M. Anthony.

The Superior Court is advised that the widow is not entitled to dower; that the annuity to the widow is payable annually; that the attempted gift to the heirs of the widow is void; that the word “heirs” in the 5th article of the will means “children;” that the trust created by the 5th article is valid; and that the residue of the estate vests, under the will, in Willis M. Anthony.

In this opinion the other Judges concurred.

1 CONN.

NEW HAMPSHIRE.

SUPREME COURT.

ADAMS *et al.*

v.

J. A. SPALDING.

The supreme court has original jurisdiction of actions of replevin when the value of the property is alleged in the writ to be greater than \$13.33, although it may upon trial be proved to be less than that sum.

(Hillsborough—Decided July 15, 1887.)

ON defendant's exceptions. *Overruled.*

Replevin for a silk cabinet, alleged in the writ to be of the value of \$15. The plaintiffs' evidence showed that the cabinet was worth \$12. The defendant moved that the action be dismissed for want of jurisdiction. Motion denied, and the defendant excepted.

Messrs. E. S. & H. A. Cutter, for defendant:

The supreme court has no jurisdiction of this case.

Gen. Laws, chap. 274, § 5, which reads as follows:

"If the value of the property replevied does not exceed \$13.33, the action shall be brought before a justice of the peace or police court; if it does not exceed \$100 the action may be brought in the police court; otherwise in the supreme court."

This presents a case of statute construction simply.

The construction of a statute is the ascertainment of legislative intention.

Robertson v. Northern R. R. 63 N. H. 544.

This statute has never been submitted to the court for judicial construction. Its language is plain, positive, unambiguous, and susceptible of but one meaning. The rule of the law is that only when a statute is ambiguous in its terms may the court rightfully exercise its power of construction, and when the language is clear it is not to be controlled by judicial construction.

Wood v. Adams, 35 N. H. 36; *Bidwell v. Whitaker*, 1 Mich. 469; *Pearce v. Atwood*, 13 Mass. 324; *Cearfoss v. State*, 42 Md. 408; *Hyatt v. Taylor*, 42 N. Y. 259; *Woodbury v. Berry*, 18 Ohio St. 456; *Bartlett v. Morris*, 9 Port. 266.

The Legislature has seen fit to enact a law to assist in the construction of statutes.

Gen. Laws, chap. 1, § 2.

Words and phrases shall be construed according to the common and approved language.

Our courts have decided that the natural import of the word is to be taken.

Robinson v. Tuttle, 37 N. H. 248; *Barnstead v. Alton*, 32 N. H. 250; *Op. of Justices*, 7 Mass. 523.

The history of the legislation on the subject-matter of the particular statute may be referred to.

Henry v. Stilson, 17 Vt. 479; *Hayes v. Han-son*, 12 N. H. 284; 127 Mass. 461.

In 1842 the following law was enacted: "If the value of the property replevied does not exceed \$13.33 the action shall be brought before a justice; otherwise in the court of common pleas."

Rev. Stat. chap. 204, § 4.

In 1878 the present law was passed (Gen. Stat. chap. 226, § 5), which is the law of 1842 with the insertion of the following: "If it does not exceed \$100 the action may be brought in the police court."

The manifest intent of the statute is that when the value of the property replevied is less than \$13.33 the police court has exclusive jurisdiction; between that and \$100, concurrent with the supreme court; and above \$100 the supreme court has exclusive jurisdiction. If the plaintiff maintains that the word "shall" should be construed to mean "may," thereby giving the supreme court and police court concurrent jurisdiction when the value of the property replevied is less than \$13.33, this statute will be completely nullified, as the supreme and police courts would have, independent of this statute, concurrent jurisdiction of this case.

Gen. Laws, chap. 208, § 3; chap. 214, §§ 1, 2; chap. 250, § 12; chap. 251, § 15; chap. 215, § 6.

We submit that this statute must be construed as we hold it, or abrogated absolutely.

In construing statutes an interpretation must never be adopted that will defeat its own purpose, if it will admit of any other reasonable construction.

The Emily v. The Caroline, 22 U. S. 9 Wheat. 381 (6 L. ed. 117); *Allen v. Parish*, 3 Hammond (Ohio), 198; *Gore v. Brazier*, 8 Mass. 523; *Gibson v. Jenney*, 15 Mass. 205.

The statute in question has three clauses: (1) the mandatory clause, giving the police court exclusive jurisdiction; (2) the permissive clause, giving the two courts concurrent, and (3) giving the supreme court exclusive jurisdiction. If the Legislature had intended that the concurrent jurisdictions should include all suits where the value of the property replevied does not exceed \$100 the first and last clauses would have been omitted, as in that event they would be mere surplusage.

The word "shall" has been given its ordinary and grammatical significance.

Ward v. Bartlett, 1 N. H. 14; *Brown v. Mathes*, 5 N. H. 229; *Bachelor v. Green*, 38 N. H. 265; *Voght v. Ticknor*, 47 N. H. 543; *Peavre v. Towne*, 57 N. H. 220; *Jones v. Lane*, 68 N. H. 331.

The word "may" has been construed to mean "shall" in numerous cases:

Blake v. Portsmouth & C. R. 39 N. H. 435; *Rogers v. Boven*, 42 N. H. 102; *Galena v. Amy*, 72 U. S. 5 Wall. 705 (18 L. ed. 560); *Ex parte Banks*, 28 Ala. 28; *Ex parte Simonton*, 9 Port. (Ala.) 390; *Superior v. United States*, 71 U. S. 4 Wall. 435 (18 L. ed. 419); *Schuyler v. Mercer*, 9 Ill. 20; *Nave v. Nave*, 7 Ind. 122; *Bansemmer v. Mace*, 18 Ind. 27; *State v. Holt County Court*, 39 Mo. 521; *Seiple v. Elizabeth*, 27 N. J. L. 407; *Newburgh T. Co. v. Miller*, 5 Johns. Ch. 101; *Cutler v. Howard*, 9 Wis. 309; *Monmouth v. Leeds*, 76 Me. 28; *Estate of Ballentine*, 45 Cal. 696; 22 Barb. 404; 51 N. Y. 401; 23 Wend. 156.

We claim that a statute defining the jurisdiction of a court should be construed strictly.

In Massachusetts the court held that the failure of justice is not sufficient ground for con-

struing a statute against its clear meaning, so as to give a court jurisdiction.

Pitman v. Flint, 10 Pick. 506.

The effect of this law is to relieve the docket of the supreme court, which is crowded with cases, and to oblige petty cases of this character to be brought before a justice or police court.

Mr. G. B. French, for plaintiffs.

Allen, J., delivered the opinion of the court:

The only point raised by the defendant's exception was decided in favor of the plaintiffs in *Stevens v. Chase*, 61 N. H. 340, and no sufficient reason appears for overruling that decision. The supreme court has original jurisdiction of actions of replevin when the value of the property is alleged in the writ to be greater than \$13.83, although it may upon trial be proved to be less than that sum.

Exceptions overruled.

Smith, J., did not sit; the others concurred.

Edward H. CLARK

v.

BOSTON & MAINE R. R.

1. The plaintiff's horse escaped into the highway and was killed upon a crossing by the defendant's train, run in a careless and negligent manner. The plaintiff was in no fault for the escape of his horse, and used reasonable diligence to retake him. *Held*, that he might recover for the loss.
2. The running by the railroad company of their train over a crossing at an unlawful rate of speed is evidence from which a jury may find negligence.
3. The statute (Gen. Laws, chap. 162, § 4) prohibiting the running of railroad trains at a greater rate of speed than 6 miles an hour, across a highway in or near the compact part of a town, is applicable to railroads which extend into an adjoining State as well as to those which are wholly within the State.

(Rockingham—Decided July 15, 1887.)

ON defendant's exceptions. *Overruled.*

Case for negligently killing the plaintiff's horse on a highway railroad crossing. The plaintiff's evidence tended to show that he exchanged horses at Newmarket Village, August 28, 1885, and reached home at Newmarket Junction a little before nine o'clock in the evening, drove into his barn and unharnessed his horse; that the horse escaped from him while he was reaching for the halter, and ran out of the barn into the highway, towards his former home, 2 miles distant; that his servant immediately took another horse and started in pursuit; that the defendant's express train, some thirty-five minutes late, passed going east, and crossed the highway leading from the junction on the crossing at the westerly side of Newmarket Village, within its compact part, at a speed of 35 or 40 miles an hour; that the horse passed on to the crossing just before the engine

did, which hit and killed him on the crossing; and that the night was so dark a person could not see a horse over 60 or 80 feet from him. The defendant's evidence tended to show that its servants had no knowledge that the horse was on the crossing, or killed, till a day or two afterwards.

Subject to the defendant's exception, the court instructed the jury that if they should find that the horse was in the highway, returning to his former home, in the way and manner the plaintiff's evidence tended to prove, through no want of ordinary care and prudence on his part, and that he used reasonable diligence in his efforts to retake it after the escape, the horse as to the defendant was lawfully in the highway, and if the defendant, by the careless and negligent running of its train, killed it, the plaintiff's want of ordinary care and prudence contributing to the injury in no degree, the plaintiff could recover.

Subject to the defendant's exception, the court declined to instruct the jury that the statute prohibiting the running of trains at a greater rate of speed than 6 miles an hour does not apply to interstate railroads that run their trains through this State. Verdict for the plaintiff.

Messrs. J. W. Towle, and **Dodge & Caverly**, for the plaintiff.

Messrs. J. A. Edgerly and **J. S. H. Frink**, for the defendant:

The nonsuit should have been ordered.

The horse, at the time of the accident, was an estray, not being then in the service of his owner or under his control.

The rule of the common law is that a man is bound to keep his cattle on his own land at his peril.

Avery v. Maxwell, 4 N. H. 36; *Rust v. Low*, 6 Mass. 90; *Wells v. Howell*, 19 Johns. 385; *Dovaston v. Payne*, 2 H. Bl. 527; *Thayer v. Arnold*, 4 Met. 589; *Lord v. Wormwood*, 29 Me. 282; *Little v. Lathrop*, 5 Greenl. 356; *Mills v. Stark*, 4 N. H. 515; *McDonnell v. Pittsfield & N. A. R. R. Corp.* 115 Mass. 565.

Cattle are lawfully on an adjoining close when they have a right to be there by the consent of the owner or of one having an interest in it.

Rust v. Low, *supra*.

If A were required to fence against cattle running in the highway, and they should break into his enclosure, although he could not maintain an action for the damage done, yet he could remove them and guard against ingress. But the owner of the cattle could not claim to have them remain upon the close, because he has no interest in it. They are not rightfully or lawfully on it, and cannot be so, unless by authority of the person owning the close, who may be deprived of redress for any injury which they have done; but no rights accrue to their owner against the tenant of an adjoining close.

Lord v. Wormwood, 29 Me. 287.

The owner of the soil in the highway may have trespass if the cattle of others do anything more than merely pass and repass. All the injury which is necessarily done by the passing, all the involuntary damages done by the traveler, must be borne by the owner of the soil. But he is entitled to damages for the excess.

Stackpole v. Healy, 16 Mass. 85.

Where a party is bound by law to maintain fence against a highway, he is not obliged to maintain it against cattle wrongfully in the highway.

Chapin v. Sullivan R. R. 89 N. H. 57; *Lord v. Wormwood*, 29 Me. 282; *Stackpole v. Healy*, 16 Mass. 85; *Avery v. Maxwell*, 4 N. H. 86; *Fork v. Davis*, 11 N. H. 241; *Page v. Olcott*, 18 N. H. 399; *Thayer v. Arnold*, 4 Met. 589.

These principles apply to railroad corporations, considered as the tenants of their roadway, as other landholders.

Lawrence v. Combe, 37 N. H. 381; *Towns v. Cheshire R. R. Co.* 21 N. H. 863; *Cornwall v. Sullivan R. R.* 28 N. H. 161; *Perkins v. Easton R. R. Co.* 29 Me. 807; *Hurd v. Rutland & B. R. R. Co.* 25 Vt. 124-151; *Woolson v. Northern R. R.* 19 N. H. 270; *Eames v. Salem & L. R. R. Co.* 98 Mass. 560; *Maynard v. Boston & M. R. R.* 115 Mass. 458; *McDonnell v. Pittsfield & N. A. R. R. Corp.* 115 Mass. 564.

A man has a right to drive his cattle along the public highways, and if, in exercising this right, he uses ordinary care and diligence, and the cattle escape into the adjoining enclosures without his fault, he is not liable for any damage they may do. But, although the cattle are upon the enclosure without fault of the owner, they are not rightfully or lawfully there, and the owner of the enclosure owes no duty to the owner of the cattle, and therefore is not liable for anything short of wanton and malicious injuries of the cattle while upon his land.

See *Woolson v. Northern R. R.* 19 N. H. 270; *Avery v. Maxwell*, 4 N. H. 86; *Tencksbury v. Bucklin*, 7 N. H. 518; *Towns v. Cheshire R. R. Co.* 21 N. H. 865.

It was not the duty of the defendant to exercise reasonable care to avoid the injury, when the horse was wrongfully in the highway.

The instructions given to the jury held the defendant to the same obligations to the plaintiff as if his horse had been rightfully upon its land; and made its paramount duty to the public, of running its train with proper speed and safety, and its use of the land set apart and fitted for the performance of that duty, subordinate to the care of private interests in property which was upon its track without right.

Maynard v. Boston & M. R. R. 115 Mass. 460.

Smith, J., delivered the opinion of the court:

The instructions were sufficiently favorable to the defendant. Under them the jury found that, without any fault on the part of the plaintiff, his horse was killed by the defendant's careless and negligent management of its train. *State v. Manchester & L. R. R.* 52 N. H. 528, 555; *Gale v. Lisbon*, Id. 174; *Norris v. Litchfield*, 35 N. H. 271; *Corey v. Bath*, Id. 580.

The fact that the speed of the train was greater than that allowed by the statute (Gen. Laws, chap. 162, § 4) is evidence from which the jury might find that the defendant was guilty of negligence. *Nutter v. Boston & M. R. R.* 60 N. H. 483.

The statute prohibiting the running of trains at a greater rate of speed than 6 miles an hour, across a highway in or near the compact part of a town (Gen. Laws, chap. 162, § 4), is an exercise of the police power of the State for the

safety and welfare of its inhabitants; applicable to railroads which extend into an adjoining State as well as to those which are wholly within the State. *Smith v. Boston & M. R. R.* 63 N. H. 25.

Exceptions overruled.

Bingham, J., did not sit; the others concurred.

George SUMNER, Admr.,

AMERICAN HOME MISSIONARY SOCIETY *et al.*

A devised his real estate to his wife for life, and ordered his executor to sell the same after her death, and from the proceeds pay over to S the sum of \$1,000. The will then reads as follows: "I further give and bequeath out of the proceeds of said sale * * * the sum of \$1,000 to be paid over to * * * the American Home Missionary Society, * * * to be applied," etc. The land sold for less than \$2,000. Held, that S and the society take the fund derived from the sale in equal shares.

(Rockingham—Decided July 15, 1887.)

PILL in equity by the administrator of the estate of Samuel Bartlett not before administered upon, with the will annexed, asking for a construction of the will. *Case discharged.*

The testator devised to his wife the sole use, improvement, and income of all his real estate of which he should die seised, during her natural life, without impeachment of waste, remainder as follows: "Third. After the decease of my said wife I order my executor to sell for the most he can get, at private sale or at public auction, as he may judge most for the benefit of those persons interested, all my real estate; and from the proceeds of said sale to pay over to Samuel Bartlett Sumner, son of George Sumner and (of) my niece Mary, his wife, when he shall arrive at the age of twenty-one years, the sum of \$1,000, to him and his heirs and assigns forever. I further give and bequeath out of the proceeds of said sale of real estate the sum of \$1,000, to be paid over to the person who, when it shall be payable, shall act as treasurer of the American Home Missionary Society, formed in the city of New York in 1826, to be applied under the direction of said society for the support of the preaching of the gospel in feeble churches in the State of New Hampshire." The residue of his estate he devised to the surviving children of a sister and brother in equal shares.

The will was executed in 1859 and probated in 1863. The real estate consisted of a farm of about 60 acres, with a house, barn, and out-buildings thereon, and a valuable growth of wood and timber on some parts of it, and was appraised at the testator's decease at \$2,575. His widow occupied the farm by herself and tenants till her death, July 8, 1884, taking the income, and cut off and disposed of most of the wood and timber. She made no repairs or improvements of any consequence upon the buildings or land, and at her decease they had greatly

depreciated in value. The plaintiff sold the premises after her death. The balance in his hands for distribution, under the third clause of the will is \$800.69. The mother of the defendant Sumner was a niece of the testator, and the son was named for him at his request.

The defendant Sumner claims the whole of the fund in the hands of the administrator, and the defendant society claims one half of it.

Messrs. W. W. Stickney and W. H. Hills, for plaintiff:

The plaintiff claims that S. B. Sumner is entitled to the whole balance in the hands of the administrator.

In Redfield on Wills, pt. 2, 483, it is said: "Unless there is some clear ground of discrimination all legacies expressed in similar terms will stand on the same basis as to the order of payment."

Of course, if expressed in different terms, they do not stand on the same basis as to the order of payment. A will operates in some measure as a deed, and conveys to the legatee an exclusive right to the property bequeathed to him. This legacy to Sumner was a vested legacy, and it transferred to him a part of those proceeds.

The doctrine of abatement does not apply to this legacy; that doctrine, as we claim, applies only to cases where the testator stands in the same relation to the different legatees, and entertains no preference in favor of one legatee over another, and where the legacies to them are expressed in similar terms.

Whether a legacy is specific or general, and whether one legacy has a preference or priority of payment over another legacy, depends upon the intention of the testator in regard to it. That intention is to be gathered from the language of the will and from the situation of the parties, their relationship, and all the surrounding circumstances known to the testator at the time of making his will.

Brown v. Bartlett, 58 N. H. 511; *Kimball v. Lancaster*, 60 N. H. 273.

If it was the intention of the testator to treat Sumner and the society alike, and to give them equal shares of those proceeds, what reason or explanation can be given for his using such different language in the legacies to them?

Messrs. Leach & Stevens, for the society: These legacies are both in their nature general, and, standing upon the same basis, will follow the well-established rule and abate *pro rata*, unless there is to be found in the will itself clear and conclusive proof that it was the testator's intention that one legatee should be preferred to the other in case of a failure of assets.

Wallace v. Wallace, 23 N. H. 151; *Miller v. Huddleston*, 3 Macn. & G. 523; *Towle v. Swasey*, 106 Mass. 104; Pom. Eq. Jur. § 1140, and note; Wms. Exrs. § 1293; Redf. Wills, pt. II. p. 483.

The burden of proving such intention on the part of the testator is upon the party seeking priority.

Miller v. Huddleston, and *Towle v. Swasey*, *supra*; *Smith v. Fellows*, 181 Mass. 20.

We claim that neither the will nor the facts in the case disclose any intention to prefer the legatee Sumner to the exclusion of the society.

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It does appear from the case that, at the time of the testator's death, the property remaining with which to pay this legacy was appraised at \$2,575, or more than enough to pay both legacies. The testator must be presumed to have known the value of his property when he made his will. If he did, he must have supposed he had more than enough property to pay both legacies (as witness the residuary clause in the fourth section of the will), and, having given to each of these legatees the same amount by his will, the conclusion is irresistible that he considered the claim of each to share in his benevolence as entitled to the same consideration. The order in which the legatees are named cannot affect the rule.

Miller v. Huddleston, *supra*.

Smith, J., delivered the opinion of the court:

The only question is whether the sum of \$800.69, proceeds of the sale of the real estate devised in the third clause, belongs to Samuel B. Sumner or is to be shared by him equally with the defendant society.

The testator may be presumed to have supposed his real estate would be worth at least \$2,000 at the end of the life estate. If the proceeds had been just \$2,000, his intention is clearly expressed that they be equally divided between two legatees. The proceeds being less, there is nothing in the will from which it can be inferred that he intended the deficiency should fall upon one rather than the other. The case is as if he had directed his executor, from the proceeds, to pay to Sumner \$1,000 when he shall arrive at the age of twenty-one years, and to the treasurer of the defendant society the sum of \$1,000. The case differs in no respect from the ordinary case where the testator's estate is not so large at his decease as it was at the date of the will, or does not realize so much as he expected. The order in which legatees are named is immaterial. So it is where one is named in the body of the will and the other in a codicil. *Hall v. Smith*, 61 N. H. 144. The presumption is that the testator intended to benefit both legatees, and as much one as the other. *Wallace v. Wallace*, 23 N. H. 149.

While the language by which the testator gives \$1,000 to Sumner is not the same as that by which he gives the same sum to the society, it is not so dissimilar as to indicate that he had different intentions in regard to them. The legal effect of the language is the same in each case. Legacies expressed in similar terms stand on the same basis as to order of payment unless there is some clear ground of discrimination. 2 Redf. Wills, 483. The legacy to the society is not from the residue of the fund after payment of the legacy to Sumner. The word "further" is used in the sense of "also," and does not indicate that the legacy to the society is given from a fund from which another legacy has been taken.

Our conclusion is that the defendants are entitled to the fund in equal shares. Case discharged.

Bingham, J., did not sit; the others concurred.

1 N. H.

TAYLOR *et al.*

v.

BLAKE.

The following words of description in a deed make the thread of the stream a boundary of the tract conveyed: "Thence * * * to a poplar tree on the bank of Newfound River, and thence up said river until it comes on the line to make a right angle with the easterly end of said corn-barn."

(Grafton—Decided July 15, 1887.)

ON defendant's exceptions. *Overruled.*

Case for diverting the water of Newfound River, in Bristol, from the plaintiff's gristmill.

Facts Found by the Court:

The plaintiffs' water privilege is furnished by a wing dam extending from near the westerly end of their mill, diagonally, two thirds the distance across the river, where it unites with the main dam above, from the overflow of which the wing dam is supplied with water. The diversion complained of consists in drawing water from the main dam to propel a wheel of the defendant, and discharging the same into the river below, whereby the plaintiffs are deprived of its use.

The plaintiffs derive their title under a deed from Moses Lewis to James Martin, in 1804, wherein their premises are described as "about 44 square rods of land, being a part of the lot No. 61 in the first division of lots in New Chester and Bridgewater, bounded as follows, viz.: Beginning 4 feet and 6 inches S. of the S. W. corner of my corn-barn, and thence N. 85° E. 6 rods and 7 links to a stake and stones; thence S. 81° E. 4 rods and 15 links to a stake and stones; thence S. 27° W. 5 rods and 20 links to a poplar tree on the bank of Newfound River, so called, and thence up said river until it comes on the line to make a right angle with the easterly end of said corn-barn, and from thence N. 11° W. about 2 rods to the bound first mentioned."

Under this deed the plaintiffs and their grantors, during the whole period from 1804 to 1881, occupied and used the water right which they now claim has been infringed by the defendant, without interruption or adverse claim, except that in 1871 or 1872 the defendant moved his wheel to near the angle of the wing and main dams, and arranged the outlet so that the water from the wheel, by the use of a gate, would discharge either into the wing dam or into the river below. Usually the discharge was into the wing dam except in time of high water. In 1881 the defendant lowered the wheel to nearly the level of the bed of the river below, since when the water from it has been discharged into the river below the dam, and that is the diversion for which this suit is brought. Several *mesne* conveyances and leases showing the history of the respective titles of both parties since 1804, stated in the case, are omitted as immaterial.

The finding was for the plaintiffs, and the defendant excepted.

Messrs. Fling & Chase, for plaintiffs:

The finding of the court with regard to the 1 N. H.

legal construction of the deed from Lewis to Martin is correct.

Rix v. Johnson, 5 N. H. 520; *Cold Spring I. Works v. Tolland*, 9 Cush. 492; *Lunt v. Holland*, 14 Mass. 149; 8 Kent, Com. 9th ed. pp. 546-556; Ang. Watercourses, ¶¶ 17-41, particularly ¶¶ 23, 26; *State v. Canterbury*, 28 N. H. 216; *Woodman v. Spencer*, 54 N. H. 507; *Goodeno v. Hutchinson*, Id. 159.

Where there is a boundary upon a fixed monument which has width,—as a way, stream, or wall,—even if the measurements were only to the side of it, the title to the land conveyed passes to the line of the middle of the monument.

Gould v. Eastern R. R. Co. 1 Mass. L. ed. 617 (2 New Eng. Rep. 595), 142 Mass. 85, Opinion of Allen, J.; Alb. L. J. p. 118, citing *White v. Godfrey*, 97 Mass. 472; *Clark v. Parker*, 106 Mass. 554; *Motley v. Sargent*, 119 Mass. 281; *Walker v. Boynton*, 120 Mass. 849; *Peck v. Deniston*, 121 Mass. 17. See *Sleeper v. Laconia*, 60 N. H. 201.

Mr. Daniel Barnard, for defendant.

Blodgett, J., delivered the opinion of the court:

The title of the plaintiffs, both by deed and by prescription, to the water diverted from them by the defendant, is quite too plain for discussion.

Exceptions overruled.

Allen, J., did not sit; the others concurred.

Ned B. SANBORN

v.

Obadiah S. PIPER *et al.*

The order appointing a time and place for considering an application to take the poor debtor's oath, under Gen. Laws, chap. 241, § 4, must state the hour as well as the day fixed for the hearing.

(Belknap—Decided July 15, 1887.)

DEBT on a prison bond. *Judgment for plaintiff.*

Facts Found by the Court:

February 17, 1886, Piper applied to two justices to take the poor debtor's oath. The justices issued an order of notice by which the plaintiff was required to appear "at the office of E. P. Thompson, in Laconia, on the 12th day of March, 1886, to show cause, etc.," which was duly served March 2, 1886. One of the justices wrote a letter to the plaintiff's counsel stating that he could not attend the hearing March 12, and that the other justice would attend and adjourn the hearing "to Monday, March 15, at ten o'clock;" and the hearing was so adjourned.

The plaintiff did not attend at any hour of the day March 12 or March 15. On the last-named day Piper was admitted by the justices to take, and took, the poor debtor's oath.

Messrs. J. L. Wilson and E. A. & C. B. Hibbard, for the plaintiff.

Messrs. S. W. Rollins and Jewell & Stone, for the defendant.

Smith, J., delivered the opinion of the court:

When a debtor makes application to justices to be admitted to take the oath for the relief of poor debtors, either of the justices may make an order on the application, appointing a time and place for its consideration. It is the duty of the debtor to cause the creditor or his attorney to be served with a copy of the application and order at least fifteen days before the day of hearing, that the creditor may appear and contest his discharge. Gen. Laws, chap. 241, § 4. One purpose of the present modified system of imprisonment for debt is to enable the creditor to put his debtor on examination, and search his conscience as to his property and means of payment. Unless the creditor is properly and seasonably notified, the opportunity for such examination may be lost. *Baker v. Moffat*, 7 Cush. 259, 262. He is not obliged to seek for information outside of the notice required by law. *Carr v. Ashland*, 62 N. H. Legal notice means something more than bare knowledge of a given fact; it is knowledge brought home to a party in a prescribed form. When its terms are so unambiguous and distinct that the meaning cannot, without negligence or inattention, be misunderstood, the notice is sufficient. Defects in form, by which a party is not misled to his injury, do not render a notice invalid. But a notice giving wrong information, so as to mislead the party upon whom it is served, or silent as to material information which the statute requires, cannot be regarded as legal notice.

The question in this case is whether the notice served upon the plaintiff gave him such definite information in regard to the time appointed for the hearing that he was enabled to be present without further information in that respect. The day fixed for the hearing was named, but the hour when the magistrates would attend was not stated. The practice, it is believed, has been universal in this State, to name not only the day, but the hour, when the party upon whom the notice is served is required to attend. The same may be said of civil process returnable before justices of the peace and police courts, and perhaps before all courts of inferior jurisdiction. The statutory provision requiring justices to appoint a time for considering the debtor's application, interpreted in the light of this uniform practice, means the appointing, not only of the day, but the hour of the day, when they will attend; and the debtor must proceed within the hour appointed unless the hearing is postponed. *Banks v. Johnson*, 12 N. H. 445, 453; *Downer v. Hollister*, 14 N. H. 122, 125.

The justices are not limited by the statute to any particular part of the day during which the time for the consideration of the debtor's application is to be fixed. The time must be a reasonable one. The convenience alike of the creditor, debtor, and justices requires that some hour be fixed; and, unless the hour as well as the day is stated in the notice, the creditor is not legally informed of the time, and is not bound to attend.

The letter written March 2 by one of the justices, notifying the plaintiff's counsel that the hearing would be adjourned, March 12, to ten o'clock on March 15, does not cure the defect in the notice, whether the letter be viewed as an original notice in itself, or as an amendment

of the notice of February 17. The service was insufficient in point of time, having been made less than fifteen days before the day of the hearing. Whether service by mail is legal service we have no occasion to consider.

Judgment for the plaintiff.

Carpenter, J., did not sit; the others concurred.

James QUINN

v.

City of PORTSMOUTH.

By the statute (Gen. Laws, chap. 46, § 15), the power of removing constables, police officers, and watchmen is made commensurate with that of appointment.

(Rockingham—July 15, 1887.)

ASSUMPSIT for services as police officer, A constable, watchman, and patrolman from December 1, 1885, to March 1, 1886. *Reversed.*

Facts Found by the Court:

In October, 1885, a petition for the "appointment of additional watchmen to patrol in the business part of the city, while the difficulty of obtaining insurance on stocks of goods and other property continued," was, by vote of the board of alderman, "referred to the committee on police, with power." That committee was then composed of O. H. Cook, chairman, and two others. Soon afterwards Cook, without consulting the other members of the committee, asked the plaintiff if he would like the place of fire patrol. The plaintiff said he would, and Cook told him to go on duty, which he did. The other members of the committee afterwards learned of Cook's action, and did not object.

The matter of the appointment of Quinn was never brought before the common council of the city, nor was any ordinance passed relating in any way to the matter. November 27 the mayor, with the assent of the majority of the committee on police, notified the city marshal to order the plaintiff to cease doing duty on and after December 1, 1885, as there was no longer need of his services, and on the same day the city marshal notified the plaintiff accordingly. The plaintiff, notwithstanding the order, continued to do regular duty until January 1, 1886, but performed no services after that time. He was paid for his services to December 1, 1885. February 4, 1886, in board of mayor and aldermen, the bill of the plaintiff for services in December was ordered paid by a vote of 4 to 3. The mayor refused to approve the bill. It was admitted that there had been no vote of the aldermen discharging the plaintiff, and that the matter of the payment of the plaintiff's bill was never before the common council.

The plaintiff claimed that he never was legally discharged, and that he was entitled to pay up to March 1, 1886. The defendant moved for a nonsuit, which motion was denied, and the defendant excepted.

Mr. George E. Hodgdon, for the plaintiff.

Mr. J. W. Emery, for the defendant:

The plaintiff was never appointed a constable, police officer, and watchman.

By Gen. Laws, chap. 46, § 15, it is provided that the aldermen shall appoint constables, police officers, and watchmen; and this statute is a part of the city charter of Portsmouth.

"Appoint," in this connection, means select by vote of the aldermen.

Rapalje & L. L. Dict. *Appoint*, p. 69, § 5.

If this was an attempt to elect the plaintiff a constable, police officer, and watchman, it failed. Such a duty is one for the board of aldermen; not one which that board might delegate the performance of.

1 Dill. Mun. Corp. 3d ed. 1, § 96; *Matthews v. Alexandria*, 68 Mo. 115; *Andover v. Grafton*, 7 N. H. 804, 805, and cases cited; *Indianapolis v. Indianapolis G. L. & C. Co.* 66 Ind. 896; *State v. Jersey City*, 25 N. J. L. 309.

Quinn was such a servant as the mayor, as chief executive officer of the city, might discharge.

Gen. Laws, chap. 45, § 5, which is a part of the charter of the defendant city, provides that "the mayor * * * shall be the chief executive officer of the city."

It seems that one of the plainest duties of the mayor of the defendant city was to discharge the plaintiff when he considered that his services were no longer needed.

Merrill v. Sherburne, 1 N. H. 199 et seq.

As relating to the matter of payment of a disputed claim, it seems clear that the aldermen alone cannot make a valid promise to pay in such a case as this.

The promise must be the promise of both of the branches of the legislative department of the city government in order to bind the city.

Gen. Laws, chap. 46, § 14; *Carlton v. Bath*, 22 N. H. 559, 564; *Horn v. Whittier*, 6 N. H. 88; *Underhill v. Gibbon*, 2 N. H. 852; *Andover v. Grafton*, 7 N. H. 800.

The vote of the aldermen was the vote of a majority, and is void.

Heslep v. Sacramento, 2 Cal. 580.

If the matter was properly in charge of committee on police, the plaintiff was properly discharged.

Blodgett, J., delivered the opinion of the court:

As to constables, police officers, and watchmen, the statute makes the power of removal commensurate with that of appointment. Gen. Laws, chap. 46, § 15. If, therefore, the plaintiff was lawfully appointed a police officer, constable, watchman, and patrolman by the committee on police, he was lawfully removed by that committee before the rendition of the services sought to be recovered for in this action, and the vote of the aldermen to pay him for such services was the vote of a gratuity which does not bind the city; and if he was not lawfully appointed, his writ does not allege any cause of action. Other questions need not be considered.

Judgment for the defendant.

Clark, J., did not sit; the others concurred.

Gilman GREENOUGH, Exr.

v.

CASS et al.

of the testator is to be sought after, other than the one so expressed.

(Rockingham—Decided July 15, 1887.)

BILL in equity asking the court to declare whether, by the following clause in the will of Ira Noyes, the executor, Gilman Greenough, is a legatee, taking equally with the other persons mentioned in the same clause: "I give and bequeath unto the following persons the remainder of my property, real estate and personal, to be divided equally between the following persons: Mary J. Bartlett, wife of A. B. Bartlett, of Plaistow, Emma M. Cass, wife of C. W. Cass, of Plaistow, the four children of sister Cogswell, of Gilmanton, the four children of sister Moulton, of Plainfield, Ira O. Sawyer, of Haverhill, Mass., Marcus M. Sawyer, of Boston, Mass., Gilman Greenough, whom I hereby appoint sole executor of this my last will and testament, hereby revoking all former wills made by me." *Case discharged.*

Messrs. Wiggin & Fuller, for plaintiff:

Plain and unambiguous words of a will must prevail, and are not to be controlled or qualified by any conjectural or doubtful construction growing out of the situation, circumstances, or condition either of the testator, his property, or family.

1 Redf. Wills, chap. 9, § 30 c, pp. 429, 430.

Messrs. Thomas Cogswell and H. W. Parker, for defendants:

The testator's intention is ordinarily ascertained, as a question of fact, by the natural weight of competent evidence, and not by artificial rules of interpretation.

Brown v. Bartlett, 58 N. H. 511, and authorities there cited.

Blodgett, J., delivered the opinion of the court:

The third clause of the testator's will gives the remainder of his estate to certain persons equally, and then designates who they are, either by name or other sufficient description. Included in this list, and standing last in order, is the name of the plaintiff, followed by the words "whom I hereby appoint executor of this my last will and testament." The reading of this clause, and especially in the light afforded by a facsimile of the will itself, leaves no doubt as to the meaning of its language; which is clear, definite, and concise; and when this is so, the means, both at law and in equity, to collect the testator's intention, are the words of the will, free of conjecture. There is in fact nothing in the words used or in their collocation which leaves any room for construction or interpretation. The rights of the plaintiff, at the end of the list, are no different than they would be were his name at the beginning or any other part of the list; and the only argument to the contrary, attempted to be made by the defendants, is that if it had been intended to include the plaintiff among the residuary legatees, the connective "and" would have been inserted before his name. This argument has little, if any, weight. Without the word "and," the testator's intention is as clearly and legally expressed as it would have been had that connective been inserted. But if not, the case presented by its omission is one of defective

When the language of a will is plain and unambiguous, no intention on the part

expression merely, which the law will rectify. "If words are omitted, they will be supplied." Ram, Wills, 55, and authorities cited.

"A word obviously omitted from a will, and which is necessary to carry out the intention as seen, will be supplied by the court." *Hoverton v. Henderson*, 88 N. C. 597. Moreover, the argument on this point, if it proves anything, proves too much; for if it was intended that the person next preceding the plaintiff should close the list of legatees, the argument is equally strong and applicable that the connective "and" would have been inserted before that person's name for precisely the same reason the defendants urge against the plaintiff; and hence, upon the defendants' theory, its omission strongly tends to show that it was not the intention to exclude the plaintiff. And this construction is supported also by the fact that the devise is to the following "persons," and not to the following "nephews and nieces," as it naturally would have been had the testator intended to include them only.

Then, again, to exclude the plaintiff, the word "whom" must not only be stricken from the will, although correctly used, but the plaintiff's name must be transposed and inserted after "appoint," in order to make the sentence read naturally, logically, or grammatically. This cannot be done; for while the court may transpose the words of a will, if by such transposition it would express the evident intent of the testator (which in this case it would not), it has no authority to strike out the words of a will which in their connection have a clear and definite meaning, and are correctly used.

Finding no ambiguity whatever in the clause of which construction is prayed for, it is not permissible to go further. As in the interpretation of statutes the cardinal rule is that the plain meaning of words cannot be departed from in search of an unexpressed and unimplied intention, so in the construction of wills "there is no rule of more universal application, both here and in England, than that the plain and unambiguous words of the will must prevail, and are not to be controlled or qualified by any conjectural or doubtful construction growing out of the situation, circumstances, or condition either of the testator, his property, or family." 1 Redf. Wills, 429, 480. If, however, it were permissible to consider these matters, it would doubtless be found, on examination, that such of the competent extrinsic facts appearing in this case as tend to make for the defendants are not of sufficient weight to overbalance the intrinsic evidence of the will itself.

The plaintiff is a legatee under the third clause of the will.

Case discharged.

Bingham, J., did not sit; the others concurred.

Sadie T. MINOT, by Josiah Minot, her Guardian,

v.

Charles E. TILTON *et al.*

1. A written instrument will be reformed in equity when it fails to express the intention which the parties

had in making the contract which it purports to contain.

2. Notice to the trustee and acceptance by him are not essential to the validity of a voluntary trust as against the settlor.

3. A trust once perfectly established is irrevocable except with the consent of all the beneficiaries.

(Merrimack—Decided July 15, 1887.)

PILL in equity to correct a mistake and compel specific performance of an agreement. *Decree for plaintiff.*

The facts are fully stated by the court.

Mr. William L. Foster, for plaintiff:

By the reserved case "the court finds as a fact that by the words 'widow, if any,'—the first declaration of trust,—was intended the first wife of Charles A. Minot."

She died before Charles A. Minot inherited the second estate; and no wife is mentioned in any papers written after that, except one, which by mistake was expressed in the terms employed in that one.

The finding of fact by the court as to the meaning of the words "widow, if any," is conclusive.

If the expression is of doubtful meaning it suggests no more than a latent ambiguity, which may be explained by parol evidence of collateral facts and circumstances.

1 Greenl. Ev. §§ 293, 300.

When a latent ambiguity arises upon any written instrument involving the question who was intended by certain terms which are equally applicable to several persons, the question to be determined is a question of intention, depending upon extrinsic evidence—a mere question of fact.

Leake, Cont. 179; *Bartlett v. Nottingham*, 8 N. H. 300, 304, 305; *South Newmarket Meth. Sem. v. Peaslee*, 15 N. H. 817; *Clough v. Bowman*, Id. 504, 511; *Peaslee v. Gee*, 19 N. H. 273, 278; *Lathrop v. Blake*, 23 N. H. 46, 60–62; *French v. Hayes*, 48 N. H. 30; *Bartlett v. Remington*, 59 N. H. 364; *Herring v. Boston Iron Co.* 1 Gray, 186.

If a patent ambiguity is created by the term "widow, if any," then the instrument, so far as it relates to a trust in favor of any such person, is inoperative.

1 Greenl. Ev. § 300.

The trust created by that instrument was modified by an agreement in which all the parties participated, which Tilton fraudulently refused to sign after he had procured the destruction of the first papers, on the pretense that he was ready to sign the last one. By the agreement expressed in that paper Tilton was and still is bound; and a court of equity will compel him to perpetuate the evidence of that agreement by embodying it in a declaration of trust.

In January, 1883, another paper was drawn up in the precise form of the one which Tilton had refused to sign, and to this paper Charles A. Minot appended his approval in writing under seal.

Although Charles A. Minot is "a spendthrift and a person of intemperate habits," there is no intimation that he did not act un-

derstandingly, and of his free will and intention, in expressing to Judge Minot and to Tilton his desire to have the agreement of trust expressed in the first paper modified, and in his subsequent most solemn approval of the modification. There is nothing in the history of these transactions indicating any undue influence upon him.

Charles A. Minot's revocation of his approval was of no effect. He had no power to revoke the settlement of the trust, without the consent of all the beneficiaries, namely, his daughter and his sisters. They having accepted the trust, their assent will be presumed (*Winfall v. Ross*, 4 Port. (Ala.) 321; *Cloud v. Calhoun*, 10 Rich. Eq. (S. C.) 358; *Field v. Arrowsmith*, 2 Humph. (Tenn.) 442); nothing short of their own act will divest them of their beneficial interest in it.

The trust is executed, not because nothing remains to be done in the future, but because the trust "is so clear and certain in all its terms and limitations that the trustee has nothing to do but to carry out all the provisions of the instrument according to its letter;" namely, to pay over the fund to the several beneficiaries in the manner expressed in the declaration which it is his duty to sign.

Perry, Tr. § 359.

The mere fact that Tilton has not yet signed the paper which he agreed to sign does not leave the trust unexecuted in the sense in which the term "executed" is used in the books. The court will compel specific performance of the act declaring the trust which Tilton agreed to declare, as of the date when he should have done it; at which time the trust became executed, in a legal sense, beyond the power of subsequent revocation.

Sherwood v. Andrews, 2 Allen, 79; *Coates v. Woodworth*, 18 Ill. 654; *Cooper v. McClun*, 16 Ill. 435; *Callis v. Ridout*, 7 Gill & J. 1; *McCartney v. Bostwick*, 32 N. Y. 53; *Hunt v. Johnson*, 44 N. Y. 27, 39; 1 Pom. Eq. Jur. § 158; 1 Story, Eq. Jur. §§ 532, 533; Perry, Tr. § 816; *Leake*, Cont. 175.

Messrs. Bingham & Mitchell, for defendant Tilton:

The wife of Charles A. Minot has such an interest in this fund, by virtue of the trust set forth in the first declaration of trust, as entitles her to notice of this proceeding, and requires that she shall be made a party before a decree is made extinguishing her interest in the fund. A wife who, if she becomes a widow, has a life estate in a given property, chargeable—both it and its income—with her support, has a larger estate than the inchoate right of dower which a wife has in her husband's real estate. A wife's inchoate right of dower is an incumbrance upon the real estate of her husband, and would constitute a breach of a covenant against incumbrances.

Rigdon v. Hubbard, 97 Mass. 195.

There is nothing in the case which cuts off Charles A. Minot himself from being a beneficiary, as respects the fund first settled agreeably to the declaration of trust made at the settlement. The fact that Charles A. Minot approved of a proposed substitute for said Tilton to sign in place of the original declaration of trust, and then revoked that approval, leaving the substitute wholly unexecuted, affects 1 N. H.

nothing. Charles A. Minot now holds and enjoys his beneficial interest in the fund by virtue of the declaration of trust set forth in the first paper. He never has received, and never can receive, anything by virtue of his revoked approval of the unexecuted substitute.

The approval of the scheme by Charles A. Minot, without the approval of all parties interested in the fund as settled, would not have authorized Tilton to sign the substitute; and if Tilton had signed it upon his approval only, the settlement previously made and perfected would not thereby have been disturbed.

But whatever authority Charles A. Minot had in the matter of resettling the fund after it had once fully and fairly been settled, his revocation of his approval, in the manner stated in the case, made that approval wholly inoperative. Nobody could have obtained any rights, and nobody could have lost any rights, by reason of such approval thus revoked.

If Charles A. Minot had had the absolute disposal of the fund, his approval of a scheme to give the fund away, revoked before the gift was made and perfected, would be of no effect.

8 Wait, Act. & Def. p. 487; *Taylor v. Staples*, 5 Am. Rep. 556; *Kent*, Com. 438.

The voluntary conveyance by Charles A. Minot of all his estate inherited from his father to Charles E. Tilton, in consideration of the declaration of trust at the same time executed by said Tilton, was a gift completed—a trust perfectly created, and irrevocable by the settlor; nor could the settlor extinguish it by getting a reconveyance, or by making a new voluntary settlement.

Perry, Tr. § 104; *Stone v. Hackett*, 12 Gray, 227; *Skipwith v. Cunningham*, 31 Am. Dec. 642; 8 Leigh (Va.), 271.

Clark, J., delivered the opinion of the court:

August 30, 1879, Charles A. Minot voluntarily conveyed to Tilton the estate inherited from his father, and Tilton executed a declaration of trust in writing and under seal, to hold and manage the estate, and, during the lifetime of Charles, to apply so much thereof as might be reasonable for the support and benefit of Charles and his family, and at Charles's decease to hold one third of the estate then remaining, during the lifetime of his widow, if any, and apply so much thereof as might be reasonable for her support; to pay over the remaining two thirds to said Charles's heirs-at-law, not including the widow, and, at the decease of the widow, if any, or at his decease, if no widow, to pay the balance of the estate to the heirs according to their proportion under the Statute of Distributions. The wife of Charles A. Minot, then living, died in August, 1881, leaving a daughter, the plaintiff, who is the only child of Charles A. Minot. He married again February 6, 1882, and after living together a short time he and his wife separated, and her place of residence is unknown.

March 22, 1882, Charles A. Minot conveyed by deed one undivided half of the estate inherited from his mother to Josiah Minot, and the other undivided half to Thomas C. Bethune; Bethune at the same time executing a declaration of trust that the conveyance was for the use and benefit of Charles and his daughter, the plaintiff, and his two sisters Sarah L. M. Bethune and Annie B. Minot; that the income

of the estate during the lifetime of Charles should be applied for his support and benefit, and at his decease all the principal and the balance of income should be applied, so far as might be necessary, for the support and education of the plaintiff, if then unmarried and under the age of twenty-one years, until her marriage or arrival at that age; and if she should then be of the age of twenty-one years, or married, or when thereafter she should become married or arrive at that age, to be paid or delivered over to her for her own use and control forever; and, in case she should die unmarried and before her arrival at the age of twenty-one years, the trust fund then remaining to be paid to the sisters, Mrs. Bethune and Annie B. Minot, in equal shares. At this time Tilton was in Europe, and the conveyance to Bethune was a temporary arrangement to hold the property until Tilton's return, when it was to be conveyed to him by Bethune to be held in trust upon the same conditions. None of the property came into Bethune's possession, except so far as the delivery of the deed to him was possession. In accordance with the understanding, after Tilton's return, Bethune conveyed the estate to him, and Tilton executed a declaration of trust intended and understood by all parties to be of the same import as that executed by Bethune, but which in fact, through accident and mistake in the preparation of the papers, was similar in its provisions to the declaration of trust previously executed by Tilton, covering the property inherited by Charles from his father. The deed of Bethune to Tilton was delivered and recorded; and the personal estate inherited by Charles from his mother was paid by her administrator to Tilton.

November 29, 1882, Charles, desirous of excluding his present wife from any share in his estate in case she should survive him, requested Tilton to execute a new declaration of trust, omitting the provision by which one third of the estate inherited from his father was to be held in trust for the benefit of his widow; and it was suggested by Josiah Minot that a new declaration of trust covering both estates, like the one Bethune had given, be prepared as a substitute for those previously executed by Tilton. Charles requested Josiah Minot to prepare such a paper and arrange with Tilton to execute it. In the preparation Minot discovered the mistake that had been made in drawing up the declaration relating to the property inherited by Charles from his mother and conveyed by Bethune to Tilton, and informed Charles and Tilton of it. Charles wanted the mistake corrected so as to exclude his wife from any benefit in both estates, and a new declaration of trust similar to that executed by Bethune, covering both estates, was prepared and shown to Tilton by Josiah Minot. On being informed that Charles had agreed to the declaration, Tilton requested that the two previous declarations made by him should be canceled before executing another; and Minot, understanding that Tilton was ready to sign the new declaration, tore up the declaration covering the estate inherited from the mother, and was about to destroy that covering the estate inherited from the father, when Tilton requested him to cancel it and allow him to take it; and thereupon Minot tore off Tilton's signature and handed

the paper to him. Tilton asked for time to consider the matter, and for more formal proof of Charles's assent to the change. He afterwards returned the first declaration from which his signature had been torn, together with the paper prepared as a substitute for the others, to Minot, requesting certain changes by striking out the provisions relating to the sisters of Charles. Minot informed him that he had no authority to make the change. Minot notified Charles that Tilton had not signed the substitute because he wanted his formal assent to it, and thereupon Minot caused it to be rewritten, and Charles affixed his approval under seal, and it was sent to Tilton for signature. February 2, 1883, Tilton wrote Minot requesting further time to consider the matter. Before Tilton knew of Charles's approval of the new declaration, he had an interview with him; and Charles, intending to revoke his approval, forbade his signing any declaration of trust; and thereupon Tilton wrote, and Charles signed, the following:

Tilton, Feb. 3, 1883.

C. E. Tilton: I hereby direct you not to sign or deliver any agreement or receipt to Judge Josiah Minot or T. C. Bethune.

C. A. Minot.

February 6, 1883, Tilton wrote Minot that Charles had forbidden his signing any new papers. Tilton has paid for the support and benefit of Charles the income and about \$4,000 of the principal of the estate inherited from his father. The prayer of the bill is that Tilton be required to execute such acknowledgment and declaration of trust as shall fully express his duties, obligation, and agreement, and for a decree that he be directed to execute, as of July 13, 1882, such a declaration of trust, covering both estates, as that executed by Bethune.

The bill has been amended by making Clarice M. Minot, the present wife of Charles A. Minot, a defendant, and service has been made by publication as provided by statute in the case of nonresident defendants. There is no appearance for her, and it does not appear that she has received actual notice. But the trust fund, the trustee, and all the other beneficiaries being within the jurisdiction, and the statutory notice having been given, the court has jurisdiction over the property to the extent of determining the relative rights of the parties to it; and to that extent the decree will be binding upon her. By virtue of its jurisdiction over property of nonresidents within its limits, the State, through its tribunals, may inquire into the nonresident's obligations to its own citizens, to the extent of controlling the disposition of the property, if necessary, the action being in the nature of a proceeding *in rem*, where there is no appearance and no service of process on the nonresident. *Pennoyer v. Neff*, 95 U. S. 714 (24 L. ed. 585); *Goodman v. Niblack*, 102 U. S. 556 (26 L. ed. 229); *Eastman v. Dearborn*, 1 N. H. L. ed. 56 (1 New Eng. Rep. 166) 63 N. H. 364; *Bancroft v. Conant*, 1 N. H. L. ed. 247 (2 New Eng. Rep. 908) 64 N. H. 151.

As to that portion of the trust estate inherited from the mother, it is conceded that the decree should be according to the prayer of the bill. By the conveyance to Bethune and the agree-

ment executed by him, a trust was perfectly created, and Tilton received and now holds the property charged with the trust. Neither the accidental error in the declaration of trust executed by Tilton, nor its subsequent destruction under a misapprehension, had the effect to divest or impair the interest of the beneficiaries in the trust estate; and there should be a decree requiring the trustee to execute a declaration of trust as of July 13, 1882, in conformity with the provisions of the declaration executed by Bethune when the trust was created.

The amendment making Clarice M. Minot a party to the bill also contained an application for a reformation of the first declaration of trust, so as to exclude her from any interest in the fund; and it should be so reformed. It is found as a fact that by the words "widow, if any," in the first declaration of trust, was intended the first wife of Charles A. Minot, who was living when the trust was created. The language of the instrument is more comprehensive than the parties intended, as it would apply to the present wife, and constitute her a beneficiary in case she survived her husband. "If a written instrument fails to express the intention which the parties had in making the contract which it purports to contain, equity will grant its relief, affirmative or defensive, although the failure may have resulted from a mistake as to the legal meaning and operation of the terms or language employed in the writing." 2 Pom. Eq. § 845; *Tilton v. Tilton*, 9 N. H. 335; *Busby v. Littlefield*, 81 N. H. 198; *Webster v. Webster*, 33 N. H. 18, 22, 23; *Kennard v. George*, 44 N. H. 440; *Inchinson v. Hutson*, 98 U. S. 79, 82 (25 L. ed. 66).

The first declaration being reformed according to the prayer of the bill, the present wife of C. A. Minot has no interest in the trust estate derived from the father. The only beneficiaries of that fund, were C. A. Minot and the plaintiff; and by the modification of the trust, assented to by them, as expressed in the new declaration prepared by Josiah Minot at the request of C. A. Minot, subsequent to November 29, 1882, covering both estates, a new trust was perfectly created which could be revoked only by the consent of all the beneficiaries; and the attempted revocation by C. A. Minot alone, February 3, 1883, by directing the trustee not to sign or deliver any receipt or agreement, was of no effect. The trustee could not, by withholding his assent, prevent a modification of the trust by the beneficiaries. Notice to the trustee and acceptance by him is not essential to the validity of a voluntary trust as against the settlor, if it is otherwise perfectly created. 1 Perry, Tr. § 185.

There is no suggestion that C. A. Minot was induced to assent to the modification of the terms of the trust through fraud, accident, or mistake or undue influence, or that he did not act understandingly in affixing his approval and seal to the paper prepared as a substitute for the original declaration. A trust thus created is irrevocable except with the consent of all the beneficiaries. 1 Perry, Tr. § 104; *Stone v. Hackett*, 13 Gray, 227; *Viney v. Abbott*, 109 Mass. 300; *Sewall v. Roberts*, 115 Mass. 262.

The fact that the trustee declines to execute the modified declaration does not defeat the

trust or affect the rights of the beneficiaries. 2 Pom. Eq. § 1007. The trust was admitted and declared by the original declaration, and, it appearing that its terms have been rightfully modified by the consent of all the beneficiaries, equity requires a corresponding modification of the declaration evidencing the trust.

Decree for the plaintiff.

Smith and Bingham, JJ., did not sit; the others concurred.

STATE of New Hampshire

v.

Nathaniel JENKINS.

1. An erroneous statement in the caption of an indictment, of the year in which it was found, does not furnish ground for a motion to quash. Such an erroneous statement, if it were a defect, might be cured by amendment under Gen. Laws, chap. 260, § 13.
2. An indictment which charges the keeping for sale of "a large quantity of malt liquor known as ale, to wit, ten gallons of ale," sufficiently describes an offense against Gen. Laws, chap. 209, § 13.

(Merrimack—Decided July 15, 1887.)

INDICTMENT for unlawfully keeping for sale ten gallons of spiritous liquor. The indictment was found at the April Term, 1887, and the caption is as follows:

State of New Hampshire,
Merrimack, ss.

At the Supreme Court holden at Concord within and for the County of Merrimack aforesaid, on the 1st Tuesday of April in the year of our Lord one thousand eight hundred and eighty.

The grand jurors of the State of New Hampshire upon their oath present, etc.

The respondent moved to quash. The motion was denied, and leave to amend, by inserting the word "seven" after the word "eighty" in the caption of the indictment, was granted, and the respondent excepted.

A second indictment charged that the defendant, not being the agent of any town, place, or city for the purpose of selling spirit, with force and arms did then and there unlawfully, knowingly, and criminally keep for sale a large quantity of malt liquor known as ale, to wit, ten gallons of ale.

The respondent moved to quash the indictment because it does not sufficiently inform the respondent of the offense with which he is charged, and does not identify the offense so as to protect him from a subsequent prosecution for the same offense, or enable the court to render a proper judgment upon it.

Messrs. Leach & Stevens, and Henry Robinson, for respondent:

Indictment No. 1. "It is unnecessary to cite authorities to the point that this indictment would be bad at common law."

State v. Blaisdell, 49 N. H. 82, and authorities.

The defect is substantial and not formal. This exact question was decided in *Commonwealth v. Doyle*, 110 Mass. 108.

The decision in *State v. Blaisdell*, *supra*, conflicts to some extent with this position; but that case differed materially from this, as the objection came there after verdict; and the court held that time was not of the substance of the offense. We also claim this opinion is not in harmony with other decisions upon the statute allowing amendments, and is not supported by sound reasoning.

In *State v. Caverly*, 51 N. H. 446, the court held the allegation of time as of the substance of the indictment, where the indictment must be found, as in this case, within one year after the commission of the offense.

This court has previously considered the statute allowing amendments in criminal processes, in *State v. Lyon*, 47 N. H. 418; *State v. Goodrich*, 46 N. H. 186.

These are the only cases where the question seems to have been discussed directly upon the same issue presented here, as to whether an amendment should be allowed, and the meaning of the statute. Both decisions were made soon after the statute was enacted. In both cases the indictment as found charged an offense, and the effect of the amendment was simply to charge some incident of the offense more particularly. The court in both cases held the amendments proposed mere matters of substance, and disallowed them.

The keeping for sale of intoxicating liquor is not an indictable offense unless it was within one year prior to the finding the indictment. The time when the indictment is found therefore becomes as important an element in alleging the crime as the time when the offense was committed. As this indictment does not show the offense committed within one year prior to the time when it was found, it states no crime under our statute.

Indictment No. 2. The offense alleged is of the sale of a certain kind of malt liquor known as ale, the sale of which is not prohibited by name, like lager-beer and cider.

Prior to the enactment of Gen. Laws, chap. 109, § 15, the sale of all malt liquor which was intoxicating was prohibited.

Gen. Laws, chap. 1, § 31.

Under this statute it was necessary to allege the same as intoxicating. This indictment, then, cannot be good under any other statute than Gen. Laws, chap. 109, § 15. The only provision in this section that can be claimed to cover this offense are the words "other malt liquors not included in the list already prohibited by law." Now, if intoxicating malt liquor was "included in the list already prohibited by law," of which there is no doubt, § 15 could only apply to lager-beer, because especially named, and such malt liquor as was not intoxicating. The court held in *State v. Biddle*, 54 N. H. 379, decided three years before the passage of § 15, that all fermented malt liquor could not be held, as a matter of law, as intoxicating. The peculiar phraseology of this section seems to have been especially adapted to meet this decision, and close every avenue of escape, by prohibiting the sale of malt liquor which was not intoxicating, leaving the penalty for that which was intoxicating as before. It distinct-

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ly recognizes the fact that some malt liquor was "already prohibited," and it does not include such malt liquor, except lager-beer, within its provisions. This section therefore created two distinct offenses for the sale of all malt liquor, except lager-beer. The penalty remained \$50 for the sale of intoxicating malt liquor, except lager-beer, and \$10 for such as was not. Any other construction of this section gives no force to the saving clause, "not included in the list already prohibited by law." This construction also explains the reduction of the fine, by § 15, to \$10. The indictment is therefore bad, because it does not allege which offense has been committed.

The decision in *State v. Leavitt*, 63 N. H. 382, does not conflict with this position in any way. The allegation there was simply for sale of intoxicating liquor, and § 15, by its terms, includes all cider and lager-beer, whether intoxicating or not, because they are particularly named; and the court has recently held that an indictment alleging the sale of lager-beer was sufficient without alleging it was intoxicating. This indictment would be sufficient if § 15 mentioned ale by name, or if it had read "lager-beer or other malt liquors," and not excepted from the provisions such other malt liquor as was already prohibited by law.

Messrs. Daniel Barnard, Atty-Gen., and H. G. Sargent, for the State:

The first indictment is clearly amendable.

Gen. Laws, chap. 260, § 18; *State v. Blaisdell*, 49 N. H. 81, and authorities cited.

The second indictment charges the defendant with keeping for sale malt liquor known as ale. The objection is made that ale may be intoxicating, and therefore the defendant may be liable under Gen. Laws, chap. 109, § 13. But the court cannot say, as a matter of law, that ale is spiritous or intoxicating. Whether it is so or not is a question of fact for the jury, whenever it is material for that fact to be determined.

State v. Biddle, 54 N. H. 379; *State v. Adams*, 51 N. H. 568.

After the publication of the opinions in those cases, the Legislature, recognizing the uncertainty of the result on the trial of this question by the jury, prohibited by name the sale or keeping for sale of cider in less quantities than ten gallons, etc., without regard to the question of its intoxicating quality.

Sess. Laws 1877, chap. 71, § 1.

A similar statute was passed in 1878, chap. 16, § 1, applicable to lager-beer and other malt liquors not included in the list prohibited by previous statutes. Lager-beer and malt liquors were not included under § 13, except as they might be included under the head of intoxicating liquors; and the quality could not be presumed, but must appear from the proof.

This indictment is for keeping ale for sale, which in terms is not a charge for keeping spiritous or intoxicating liquors for sale, and therefore is not included under § 13. As an offense under § 15 it is well described. There is no charge that the ale is intoxicating; and no evidence of that fact, if it was so, would be competent. The offense is sufficiently identified. If any question arises upon another indictment as to whether it is for the offense charged in this one, it will be sufficient to consider that question when it arises. This one

clearly would not be a bar to an indictment for keeping for sale or selling spirituous or intoxicating liquor subsequent to the time of the commission of the offense charged in this one, though a portion of the same ale was found to be the subject-matter of the offense.

See 1 Bish. Cr. L. §§ 1048-1065; *State v. Sias*, 17 N. H. 558.

Blodgett, J., delivered the opinion of the court:

The motion to quash the first indictment because of an erroneous statement, in its caption, of the year in which it was found, was rightly denied. The caption is no part of an indictment; its office is to state the style of the court at which, and the time and place when and where, the indictment was found, with reasonable certainty. *State v. Gray*, 36 N. H. 359. In our practice, however, it is customary to affix a caption to every indictment, and when this is done, the caption may doubtless be referred to in order to ascertain the court in which, and the time and place at which, the indictment is found. But in these matters, and especially in that of time, the caption is not the sole evidence, and if it is defective, the defect may be supplied by the general records of the term (*State v. Gray*, Id. 361; *Commonwealth v. Hines*, 101 Mass. 38; *Commonwealth v. Smith*, 108 Mass. 486), or by other competent evidence. And if this were not so, the amendment was clearly authorized by Gen. Laws, chap. 260, § 13, which provides that "no indictment, complaint, return, process, judgment, or other proceeding, in any criminal case in the courts or course of justice, shall be abated, quashed, or reversed for any error or mistake, when the person or case may be rightly understood by the court,—nor through any want of form or addition; and courts or justices may, on motion, order amendments in any such case." Besides, *State v. Blaisedell*, 49 N. H. 81, is directly in point.

The motion to quash the second indictment is not well founded. The indictment charges the respondent with unlawfully keeping for sale a large quantity of malt liquor known as ale, to wit, ten gallons. The keeping of malt liquor for sale is thus set forth plainly, fully, substantially, and formally, as art. 15 of the Constitution requires; and it is unquestioned by the respondent that such keeping is unlawful. His sole contention in argument is that it does not appear whether the offense alleged is a violation of Gen. Laws, chap. 209, § 15, or of § 13 of the same chapter, in which the penalty is different, and consequently that the indictment is bad for uncertainty. But § 13 applies to spirituous or intoxicating liquors only, so that an indictment under that section must allege that the liquor sold or kept for sale is intoxicating; and this indictment contains no such allegation. On the other hand, § 15 prohibits the sale or keeping for sale of "lager-beer or other malt liquors not included in the list of those already prohibited by law" (that is, by § 13), and from necessity, therefore, is applicable only to such malt liquors as do not fall within the prohibition of that section. In brief, both sections prohibit the sale and keeping for sale of malt liquors, but the prohibition in § 13 is against such as are intoxicating, while

that in § 15 is against such as are not intoxicating. Hence an indictment under the latter section must not allege that malt liquor is intoxicating, while an indictment under the former must so allege, as before stated.

For these reasons we are of opinion that it sufficiently appears that the respondent is charged with the violation of § 15.

Exception overruled in the first case; motion to quash denied in the second case.

Clark, J., did not sit; the others concurred.

Charles E. PERKINS, Admr.,

v.

Trueworthy EATON.

The possession of a mortgagor is analogous to that of a tenant at will or at sufferance. By bringing a suit to foreclose the mortgage, the mortgagee may elect to treat that possession as a disseisin.

(Merrimack—Decided July 15, 1887.)

ON defendant's exceptions. *Overruled.*

Writ of entry on a mortgage of an undivided half of land and buildings in Pittsfield, executed by Joseph H. Eastman to John C. Perkins, the plaintiff's intestate, July 25, 1857, to secure a note for \$225, dated November 12, 1851, payable on demand. Pleas, *nul disseisin* and the Statute of Limitations.

Subject to exception the plaintiff was permitted to testify to a conversation he heard between Eastman and his intestate in 1860, in which the former said he had lost the mortgage note; to which Eastman replied: "Your mortgage is all right; it is on record, and you can have possession at any time. I shall have no more to do with the house." There was no evidence that the mortgagee was ever in possession of the premises. The defendant moved for a nonsuit, which was denied.

The defendant testified that he went into possession and occupation of the premises in July or August, 1862, and had occupied them ever since; that he entered by permission and as tenant of S. M. D. Perkins, who was a half-owner, and that he had paid him \$36 a year as rent for his half since; that for twenty years he had made repairs upon the buildings at different times, and shingled the house eighteen years ago; and that neither Eastman, (the mortgagor, nor John C. Perkins, the mortgagee, had ever called upon him to pay rent, or interfered with his occupancy, or made any entry upon or claim to the premises.

Neither party desiring to submit any question of fact to the jury, a verdict was ordered for the plaintiff, and the defendant excepted.

Mr. A. F. L. Norris, for defendant:

This is an action for the recovery of real estate brought more than twenty-four years from the time the right to recover first accrued to the party claiming it, or to some person under whom he claims, and the Statute of Limitations is a bar to the action.

Gen. Laws, chap. 221, § 1.

The talk of John C. Perkins and Eastman in the presence of Charles E. Perkins did not af-

fect the relations of the parties. Nothing was done by either of them, then or subsequently, to change the relations of the parties. The conversation between them was in no sense competent evidence.

Messrs. Chase & Streeter, for plaintiff:

The only question requiring consideration in this case is whether the cause of action is barred by the Statute of Limitations. The authorities clearly show that a negative answer must be given to it.

The mortgage in question vested the seisin of the demanded premises in the plaintiff's intestate. After the execution of the mortgage, the mortgagor and those claiming under him were in possession of the premises, with the privity and assent of the mortgagee, and in subordination to his title, until the mortgagee elected to treat their possession as a disseisin, unless they gave to their possession in the mean time an adverse character by some unequivocal act, hostile to the mortgagee's title, and distinctly brought to his knowledge. "Until such actual disseisin by the act of the mortgagor, or by the election of the mortgagee, the possession is not adverse, but in privity with the mortgagee, and the Statute of Limitations does not begin to run." The right to recover "first accrues" to the mortgagee, within the meaning of Gen. Laws, chap. 221, § 1, when (1) the act of the mortgagor constituting actual disseisin, or (2) the election of the mortgagee to treat the mortgagor's possession as disseisin, takes place.

Tripe v. Marcy, 39 N. H. 439, 445, and authorities cited; *Howard v. Hildreth*, 18 N. H. 105; *Sheafe v. Gerry*, Id. 245; *Furbush v. Goodwin*, 29 N. H. 321, 332; *Gray v. Gillespie*, 59 N. H. 469; *Clough v. Rowe*, 1 N. H. L. ed. 140 (2 New Eng. Rep. 254), 63 N. H. 562; *Jones, Mort.* §§ 42, 667 *et seq.*, 1194. See also *Robie v. Flanders*, 33 N. H. 524; *Bacon v. McIntire*, 8 Met. 87.

There was no actual disseisin of Eastman (the mortgagor), or of the plaintiff's intestate (the mortgagee). The defendant entered into possession of the premises "by permission, and as tenant of S. M. D. Perkins, who was a half-owner" thereof in common with Eastman. The possession thus taken by the defendant was that of his landlord, which was that of a tenant in common of the premises. He does not pretend that he got or claimed possession of the plaintiff's undivided half of the premises in any other way. He does not set up any title thereto. Possession taken under such circumstances is presumed to have been with the assent of the other tenant in common—in fact, is regarded as his possession. To subsequently convert it into an ouster or an adverse possession would require some decided, unequivocal act, brought to the knowledge of the other tenant in common, and showing that he denied such tenant's title; until such act, it is presumed to continue of the same character as when first taken. Such act, moreover, must have occurred twenty years at least prior to the commencement of this action.

4 Kent, Com. 370; *Tiedeman, Real Prop.* § 251, and numerous authorities there cited, among which are: *Munroe v. Luke*, 1 Met. 459, 470; *Campbell v. Campbell*, 13 N. H. 483, 485. See also *Tripe v. Marcy*, 39 N. H. 445.

When the mortgagor is permitted to re-

tain possession of the land for twenty years without interruption, the presumption is that the mortgage debt has been paid, or had no valid existence, unless this presumption is repelled by the payment of interest, or other act recognizing the validity of the mortgage.

Tripe v. Marcy, 39 N. H. 448, 449, and numerous authorities there cited.

The presumption of payment is not conclusive in favor of a mortgagor who has been in uninterrupted possession for twenty years, but may be controlled by evidence of part payment of principal or interest, or other admissions or circumstances from which it may be found that the debt is still unpaid.

2 Jones, Mort. § 1196.

This presumption may be repelled by evidence of "an acknowledgment that the mortgage is still existing."

Id. § 1198.

For the purpose of repelling this presumption, the evidence of John C. Perkins as to the conversation in 1869 between his brother (the mortgagee) and Eastman (the mortgagor) was clearly competent. It was an acknowledgment by the mortgagor that the mortgage still existed and was all right, and that the mortgagee could enforce it at pleasure. It occurred less than twenty years prior to the commencement of this suit. It conclusively repels the presumption aforesaid.

Smith, J., delivered the opinion of the court:

Upon the execution of the mortgage the seisin as well as the title of the demanded premises vested in the demandant's intestate, who acquired and remained in constructive possession of the same until his death, unless the defendant's occupation assumed an adverse character by some unequivocal act distinctly brought to his knowledge. After the title became vested in the mortgagee, the mortgagor's possession was that of a tenant at will or at sufferance, or analogous to it; and the mortgagee's right to recover possession first accrued when the demandant, as his legal representative, by bringing this suit, elected to treat the defendant's possession as a disseisin. *Howard v. Hildreth*, 18 N. H. 105; *Sheafe v. Gerry*, 18 N. H. 245; *Chellis v. Stearns*, 22 N. H. 312; *Furbush v. Goodwin*, 29 N. H. 321; *Tripe v. Marcy*, 39 N. H. 439; *Clough v. Rowe*, 1 N. H. L. ed. 140 (2 New Eng. Rep. 254), 63 N. H. 562.

The defendant, by pleading *nul disseisin*, admitted that he was in possession of the demanded premises claiming a freehold, and denied the demandant's right to recover any part of the premises. *Mills v. Peirce*, 2 N. H. 9; *Graves v. Amoskeag Mfg. Co.* 44 N. H. 462. Under this plea no evidence was admissible except on the question of title. The defendant claims a title acquired by adverse possession. He does not claim under Eastman, the mortgagor. He went into possession in 1862 as the tenant of S. M. D. Perkins, the owner of the other undivided half of the premises, and has since paid him rent for his half. There is no evidence tending to show that he occupied or claimed Eastman's undivided half adversely to him or to the demandant's intestate. *Campbell v. Campbell*, 13 N. H. 483. The fact that the defendant made some repairs upon the buildings

while in their occupation as tenant of one of the owners, is not, standing alone, evidence of an adverse holding against the other owner. The defendant's possession was the possession of his landlord; and a tenant in common taking the income and making repairs is presumed to be in according to his title, unless he claims that his possession is exclusive and an ouster of his cotenant. *Thompson v. Gerriah*, 57 N. H. 85.

The demandant's testimony as to the conversation with Eastman in 1869 was competent to show that his mortgage was not barred by the Statute of Limitations. *Hodgdon v. Shannon*, 44 N. H. 572, 576. Whether, as against one having no title, it was necessary to rebut the presumption of payment arising from the lapse of time, is a question which need not be considered.

The deed of the defendant to S. M. D. Perkins in 1862 may be laid out of the case as immaterial.

As there was evidence from which the jury might find for the demandant upon both issues, and the defendant did not desire to submit any question of fact to them, the verdict was properly ordered for the demandant.

Exceptions overruled.

Clark, J., did not sit; the others concurred.

Bridget O'BRIEN

v.

O'LEARY *et al.*

J. Q. died leaving six children, to one of whom, J. Q., Jr., he gave by will certain land, "to have and to hold to him, his heirs and assigns forever." Another clause of the will provides that, "in case of the decease of any one of my said children without issue living at the time of such decease, the devise or bequest given to such child I give and bequeath in equal shares to the surviving brothers or sisters of said deceased." J. Q., Jr., having died without issue,—*Held*, that the land passed in equal shares to his brothers and sisters living at the time of his death.

(Strafford—Decided July, 15, 1887.)

PETITION for partition. *Case discharged.*

John Quinn died leaving six surviving children, viz., Bridget, the plaintiff, Margaret, one of the defendants, Kate Tolmay, Joseph Quinn, John Quinn, Jr., and Mary Ann McKenney. By the sixth item of his will he devised to John Quinn, Jr., the land sought to be divided, "to have and to hold to him, his heirs and assigns forever." The seventh item is as follows: "In case of the decease of any one of my said children without issue living at the time of such decease, the devise or bequest given to such child I give and bequeath in equal shares to the surviving brothers or sisters of said deceased."

Kate Tolmay died in 1885, and the defendant Thomas is her minor child. John Quinn, Jr., died in 1886, never having had issue. Since his death Joseph Quinn and Mary Ann Kenney have died. The defendants John W. and

Joseph are minor children of the former; Ellen and Josephine, of the latter. The land has been sold by order of the court, and the question is upon the division of the avails.

Mr. J. G. Hall, for plaintiff.

No counsel appeared for defendant.

Allen, J., delivered the opinion of the court:

By the sixth item of John Quinn's, the ancestor's, will, the land in question was devised to John Quinn, Jr., "to have and to hold to him, his heirs and assigns forever." Taken by itself and without reference to the remaining part of the will, this was a devise in fee to John Quinn, Jr., and, upon his death intestate, leaving no lineal descendants, the land would have fallen to his brothers and sisters living, and to the children of those deceased. But the seventh item of the will provides that, "in case of the decease of any one of my said children without issue living at the time of said decease, the devise or bequest given to such child I give and bequeath in equal shares to the surviving brothers or sisters of said deceased." This clause in the will is a limitation of the devise in the sixth clause, in favor of John's "surviving brothers and sisters" in case he should die without issue.

In case of a devise or bequest to one for life with remainder over to the survivors of a class, words of survivorship, in the absence of clear intention to the contrary, are referred to the time of the death of the tenant for life, and not to that of the testator; and those will take who, at the death of the tenant for life, answer the description in the will, to the exclusion of the representatives of those who are then dead. *Hill v. Rockingham Bank*, 45 N. H. 270, and cases cited; *Kimball v. Penhallow*, 60 N. H. 448; *Olney v. Hull*, 21 Pick. 311; *Sinton v. Boyd*, 19 Ohio St. 80; 2 Jarm. Wills, *727-751.

The intention of the testator, the ascertainment of which from competent evidence is the true construction of the devise, must govern; and that intention can only be reached by considering all parts of the will. Giving force to this principle, and limiting the devise in the sixth item by the language of the seventh, the meaning of which cannot be mistaken, it was clearly John Quinn's intention that the land devised to his son John should, in the event of his death without issue, descend in equal shares to his brothers and sisters then living. The language is plain, and there is little room for construction. John died leaving no issue, and four brothers and sisters surviving him, viz.: Bridget, Margaret, Joseph, and Mary Ann. They were the brothers and sisters intended by the limiting clause of the devise and the only persons answering the description,—“the surviving brothers and sisters of said deceased.” Upon John's death the title to the land became vested in them in equal shares, in common and undivided, to the exclusion of the defendant Thomas Tolmay as representative and heir of Kate Tolmay, a sister deceased before the death of John.

Since the death of John Quinn, Jr., his brother Joseph and sister Mary Ann McKenney have deceased, each leaving two children, the former John W. and Joseph, and the latter Ellen and Josephine, all of whom are defendants in the proceeding. In the partition of the estate these children are entitled respectively to their

parents' share. The two sisters now living will each take one fourth, and the four children of the deceased brother and sister, Joseph and Mary Ann, will each take one eighth of the avails from the sale of the estate.

Case discharged.

Carpenter, J., did not sit; the others concurred.

Mayor of MANCHESTER

v.
SMYTHE.

The court will not interfere by injunction to prevent the violation of a city building ordinance, designed to furnish security against fire, when it appears that the threatened violation will not constitute a nuisance by increasing the danger from fire.

(Hillsborough—Decided July 15, 1887.)

BILL in equity for an injunction to restrain the defendant from proceeding further with the work of raising and enlarging a building in Manchester in violation of a city ordinance. *Bill dismissed.*

The following is the provision of the ordinance alleged to have been violated:

"No person shall erect, or cause to be erected, any building exceeding 10 feet in height, nor shall any building now or hereafter erected be raised or enlarged unless the walls of the same shall be built of iron, brick, or stone, with the roof of slate, iron, or other incombustible material, within the following limits," etc.

Facts Found by the Court:

The original building—adwelling-house—was built in 1845 of wood, a little more than two stories high, with a square roof, covered with shingles. The plates on which the rafters rested were about two feet above the floor of the attic, which consisted of a single finished room lighted from the roof, with an unlighted recess used for storage on each of its four sides. In order to obtain additional and better lighted rooms, the defendant has removed the old roof, extended the outer walls upward on each side of the building, from 5 to 7 feet, put on or begun to put on, a flat, gravel, concreted roof, which at its highest point is 4 inches higher, and at its lowest point 20 inches lower, than the highest point of the old roof. This is the raising and enlarging complained of. The interior is now wholly unfinished. If the building is completed according to the defendant's design, the danger from fire will be in some respects increased and in others diminished, but on the whole, considering the interior and exterior exposure of the building itself and that of adjacent buildings, it will be neither increased nor diminished.

Messrs. Sulloway & Topliff, for plaintiff:

The city council had authority to pass the ordinance in question, and their discretion in so doing is conclusive and final.

1 Dill. Mun. Corp. 3d ed. § 328; *Hine v. New Haven*, 40 Conn. 478.

This discretion cannot be judicially interfered with.

1 Dill. § 94; *State v. Clarke*, 54 Mo. 17; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 509; *St. Louis v. Boffinger*, 19 Mo. 15; 1 Dill. 3d ed. § 475; *Baker v. Boston*, 12 Pick. 184; *Harvey v. Mayo*, 45 Me. 322; *Fay, Petitioner*, 15 Pick. 243; *Parks v. Boston*, 8 Pick. 218; *Danielly v. Cabanis*, 52 Ga. 211; *Sheridan v. Colvin*, 78 Ill. 237; *Western Saving Fund Soc. v. Philadelphia*, 31 Pa. 175, 185; *Indianapolis v. Indianapolis G. & C. Co.* 66 Ind. 396; 1 Dill. 8d ed. p. 401, note 1; *Mayor & Council of Monroe v. Hoffman*, 29 La. Ann. 651; 3 C. 29 Am. Rep. 345.

Discretionary powers are not subject to judicial control.

2 Dill. § 882; High. Inj. 2d ed. §§ 1240, 1270; *Lane v. Morrill*, 51 N. H. 423; *Kelsey v. King*, 82 Barb. 410; *People v. Mayor of N. Y.* Id. 102; *McKinley v. Union County*, 29 N. J. Eq. 164; *Andrews v. Knox County*, 70 Ill. 65; *Surett v. Troy*, 62 Barb. 680; *Phelps v. Watertown*, 61 Barb. 121; *Fitzgerald v. Harms*, 92 Ill. 372.

An injunction will not be granted to restrain an act which is within the discretion of a municipal corporation.

M'Cuffery v. Glazier, 10 How. Pr. 475; *Cleveland F. Alarm Co. v. Metropolitan Fire Comrs.* 7 Abb. N. S. 49; 55 Barb. 288; *Semmes v. Columbus*, 19 Ga. 471; *People v. Mayor of N. Y.*, 9 Abb. 253; 19 How. 155; 32 Barb. 35.

A city may pass ordinances to prevent as well as to remove nuisances.

Gregory v. New York, 40 N. Y. 273; Wood. Nuis. §§ 740, 741; *Harrison v. Baltimore*, 1 Gill (Md.), 284; 1 Dill. 3d ed. § 144; High. Leg. Rem. §§ 42, 325, 418; 1 Dill. § 379.

The Legislature may delegate to municipal corporations the power to make by-laws and ordinances, which have all the force, in favor of municipalities, and against persons bound thereby, of laws passed by the Legislature of the State.

1 Dill. Mun. Corp. 3d ed. §§ 308, 399; *Heland v. Lowell*, 3 Allen, 407; *Brick Presb. Church v. New York*, 5 Cow. 538; *St. Louis v. Boffinger*, 19 Mo. 18, 15; *St. Louis v. Manufacturers Sav. Bank*, 49 Mo. 574; *McDermott v. Board of Police*, 5 Abb. (N. Y.) Pr. 422; *Mason v. Shannetown*, 77 Ill. 533; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 508; 24 Am. Rep. 756; *State v. Tryon*, 39 Conn. 183; *Indianapolis v. Indianapolis Gas Co.* 66 Ind. 396; *Starr v. Burlington*, 45 Iowa, 87; *Taylor v. Carondelet*, 22 Mo. 105; *St. Louis v. Foster*, 52 Mo. 513; *Lord Abinger in Hopkins v. Mayor, etc. of Swansea*, 4 Mees. & W. 621, 640; *Milne v. Davidson*, 5 Martin, N. S. (La.) 586; *Reg. v. Oster*, 32 U. C. Q. B. 324.

Power will be held to be given by authority to make police regulations, or to pass by-laws respecting the health, good government, and welfare of the place.

1 Dill. § 372, citing, *Bogert v. Indianapolis*, 18 Ind. 184; *Mayor of N. Y. v. Slack*, 3 Wheeler, Cr. Cas. 237; *Brick Presb. Church v. Mayor of N. Y.* 5 Cow. 538; *Coates v. Mayor of N. Y.* 7 Cow. 582; *Austin v. Murray*, 16 Pick. 121; *Commonwealth v. Fahey*, 5 Cusb. 408; *New Orleans v. Wardens of the Church of St. Louis*, 11 La. Ann. 244; *Cuddon v. Eastwick*, 1 Salk. 192; *People v. Morris*, 18 Wend. 325, 334; *People v. Hurlbut*, 24 Mich. 44, 38;

Brinkerhoff v. Board of Education, 37 How. Pr. 499.

It is within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others.

Boston Beer Co. v. Massachusetts, 97 U. S. 25 (24 L. ed. 989); *Hannibal & St. J. R. R. Co. v. Huen*, 95 U. S. 465 (24 L. ed. 527); *Thorpe v. Rutland & B. R. R. Co.* 27 Vt. 149.

The power to make by-laws is incidental to the very existence of corporations, and without any grant it may make all appropriate by-laws.

London v. Vanacker, 1 Ld. Raym. 496; Hobart, 211.

And such by-laws when made are as binding as any public law of the State.

Anacosta Tribe v. Murbach, 13 Md. 91; *Cummings v. Webster*, 43 Me. 192.

A municipal corporation has inherent power, independent of legislative grant, to forbid the erection and compel the removal of buildings formed of combustible materials within the densely built up parts of a town.

Mayor & Council of Monroe v. Hoffman, 29 La. Ann. 651; S. C. 29 Am. Rep. 346.

The city council, by the terms of the legislative grant to it, was not prohibited or shorn of the power it otherwise would have had to make the ordinance or by-law in question.

Mr. Dillon (1 Mun. Corp. 8d ed. p. 329, note) says: "The true rule in such cases may be expressed to be that the enumeration of special cases does not, unless the intent be apparent, exclude the implied power any further than necessarily results from the nature of the special provisions," citing:

Heisembrittle v. Charleston, 2 McMull. (S. C.) 233; *Wadleigh v. Gilman*, 12 Me. 408; *State v. Clark*, 8 Foster, 182; *State v. Ferguson*, 33 N. H. 432; *State v. Freeman*, 38 N. H. 427, 428; *Commonwealth v. Turner*, 1 Cush. 498; *Collins v. Hatch*, 18 Ohio, 528.

The establishment of limits within the denser portion of cities and villages, within which buildings constructed of inflammable material shall not be erected or repaired, may also in some cases be equivalent to a destruction of private property; but regulations for this purpose have been sustained, notwithstanding this result.

Cooley, Const. Lim. 5th ed. p. 740, and note, p. 742; *King v. Davenport*, 98 Ill. 305; 38 Am. Rep. 89; *Respublica v. Duguet*, 2 Yeates, 493; *Wadleigh v. Gilman*, 12 Me. 408; 28 Am. Dec. 188; *Brady v. Northwestern Ins. Co.* 11 Mich. 425; *Monroe v. Hoffman*, 29 La. Ann. 651; 29 Am. Rep. 345.

A municipal corporation may by ordinance provide that buildings shall not be erected of wood or other inflammable material.

Wood, Nuis. § 741; *Hudson v. Thorne*, 7 Paige, 261; *Douglas v. Commonwealth*, 2 Rawle (Pa.), 262; *Brady v. Northwestern Ins. Co.* 11 Mich. 415; 1 Dill. § 405; *Wadleigh v. Gilman*, 12 Me. 408; *Vanderbilt v. Adams*, 7 Cow. 349, 353.

It is one thing to deprive a party of his rights, and quite another to regulate and restrain their exercise in such a manner as the common convenience and safety may require.

State v. Freeman, 38 N. H. 428; *State v. Clark*, 8 Foster, 182; *Baker v. Boston*, 12 Pick. 193, 194; 1 Dill. § 141; Wood, Nuis. § 1; *Wad-*
1 N. H.

leigh v. Gilman, 12 Me. 408; *Vanderbilt v. Adams*, 7 Cow. 349; *Stuyvesant v. Mayor of N. Y.* 7 Cow. 588; *Dore v. Gray*, 2 T. R. 858; *Governor v. Meredith*, 4 T. R. 794; Cooley, Const. Lim. 5th ed. chap. 16, pp. 708, 711, 712, and notes; *Gregory v. New York*, 40 N. Y. 273.

The preservation of the public health and safety is a matter of municipal duty.

Harrison v. Baltimore, 1 Gill (Md.), 264; *Johnson v. Simonton*, 43 Cal. 242; *Tucker v. Virginia City*, 4 Nev. 20; *Ashbrook v. Commonwealth*, 1 Bush (Ky.), 139; *Ex parte Shrader*, 83 Cal. 279; *Commonwealth v. Alger*, 7 Cush. 85, 86.

The public safety is paramount law, and any act which endangers it is a nuisance.

Wood, Nuis. §§ 1, 25; *United States v. Hart*, Pet. C. Ct. (U. S.) 890; *State v. Hanson*, 23 Tex. 232.

Equity may grant relief.

Story, Eq. §§ 923, 924; High, Inj. 2d ed. § 739; Kerr, Inj. Eq. pp. 165, 166, 206.

Where the right to the private remedy exists, there can be no doubt that an injunction will lie.

Blanc v. Murray, 51 Am. Rep. 9; Story, Eq. Jur. § 924; *Milhan v. Sharp*, 27 N. Y. 625; *Doolittle v. Broome County*, 18 N. Y. 160; Story, Eq. § 926.

The writ of injunction is more frequently used to prevent a meditated wrong than to redress an injury already done. It is therefore to be regarded more as a preventive than a restorative or remedial process.

8 Wait, Act. & Def. p. 680. See *Webber v. Gage*, 39 N. H. 186; *West Point Iron Co. v. Reymert*, 45 N. Y. 708; *Nicodemus v. Nicodemus*, 41 Md. 529; *Schurmeier v. St. Paul & P. R. R. Co.* 8 Minn. 113; *Wilson v. Mineral Point*, 39 Wis. 160; 2 Story, Eq. Jur. §§ 925, 926; Eden, Inj. 286; Jeremy, Eq. Jur. § 310; *People v. St. Louis*, 5 Gillm. 351; *Hoole v. Attorney-General*, 22 Ala. 190; *Attorney-General v. Sheffield Gas Consumers Co.* 19 Eng. L. & Eq. 639; *Aldrich v. Howard*, 7 R. I. 87; *Zabriskie v. Jersey City & B. R. R. Co.* 13 N. J. Eq. 814; *Jersey City v. Hudson*, 13 N. J. Eq. 420; *Attorney-General v. Brown*, 24 N. J. Eq. 89; Wood, Nuis. chap. 25; *Burnham v. Kempton*, 44 N. H. 94, 95; *Fishmongers Co. v. East India Co.* 1 Dick. 163; *Lord Eldon in Attorney-General v. Nichol*, 16 Ves. 342, 343.

Towns may maintain a bill in equity, and courts will aid them by injunction in enforcing their by-laws.

Winthrop v. Farrar, 11 Allen, 398; *Watertown v. Mayo*, 109 Mass. 815.

Courts afford protection by injunction where there are no ordinances, and even a kind of remedy at law.

Wood, Nuis. § 142.

The ordinance does not impose a penalty greater than is authorized by statute.

If an ordinance, or even the same section of an ordinance, contains two separate prohibitions relating to different acts, with distinct penalties for each, one of which is valid and the other void, the ordinance may be enforced as to that portion of it which is valid.

1 Dill. Mun. Corp. 8d ed. § 421; *Commonwealth v. Dow*, 10 Met. 382; *Amesbury v. Bowditch Mut. F. Ins. Co.* 6 Gray, 596; *Shelton v. Mayor of Mobile*, 30 Ala. 540; *Rogers v. Jones*,

1 Wend. 287; *Thomas v. Mount Vernon*, 9 Ohio, 280; 1 Barn. & Ad. 95; 7 T. R. 549; 1 Str. 469; Sir T. Raym. 288, 294; *State v. Clarke*, 54 Mo. 17, 36.

Meers. Cross & Taggart, for defendant:
1. This court, as a court of equity, has no jurisdiction in this case.

A court of equity in this State cannot issue an injunction, to restrain a citizen from erecting wooden buildings in the city of Manchester.

There is no authority given under Gen. Laws, § 1, chap. 209. The erection of the building is not a nuisance *per se*.

A court of equity will not enjoin the erection of wooden buildings within the fire limits, although such erection is forbidden by ordinance.

2 Dill. Mun. Corp. 3d ed. note, p. 400; High, Inj. 788; *Waupun v. Moore*, 34 Wis. 450; 17 Am. Rep. 446; *St. Johns v. McFarlan*, 38 Mich. 72; 20 Am. Rep. 671.

2. The ordinance under which this bill for injunction is brought is unauthorized and void.

1 Dillon, 3d ed. § 423, says: "As all municipal corporations exercise only delegated and limited powers, in the absence of statutory authority to that effect, courts are authorized to indulge in no presumptions in favor of the validity of their ordinances, especially where they abridge general or common-law rights, or impose burdens or penalties upon the inhabitants."

The power of cities to pass ordinances is a "police" power, delegated by the State.

1 Dill. § 141.

The city has no right to exercise this power except so far as it has been authorized by the State.

Dill. 315-317.

The reasonable presumption is that the State has granted, in clear and unmistakable terms, all it has designed to grant.

Cooley, Const. Lim. 195.

This presumption applies with undiminished force when the power sought to be implied is one to limit those rights of property which are secured to every citizen under the general laws of the State.

Potter's Dwar. 146.

A city cannot, without express authority in either its charter or by statute, establish fire limits and declare wooden buildings within such limits to be nuisances.

Rye v. Peterson, 45 Tex. 312; 28 Am. Rep. 608. See Cooley, Const. Lim. p. 229.

The statute authorizes "to regulate the erection or use of buildings."

The ordinance says: "No person shall erect or cause to be erected any building exceeding 10 feet high."

This is the extent of the authority of the city. The words "or use" are limited to occupation or use to which any building can be put whereby the danger from fire is increased. The ordinance goes further than "to regulate the erection," for it says, "nor shall any building now or hereafter erected be raised or enlarged."

The statute authorizes to regulate one thing besides "the use," viz., "the erection."

The ordinance prohibits three things: (1) "the erection;" (2) "the raising;" (3) "enlarging."

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The common and ordinary use of language does not warrant the city in saying that, under the word "erection," it can prohibit the raising or enlarging of an existing building.

Penal statutes must be strictly construed.

Daggett v. State, 4 Conn. 68.

In Dill. 3d ed. § 317, it is said: "Since all of the powers of a corporation are derived from the law and its charter, it is evident that no ordinance or by-law of a corporation can enlarge, diminish, or vary its powers."

See also §§ 315, 316, and authorities cited; *State v. Ferguson*, 33 N. H. 424.

A by-law being entire, if it be void in part shall be void for the whole.

Austin v. Murray, 16 Pick. 126.

The power conferred by the Legislature upon the city council to pass by-laws and ordinances is limited to such as are reasonable, and the penalties prescribed by which do not exceed \$20 for one offense. A by-law or ordinance imposing a penalty which may exceed this limit is beyond the power conferred by the Legislature, unreasonable, and wholly void.

Commonwealth v. Wilkins, 121 Mass. 356.

Allen, J., delivered the opinion of the court:

The plaintiff seeks the extraordinary remedy of a perpetual injunction against the defendant's proposed erection and enlargement of his building, claimed to be in violation of a penal ordinance of the city made to prevent the spread of fire. The equity powers of the court are not often, if ever, invoked or used to restrain or suppress the commission of crimes and misdemeanors, either as a substitute for the remedy by prosecution for the penalty affixed to the offense, or to obviate the necessity of repeated prosecutions. The equity jurisdiction of the court undoubtedly includes, in proper cases, the restraining by injunction of the erection and maintenance of nuisances, public and private. To warrant the application of this restraining power, the danger of irreparable mischief or injury must be imminent and clearly made to appear. *Wason v. Sanborn*, 45 N. H. 169; *Perkins v. Foye*, 60 N. H. 496. The act sought to be restrained must be one which, if performed or executed, will inevitably bring on the danger threatened by it. It must be a nuisance in fact, and not one created solely by statutory enactment or municipal ordinance. *Waupun v. Moore*, 34 Wis. 450.

In this case the defendant's proposed raising and enlargement of his building, if carried to completion, would neither be a nuisance in fact nor the occasion of irreparable mischief or injury. The ground of complaint is that the danger from fire will be increased, but the case finds that the proposed change will neither increase nor diminish that danger. But for the ordinance prohibiting and restraining the change, it would be lawful, and the defendant's right to carry out the undertaking would be unquestioned.

With these views, it is not necessary to consider whether the ordinance, a threatened violation of which is complained of, is or is not authorized by the charter of the city or the statute upon the subject.

Bill dismissed.

Smith and Clark, JJ., did not sit; the others concurred.

CHADBOURNE *et al.*

v.

Israel H. GILMAN *et al.*

A mortgage of land made by a husband directly to his wife to secure a valid debt due from him to her, will be sustained in equity.

(Carroll — Decided July 15, 1887.)

BILL in equity to set aside a mortgage of certain land, made by Israel H. Gilman to his wife, Mary E. Gilman, in June, 1885, to secure a promissory note from him to her for \$2,225. *Dismissed.*

Facts Found by the Court.

The plaintiffs are creditors of I. H. Gilman, and, in July, 1885, caused the mortgaged premises to be attached on a writ against him, and now seek to hold the same, discharged of the mortgage, for the satisfaction of their debt.

Israel H. was insolvent at the time, and had no other attachable property, and the value of this beyond the mortgage was not sufficient to satisfy the plaintiffs' demand.

The consideration of the note was a loan of \$500 by Mary E. to Israel H., in 1866, to use in his business of a tailor; and an agreement to pay her \$3 per week for such time as she could work for him in the business, besides performing her household duties. Under this agreement she worked for him to the amount of one half the time for fifteen years. The \$500 loaned and interest, and the services at \$3 per week for the time, give the amount of the note.

There is no actual fraud on the part of the defendants in making the mortgage. They both believed his indebtedness to her was binding upon him, and that he might pay or secure her by a preference over other creditors.

There was no intent to hinder or delay his creditors in the collection of their demands, beyond the natural consequence of making the mortgage under such circumstances.

Mr. J. H. Hobbs, for plaintiffs:

At common law, husband and wife are not competent parties to a contract.

Lewis v. Lee, 8 B. & C. 291; 2 Kent, Com. 107, 109; *Patterson v. Patterson*, 45 N. H. 166.

The husband is not authorized in this State to convey any of his property to his wife in any other manner or with any other effect than at common law.

Gen. Laws, chap. 188, § 18.

The case finds that there was no intent, in making the mortgage, to hinder or delay the creditors of Israel H. Gilman in the collection of their demands by the attachment or seizure of property, beyond the natural consequence of making the mortgage under insolvent circumstances; and the plaintiffs respectfully insist that, from all the facts found, the inference of fraud in the eye of the law is inevitable.

Mr. Frank Weeks, for defendants:

If a husband has no more power to convey his property to his wife under Gen. Laws, chap. 188, than if it had not been passed, what power has he without the statute?—for the statute takes away no power and creates no disability. At common law, husband and wife being one, neither could convey directly to the

other, but indirectly could make conveyances to each other. This was somewhat technical, and in equity was not regarded; but direct conveyances between husband and wife were always upheld, unless some cause existed, besides the form of the conveyance, whereby they were invalid.

Direct conveyances which were formerly good in equity are now good in equity. In *Kelley on Contracts of Married Women*, §§ 8-10, and notes, many authorities are cited and appear to be uniform. These plaintiffs have sought their remedy in equity, and must be governed by equitable principles.

Against the *bona fide* claim and mortgage of the defendant Mary E. Gilman, given and taken in good faith, the plaintiffs, with no better claim, are not entitled to equitable relief.

If necessary, the mortgagor, I. H. Gilman, will be treated as a trustee of the mortgaged premises for the benefit of Mary E. Gilman, to the extent of the valid mortgage claim thereby secured. Sustaining this position is *Sheppard v. Sheppard*, 7 Johns. Ch. 57, where it is said by the court: "Husband and wife may contract, for a *bona fide* and valuable consideration, for a transfer of property from him to her."

In *Wallingsford v. Allen*, 35 U. S. 10 Pet. 583 (9 L. ed. 642), the court says: "In regard to grants from the husband to the wife, an examination of the cases in the books will show, when they have not been sustained in equity it has been on account of some feature in them impeaching their fairness and certainty."

In *McCampbell v. McCampbell*, 2 Lea, 661; S. C. 31 Am. Rep. 623, it was held that equity will enforce a note executed by husband to wife during coverture, in consideration of her moneys received and collected by him.

In *Hunt v. Johnson*, 44 N. Y. 27, 4 Am. Rep. 631, the court of equity sustained a direct conveyance from husband to wife, "though void at law." And in *Sims v. Ricketts*, 35 Ind. 181, 9 Am. Rep. 679, such deed, though void at law, was sustained in equity. So in *Sayers v. Wall*, 26 Gratt. 354, 21 Am. Rep. 803.

In *Warlick v. White*, 86 N. C. 139, 41 Am. Rep. 453, the court says: "By the rule of the common law, which regards husband and wife as one, every deed of gift made directly from husband to wife is void; but a court of equity, having a greater regard for the intention and convenience of the parties, and treating the deed merely as a defective conveyance, will uphold it in favor of the wife." And the authorities are numerous and uniform that gifts of personal or real property, by the husband directly to the wife, will be upheld in equity, unless the rights of creditors are infringed thereby.

A portion of the consideration of the mortgage note represents the earnings of the wife, to which she has been entitled since the enactment of the General Statutes in 1867; and money due for her services after the passage of that Act is her property, whether due on note or account.

Cooper v. Alger, 51 N. H. 172.

Should any part of the consideration fail, it may be sustained as to such part as is valid. The doctrine is well established that such conveyances will be sustained in equity, and against

creditors of the husband, provided there is good faith and a valuable consideration.

Blodgett, J., delivered the opinion of the court:

At common law a wife cannot be the immediate grantee of her husband, but she may take an estate from him through the intervention of a trustee. In equity, however, it is otherwise, and a direct conveyance from husband to wife will be upheld whenever there is an adequate consideration. *Sheppard v. Sheppard*, 7 Johns. Ch. 57; *Arundell v. Phipps*, 10 Ves. 146, 149; *Hunt v. Johnson*, 44 N. Y. 27; *Dale v. Lincoln*, 62 Ill. 22; *Sims v. Rickets*, 35 Ind. 181; *Smith v. Dean*, 15 Neb. 492; *Jordan v. White*, 38 Mich. 253; *Putnam v. Bicknell*, 18 Wis. 334; *Beard v. Dedolph*, 29 Wis. 136; *Fenelon v. Hogoboom*, 31 Wis. 172; *Carpenter v. Tatro*, 36 Wis. 297; *McCampbell v. McCampbell*, 2 Lea (Tenn.), 661; *Sayers v. Wall*, 26 Gratt. 354; *Powe v. McLeod*, 76 Ala. 418; *Washburn v. Gardner*, Id. 597; *Craig v. Chandler*, 6 Col. 543; 2 Story, Eq. Jur. (12th ed.) §§ 1368, 1372, 1375 and notes. And see also *Wallingsford v. Allen*, 35 U. S. 10 Pet. 583 (9 L. ed. 542), and *Jones v. Clifton*, 101 U. S. 225 (25 L. ed. 908). This rule or principle of equity jurisprudence has not been abrogated in this State by statute (Gen. Laws, chap. 183, § 13); and as it is found as a fact that the mortgage deed sought to be annulled was given and taken in good faith, and as it must be deemed to have been upon an adequate consideration (*Cooper v. Alger*, 51 N. H. 172; *Kaufman v. Whitney*, 50 Miss. 103; *Rowland v. Plummer*, 50 Ala. 182), the plaintiffs make no case for equitable relief. Exceptions sustained.

Bill dismissed.

Allen, J., did not sit; the others concurred.

CAMPBELL, Exr.,

v.

CLARK et al.

1. A devise "in equal shares to my nieces and nephews, and to the nieces and nephews of my former husband," is a gift to such of them as survive the testatrix, and they take *per capita*.
2. A niece or nephew of the testatrix, who is also a niece or nephew of her former husband, does not take a greater share than the others.
3. The daughter of a niece who died in the lifetime of the testatrix does not take, under Gen. Laws, chap. 193, § 12, the share which her mother would have taken had she outlived the testatrix.

(Rockingham—Decided July 15, 1887.)

BILL in equity by the executor, asking for a construction of the will of Sarah Clark. *Case discharged.*

The eighth clause of the will is as follows: "I give and devise the remainder of my estate, real, personal, and mixed, in equal shares to my nieces and nephews, and to the nieces and nephews of my former husband, John Carr."

William Carr, a nephew, and Clarissa Coggs-

well, a niece, of John Carr, died prior to the execution of the will, leaving issue. A niece died after the making of the will and before the death of the testatrix, leaving a child, Belle A. Williston. Sarah Dickey is a niece, and John and Samuel Campbell are nephews, of the testatrix, and also of John Carr.

The questions submitted are as follows:

1. Whether the issue of William Carr and of Clarissa Coggs-well take any share in the residue.

2. Whether Belle A. Williston takes any share.

3. Whether the residue shall be divided *per capita* among the nieces and nephews of John Carr and of the testatrix, or into two equal shares, of which one shall be distributed among the nieces and nephews of the testatrix, and the other among the nieces and nephews of John Carr.

4. What shares do Sarah Dickey, John Campbell, and Samuel Campbell take in the residue?

Messrs. G. C. & G. K. Bartlett, for plaintiff.

Messrs. Gilman & Barnes (of Massachusetts), for defendants Milton Abbott and five others.

Mr. E. B. Gould (with *Messrs. Carpenter & McGowan* of Massachusetts), for defendants N. O. Clark and two others.

Messrs. Wiggins & Fernald, for defendant Belle A. Williston:

1. A will is to be construed with reference to persons and objects in existence when it is made, except so far as by its terms it contemplates and provides for the contingency of a change of conditions at the time the will is to take effect. A testator is presumed to know whether the objects of his bounty are living when he makes his will, and no person who does not then come within the persons described as beneficiaries is entitled to participate in his bounty. The issue of the nephew and niece who died before the making of the will is not entitled to any share in the residue.

Re Hotchkiss Trusts, 8 Eq. Cas. 643; *Smith v. Pepper*, 27 Beav. 87; *Gray v. Garman*, 2 Hare, 268.

2. The residue to be distributed under the eighth clause should be divided *per capita* among the nephews and nieces of John Carr and the nephews and nieces of the testatrix. This question has been settled in this State.

Farmer v. Kimball, 46 N. H. 435.

It should be distributed among all the persons who come within the description of either class. If a person answers the description of both classes, he is not thereby entitled to a double share.

3. Belle A. Williston, the only child and heir of Diantha High, one of the nieces of the testatrix, is entitled to stand in her mother's place, and take the share she would have received if she had survived the testatrix. This right is secured to her by Gen. Laws, chap. 193, § 12. There is direct evidence in the will itself that the testatrix understood the statute in the sense we have claimed. The fifth clause provides as follows: "I give and bequeath to my sister Sophia Clark's children that may be living at my decease, etc." This construction is supported by common-law decisions in cases where the will provided against a lapse.

See *Hunter v. Cheshire*, L. R. 8 Ch. App. Cas. 731; *Nutter v. Vickery*, 64 Me. 490; *Minter's App.* 40 Pa. 111; *Barnes v. Huson*, 60 Barb. 589.

Carpenter, J. delivered the opinion of the court.

A will speaks, not from its date, but from the death of the testator, unless a different intention is expressed. The residue is given to the nieces and nephews as a class. The individuals composing the class are ascertained at the time when the devise takes effect, that is to say, at the testator's death. The gift is to the nieces and nephews in being at that time. *Hall v. Smith*, 61 N. H. 144. This doctrine, like all rules for the interpretation of wills, rests upon the ground that it gives effect to the testator's intention. A gift to a class implies an intention to benefit those who constitute the class when the gift takes effect, and to exclude all others. *Barber v. Barber*, 3 Myl. & Cr. 607. There is nothing in the present will from which it can be inferred that such was not the design of the testatrix.

The statute providing that "the heirs in the descending line of any legatee or devisee deceased before the testator shall take the estate devised or bequeathed in the same manner the legatee or devisee would have taken the same if he had survived" (Gen. Laws, chap. 193, § 12) has no application. Its purpose was not to defeat the testator's intention, or to change the rules of construction by which the intention is determined, but to provide that, if, by reason of a legatee's or devisee's death in the testator's lifetime, the gift cannot take effect as intended, it shall go to the lineal descendants of the legatee or devisee rather than to the testator's heir at law or residuary legatee. It only applies where the intended donee dies before the testator, and where the property in that event is not disposed of by the will otherwise than by a residuary clause. If a devise be to two or more and to the survivor of them, or to be held by them as joint tenants, or to such of a class of persons as may be living at the testator's death, and one die in the testator's lifetime leaving issue, a holding that such issue take under the statute as the parent would have taken had he survived would defeat the expressed intention of the testator. It is not material whether the intention is stated in express language or is determined by construction. If a devise generally to a class of persons, and a devise to such individuals of the class as may survive the testator, are in legal effect equivalent, the statute can no more be applied in the one case than in the other, without thwarting the testator's intention. It cannot be held that Belle A. Williston takes the interest which her mother would have taken if she had outlived the testatrix, without overruling the settled doctrine that, in a gift to a class, the intended objects of the testator's bounty are the persons of the class who are in being at his decease.

Mr. Jarman, commenting upon a similar English statute, says it does not "touch the case of a gift to several persons as joint tenants; for, as the share of any object dying in the testator's lifetime would survive to the other or others, such event occasions no lapse, to pre-

vent which is the avowed object of the clause under consideration. The same reasoning applies to a gift to a fluctuating class of objects who are not ascertainable until the death of the testator, though made tenants in common. Thus, suppose a testator to bequeath all his personal estate to his children simply in equal shares, it would seem that the entire property would, as before the statute, belong to the children who survive the testator, without regard to the fact of any child having, subsequently to the date of the will, died in the testator's lifetime, leaving issue who survive him." 1 Jarm. Wills, 1st Am. ed. 813. So in 2 Wms. Exrs. 1222, it is said that the statute "does not apply to gifts to a class. For the intention was to provide against lapse merely, and not to alter the construction to be put on the will." The same conclusion under similar statutes was reached in *Young v. Robinson*, 11 Gill, 328; *Gross's Estate*, 10 Pa. 360. See also *Morse v. Mason*, 11 Allen, 86. A contrary view was taken in *Moore v. Diamond*, 5 R. I. 121, and under a materially different statute in *Yates v. Gill*, 9 B. Mon. 203. See also *Jamison v. Hay*, 46 Mo. 546.

The devisees take *per capita*. *Farmerv v. Kimball*, 46 N. H. 435. There is nothing that the testatrix intended that those who were her nieces and nephews and also the nieces and nephews of her former husband, should take more than others. It is as if she had said "I give, etc., to my nieces and nephews by blood and by my marriage with John Carr."

Case discharged.

Bingham, J., did not sit; the others concurred.

Daniel R. MARSHALL,

v.

David WADSWORTH.

Highway surveyors have no authority to arrest the body to enforce collection of a highway tax.

(Hillsborough—Decided July 15, 1887.)

PETITION for a writ of *habeas corpus*.
Granted.

The petition alleges that Joseph E. Wood, of Hudson, is illegally imprisoned and detained in the county jail, by David Wadsworth, the jailer. The defendant justifies the imprisonment by virtue of a certificate of George W. Marshall, Jr., highway surveyor of District No. 6 in Hudson for the year 1886-7, upon a copy of his warrant of the sum said Wood was taxed for in his list; and that he has taken his body for want of goods and chattels whereon to make distress, and committed him to jail; and that the defendant detains said Wood in his custody for nonpayment of said tax, cost of commitment, and charges of imprisonment.

Mr. C. W. Hoitt, for plaintiff:

The petition should be granted, and writ of *habeas corpus* issued, Wood being illegally imprisoned and restrained, *i. e.*, committed by warrant of a highway surveyor.

Gen. Laws, chap. 242, § 1. The surveyor had no power to take the body of Wood for nonpayment of a highway tax, and commit him to jail.

It is true that, by the law of 1872, highway surveyors have all the powers of, and are subject to the same liability as, collectors of taxes (Gen. Laws, chap. 72, § 6); but by the same chapter we are directed that highway surveyors shall give notice to work out tax first; on neglect to attend, the surveyor shall levy his tax by distress or sale as collectors may levy the State tax, unless he renders sufficient excuse, in which case he is given another opportunity to work it out (§ 9).

Collectors of taxes are specially authorized to distrain goods and sell the same; and, for want of goods whereon to make distress, the collector may take the body (Gen. Laws, chap. 58, §§ 4, 6, 8); in the latter case going one step farther than in the former. From this, we infer that the authority above given, that surveyors may have all the powers, etc., is directory, simply, as to the course to be pursued in case of distress being made, and to the extent set forth in the several sections following § 6. If limited to distress only, as we claim, it can by no distortion of language be successfully claimed that it was the intention of the Legislature to include an arrest in the meaning of the word "distrain" or "distress." A distress is the taking of a personal chattel out of the possession of the wrongdoer into the custody of the injured party, to procure a satisfaction for the wrong committed.

3 Bl. Com. 6.

It is so recognized by our statutes (see Gen. Laws, § 7, chap. 103; chap. 247, § 24; chap. 42, § 12; chap. 57, §§ 6, 8); in each and every case the word "distress" being applied and limited to chattels and personal property only, and in no way broadened, or its signification extended.

We think that under the law as existing prior to 1881, and as above considered, the highway surveyor had no authority to make the arrest; but the law passed in 1881 strengthens our position that the surveyor has no such authority. By this last Act, surveyors of highways shall return their warrants and lists to the selectmen, with a statement of the amounts collected or worked out, and the amount against each person not paid or worked out. All claims against this latter class shall be committed to the collector of taxes then in office, who shall have all the powers to collect the same which he has to collect other taxes. This return should in this case not be made until July next. These taxes, being assessed on real estate, could be collected from the real estate, and should be so collected. That the real estate might be holden for the same, the Act specifically states that the time for which real estate is holden for highway taxes is extended for one year.

Pamphlet Laws, 1881, chap. 88, § 2.

Are we to believe it was the intention of the law, with the above course distinctly mapped out, to give to or to clothe highway surveyors with such authority? Would there have been any delinquents at all, or would the Legislature have thought it necessary to consider delinquents, if highway surveyors were authorized to arrest? If they had such authority, they could collect, if anybody could do so. But the Act goes still farther, and specifically clothes even the collector of taxes with all the powers to collect these highway taxes that he has to

collect other taxes for said town; so that here is an intimation that even the collector did not have such powers before.

I find it is suggested that the Legislature of 1885 declined to grant this authority in express terms, thus indicating the feelings of that body or its intention on this point.

See Morrison's Town Officer, p. 289, § 9, note 1, ed. 1886.

Messrs. J. A. Leach and E. S. Cutter, for defendant:

The only question raised in this case, as we understand it, is whether the selectmen had the power, under our statute, to command the surveyor, in the warrant, and the surveyor the power, to take the body of said Wood, the delinquent, for nonpayment of a resident, highway tax, and commit him to the jail.

If the statutes give authority to surveyors of highways to arrest delinquent taxpayers, in default of working out their taxes on notice, and in default of exposing goods to distrain, then it follows that the selectmen are authorized to issue warrants to the surveyors, empowering them to make arrests under such circumstances.

Highway surveyors have all the powers of collectors of taxes.

Gen. Laws, chap. 72, § 6.

Collectors in the collection of taxes, and hence highway surveyors, have all the powers vested in constables in the service of a civil process.

Id. chap. 58, § 1.

Highway surveyors are authorized to distrain goods and chattels of the delinquent taxpayer, in default of his working out his tax on notice.

Id. chap. 72, § 9.

Collectors of taxes, and hence highway surveyors, have the power of arrest for nonpayment of taxes in default of goods to distrain.

Id. chap. 58, § 8.

Stat. 1881, chap. 88, does not deprive highway surveyors of any powers which they had prior to the passage of said Act.

Section 2 of said Act requires highway surveyors, on the first Saturday of July next after the expiration of their term of office, to account to the selectmen for the taxes on their lists, and return their warrants and lists to the selectmen; and any uncollected taxes then upon their lists are to be put into the collector's hands for collection.

The object of this statute was to remedy an evil which has long existed in this State, of highway surveyors having in their hands their warrants and lists, with uncollected taxes on them, long after their term of office had expired, and collecting them from time to time, as they could, by occasionally dunning the delinquents. This practice left the old lists unsettled, and oftentimes in irresponsible hands, and taxes unaccounted for. Section 5 of the same statute requires highway surveyors, in certain cases, to give a bond for the faithful performance of their duties. This statute was passed to enforce a more rigid performance of their duties, on the part of highway surveyors, but left all the powers which they previously had intact.

Blodgett, J., delivered the opinion of the court:

Collectors of taxes have all the powers vested in constables in the service of civil process (Gen. Laws, chap. 58, § 1), and, "for want of goods

and chattels whereon to make distress, the collector may take the body of any person neglecting or refusing to pay the tax assessed against him, and commit him to jail." Id. § 8. In the collection of highway taxes assessed on residents, and on real estate taxed as resident, surveyors of highways shall have all the powers of, and be subject to the same liabilities as, collectors of taxes. Id. chap. 72, § 6. The effect of these provisions consequently is to confer upon highway surveyors the power of arrest for non-payment of taxes, in default of goods and chattels to distraint; and so far the case is free from difficulty.

But there are other provisions bearing upon the subject; and it is a familiar principle, in the construction of statutes, that all statutes upon the same subject-matter are to be considered in interpreting any one of them, and that such a construction is to be given to the different parts of each, and to the whole, consistent with the words, as will promote the object and policy contemplated thereby. In accordance with this principle the subsequent §§ 7 and 9 of chap. 72 must be considered. The former provides for notice of the tax to each person named in the surveyor's list, and of the time and place, and the tools with which, he shall attend to work; and the latter reads as follows: "If any person so notified does not attend in person, or by one or more suitable laborers, the surveyor shall levy his tax by distress or sale as collectors may levy the State tax, unless, within four days after the time so appointed, he renders to the surveyor a sufficient excuse for his neglect; in which case he shall be notified to work at some future time." By this section it is imperatively made the duty of the surveyor to collect the delinquent's tax by distress; and distress legally applies and is limited to personal chattels only. 3 Bl. Com. 6; 1 Bouv. L. Dict. 432. This is repeatedly recognized in our statutes. For example: "No distress shall be made of any person's tools or implements necessary for his trade or occupation, nor of his arms or utensils of household necessary for upholding life, nor of bedding or apparel necessary for him or his family." Gen. Laws, chap. 58, § 5; and see Id. chap. 103, § 7, and chap. 55, §§ 8, 10.

Such being the import of distress, both as a statutory process and a common-law remedy, there is no tenable ground for holding that the Legislature intended it to include an arrest of the body in the section under consideration; and the effect therefore is that § 9 has the force of an exception, and restrains and limits the general authority to arrest conferred by § 6 accordingly. Specified provisions relating to a particular subject must govern in respect to that subject, as against general provisions in other parts of the law, which might otherwise be broad enough to include it (*Felt v. Felt*, 19 Wis. 193, 196); and general words in one clause of a statute may be restrained by the particular words in a subsequent clause of the same statute. *Covington v. McNickle*, 18 B. Mon. 262; *Stockell v. Bird*, 18 Md. 484; *Dwar. Stat.* 63; *Sedg. Stat. L.* 48.

This construction makes both sections effective and consistent with each other; and it is also in harmony with and supported by Laws of 1881, chap. 88, § 2, which provides that, if any highway taxes remain unpaid or unworked

on the surveyor's lists at the expiration of his term of office, the selectmen shall commit the same to the collector of taxes then in office, who shall collect the same in money, and have all the powers to collect the same he has to collect other taxes; for if the Legislature had supposed that highway surveyors were invested with authority to take the bodies of delinquents, it is hardly probable that they would have deemed it to be either expedient or necessary to relieve them from the discharge of that duty, and impose it upon collectors.

Petition granted.

Smith, J., did not sit; the others concurred.

Joseph STICKNEY

v.

Thomas W. BURKE.

The notice requisite under the statute to determine a tenancy at will may require the tenant to quit at any time therein named.

(Merrimack—Decided July 15, 1887.)

ON defendant's exceptions. *Overruled.*

Action upon the Statute of Landlord and Tenant. The defendant occupied the plaintiff's store as a tenant at will. The rent for each month was payable on the first day of the next month. January 29, 1887, the plaintiff gave the defendant notice to quit March 1, 1887. The defendant objected that the notice was insufficient because it required him to quit on the first day of the month, and contended that it should have required him to quit on the last day of the month. The court held that the notice was sufficient, and the defendant excepted.

Messrs. A. F. L. Norris and Henry Robinson, for defendant:

The case finds that the tenancy was not at will strictly, and the rent not payable on demand, because a different contract appears. The rent was payable on the first day of each month for the whole of the previous month. It was a tenancy from month to month, because the rent had been paid in this way monthly.

Currier v. Perley, 24 N. H. 225, pt. 3.

By the terms of the contract the rent might have been made payable monthly, upon any day during the month, for the month before such day; and in that case it would not have been necessary that the notice should terminate with the last day of any year or month, except of the current year or month. It would still be expedient that the notice should end with the current month, since the lessor could claim no rent for an unexpired month where he had put an end to the lease by his own act; and the tenant, for the same reason, could not relieve himself of the rent for the whole month by electing to leave a few days before it expired.

Comyn, Land. & T. 269; *Baker v. Adams*, 5 Cush. 104; *Currier v. Perley*, 24 N. H. 224, pt. 2.

We think the notices prescribed by the statute were designed to be substituted for those required at common law.

Currier v. Perley, 24 N. H. 224.

In *Hazeltine v. Colburn*, 31 N. H. 472, it is said by Bell, J., that, "at common law, it was not only allowed, but it was indispensably requisite, that the time on which the tenant was notified to quit should be the last day of his year, quarter, etc., and there is not the slightest ground in the statute to believe that the Legislature could have intended to make a change by which the notice should not terminate on that day."

In *Leavitt v. Leavitt*, 47 N. H. 341, it is said by Bellows, J., that in *Hazeltine v. Colburn*, 31 N. H. 472, it is said that "at common law it was indispensable that the time when the tenant was notified to quit should be the last day of his year, quarter, etc., and there is not the slightest ground in the statute to believe the Legislature could have intended to make a change by which the notice should not terminate on that day." Thus, our court, at the three different periods, has unmistakably adopted the same law, that the time when the tenant was notified to quit should be the last day of his year, quarter, month, etc. And so it is held in Massachusetts, under a statute much like ours: "A notice to quit which breaks into the quarter, month, or week is not a good notice."

Baker v. Adams, 5 Cush. 99; *Prescott v. Elm*, 7 Cush. 346; *Oakes v. Munroe*, 8 Cush. 285; *Sanford v. Harcey*, 11 Cush. 93; *Currier v. Barker*, 2 Gray, 224; *Steward v. Harding*, 2 Gray, 335.

As neither party has a right to put an end to the tenancy before the expiration of the year, if the occupation goes beyond that period, a new year is entered upon, and a right to enjoy it arises.

Taylor, Land. & T. § 476.

For instance, a tenancy from year to year in England is said to be determined by six months' notice to quit, by which is meant a notice to quit in six months, or at the expiration of six months. So, too, in case of a tenancy from quarter to quarter, or from month to month, a quarter's or a month's notice to quit is required, by which is always understood a notice to quit at the expiration of a quarter or a month. Such, in fact, is the mode in which notices to quit are almost uniformly designated in the elementary books, and in the reports of the adjudged cases.

Oakes v. Munroe, 8 Cush. 285; *Taylor, Land. & T.* 49; 2 Archb. N. P. 394; Comyn, Land. & T. 268; *Right v. Darby*, 1 T. R. 159; *Doe v. Spence*, 6 East, 121; *Huffell v. Armitstead*, 7 Car. & P. 56; *Doe v. Green*, 9 Ad. & El. 658.

Messrs. Albin & Martin, for plaintiff:

The rent was payable on the first day of each month. The landlord sought to terminate the lease for other reasons than the nonpayment of rent. The notice given the tenant terminated the lease on pay-day, i. e., the 1st day of March. Should that notice have terminated the lease on the last day of February? This is the only question before the court.

The leading authorities in this country and in England would require the notice to terminate the lease on pay-day (March 1), and a notice terminating it on any other day, for any cause except the nonpayment of rent, would not be good.

Walker v. Sharpe, 14 Allen, 48; *Waters v.*

Young, 11 R. I. 1; *Wilson v. Prescott*, 62 M. 115; *Atkins v. Sleeper*, 7 Allen, 487.

In *Kemp v. Derrett*, 8 Camp. 510, the defendant became tenant on the 29th of October, 1810, under an agreement that he was always to be subject to quit at three months' notice. Lord Ellenborough declared this to be a holding from three months to three months, and that the notice should have expired on either January 29, April 29, July 29, or October 29. According to the position taken by the defendant in the action at bar, the notice should have terminated upon the 28th, and not upon the 29th, of the above-named months.

In *Akland v. Lutley*, 9 Ad. & El. 871. Denman, Ch. J., uses this language: "The general understanding is, that terms for years last during the whole anniversary of the day from which they are granted."

In the case at bar the defendant was entitled to the use of the premises until midnight of the last day of February, as against a notice to terminate the lease for any reason except the nonpayment of rent. To hold that the notice should terminate upon that day would, in effect, deprive him of some portion of his term, and would be unjust as between landlord and tenant. It is not the policy of the law, in such case, to impose this burden upon the tenant.

There is nothing in our statute to distinguish the above-named cases from the case at bar.

Carpenter, J., delivered the opinion of the court:

The statute provides that "any lessor or owner of any lands or tenements may at any time determine any lease at will or tenancy at sufferance, by giving to the tenant or occupant a notice in writing to quit the same at a day therein named." Gen. Laws, chap. 250, § 1.

In *Currier v. Perley*, 24 N. H. 219, and *Hazeltine v. Colburn*, 31 N. H. 466, 471, it was held, under this statute, that the notice need not require the tenant to quit on the last day of the year, month, or week of the tenancy.

Exceptions overruled.

Clark, J., did not sit; the others concurred.

A. Jennie NOYES

v.

Town of BOSCAWEN.

The negligence of the driver of the carriage in which the plaintiff was riding at the time of his injury is no defense to an action against a town, for damages from a defective highway, by a passenger guilty of no personal negligence and having no control over the driver.

(Merrimack—Decided July 15, 1887.)

CASE for damages for injuries from a defective highway. Verdict for defendant. *New trial granted.*

At the time of the injury the plaintiff was riding with Dearborn, her brother-in-law, in his carriage, which he was driving. The plaintiff requested the court to instruct the jury that

the negligence of Dearborn, the driver, could not affect the plaintiff's right to recover, unless he was her agent, and either under her control, or controlled her personal conduct. The court instructed the jury that if either Dearborn or the plaintiff did not exercise ordinary care, and by such care the plaintiff would have escaped injury, their verdict should be for the defendant; and the plaintiff excepted.

Mr. D. F. Dudley, for plaintiff:

In actions against towns for injuries happening on highways, it is incumbent on the plaintiff to prove:

1. That the injuries received were caused "by reason of" some "obstruction, defect, insufficiency, or want of repairs, which renders it (the highway) unsuitable for the travel thereon."

Gen. Laws, chap. 75, § 1.

The defect alleged in this case was a stone placed in a turnout to the premises of an abutting owner, and outside of the track of onward travel. Plaintiff made no claim that travel up and down the street was obstructed.

She was entitled to have the jury instructed as to what conditions would render a town liable for injuries received outside of the track of onward travel, and instruction 2 should have been given.

Stark v. Lancaster, 57 N. H. 88; *Stack v. Portsmouth*, 52 N. H. 221.

The evidence that others had run over the same stone was admissible to show its capacity to do injury.

Darling v. Westmoreland, 52 N. H. 401.

And further to show that its position was such that it was dangerous and calculated to do injury.

Griffin v. Auburn, 58 N. H. 121.

And instruction 7 should have been given, for in repairing part of the highway a reasonable respect must be had to the rights of all kinds of travel. The highway is for the use of both teams and foot travelers, and must be reasonably safe for both where used by both.

Hubbard v. Concord, 35 N. H. 52.

2. That, at the time of receiving the injuries complained of, plaintiff was in the exercise of ordinary care.

On this question evidence of Dearborn's character as a driver was competent, and instruction 1 should have been given.

Shearm. & R. Neg. § 46, note 2, where the cases are reviewed; Bigelow, Lead. Cas. *Torts*, 729.

This court has held that defects in a wagon or horse unknown to the plaintiff, and which he would not be expected to discover by the exercise of ordinary care, did not prevent a recovery, although they contributed to the injury.

Winship v. Enfield, 43 N. H. 197; *Clark v. Barrington*, 41 N. H. 44.

If plaintiff was guilty of no negligence in riding with Dearborn, and some fault of Dearborn's did in fact contribute to the injury, and the town was also in fault, why should the town escape and lay the loss on an innocent person? If this is the rule it must be supported by reason, and the reason must be some facts in the case. The fact of control seems to be the only criterion. Whether the suggestion made by the plaintiff to Dearborn about turning aside into a cross-road authorized him in turning out where he did, so as to make it her act, and whether

plaintiff could and did exercise any control over him, may be questions for the jury. If the court decide these questions from the case, that shows that plaintiff suggested one place and Dearborn turned out at another, which indicates a lack of control; and because plaintiff suggested turning on to another road it does not follow that she was at fault for Dearborn's turning where he did. If that act was suggestive of danger, or evidence of negligence, it should not be attributed to plaintiff unless as a matter of law, without regard to the facts, plaintiff is identified with every act Dearborn did. If Dearborn's careless driving had injured another, no one would have the temerity to say plaintiff was liable.

Shearm. & R. Neg. § 46, note 2; Bigelow, Lead. Cas. *Torts*, 729.

Plaintiff attempted to show that she was free from fault, by showing she was riding in a suitable vehicle, drawn by a suitable horse, and driven by a careful driver. One seems as material as another, on the authorities cited above.

If a town is bound to keep its highways safe for careful driving, then it follows *ex vi termini* that the driving being careful, the town is liable. But all the cases hold that the way need only be reasonably suitable and sufficient for the travel thereon.

In *Moulton v. Sanford*, 51 Me. 127, it is held that, in order to charge the town for an injury, it must be caused by the defect without any other independent contributing cause.

This is the principle of the argument intended to be advanced by counsel for defendant. Our statute does not say that towns are liable only for injuries caused solely by the defect; neither does the Maine statute, yet the Maine court has so held.

Moulton v. Sanford, *supra*.

Our court has held the other way.

Tucker v. Henniker, 41 N. H. 317; *Tuttle v. Farmington*, 58 N. H. 13; *Winship v. Enfield*, 43 N. H. 197; *Clark v. Barrington*, 41 N. H. 44.

The Maine court says it makes no difference whether the plaintiff is to blame for the contributing cause or not, which is contrary to New Hampshire authorities cited.

This court having held that the defect need not be the sole cause, and having enumerated some of these contributing causes, viz.: weakness in the harness, defective bolt, frightening of a horse without fault of the plaintiff (see argument of Sargent J., 42 N. H. 215); is there any reason to distinguish between these causes and defective driving for which plaintiff is not in fault?

See *Little v. Hackett*, 116 U. S. 866 (29 L. ed. 652), overruling *Thorogood v. Bryan*, 8 C. B. 115, relied upon by defendant.

I would suggest as a test of liability on the part of plaintiff, whether the faulty act is one she was bound to do by herself or another. The bailee of property has possession and represents the owner. But does a person accepting a gratuitous ride with another become subject to any such relation to him as exists between a bailee and the subject of the trust? A bailee of a team might drive so recklessly near a precipice as to go over. But need one who had opportunity to see and appreciate danger hang on and go over with him, although riding with him?

Allyn v. Boston & A. R. R. Co. 105 Mass. 77.

A gratuitous passenger must exercise the caution the circumstances call for. This rule allows no relaxation of care and prudence. And *Allyn v. Boston & A. R. R. Co.* proceeds more on this last idea than on the theory that the passenger is bound by the acts of the driver. It must be inferred from *Daniels v. Lebanon*, 58 N. H. 284, that the son was performing an act which the plaintiff was bound to do, i. e., drive his own team and drive where plaintiff said.

But in this case plaintiff was not the owner or bailee of the team,—had no legal right or actual power to drive or direct the driver. Nor does it appear that there was any circumstance to indicate danger to her so that she was in fault for proceeding.

Robinson v. New York Cent. & H. R. R. R. Co. 28 Am. Rep. 1; *Knapp v. Dagg*, 18 How. Pr. 165; *Metcalf v. Baker*, 11 Abb. N. S. 431; *Bennett v. New Jersey R. R. & T. Co.* 36 N. J. L. 225; *Plummer v. Ossipee*, 59 N. H. 55.

This court has gone too far already in construing the statute to adopt at this day the anomaly that the statute did not contemplate giving a remedy where careless driving contributed to an injury. No injury is done the town by the application of the doctrine contended for by the plaintiff. If the way is "reasonably suitable," etc., careful driving avails a party nothing; he must content himself if he meet injury with the consolation that his loss is accidental.

Lockhart v. Leichtenhaler, 46 Pa. 151, is cited by Shearm. & R. as contrary to *Thorogood v. Bryan*, 8 C. B. 115, and it leaves it as a question of fact whether carrier's negligence deprives his passenger of a right of action.

9 Ohio St. 484, is not a case in point.

If a person invited me to ride in his carriage driven by his servant, I might have a right of action against the master if injured by the negligent act of the servant; but not, if by the mere fact of riding with that servant he became mine.

Bennett v. New Jersey R. R. & T. Co., and *Robinson v. New York Cent. & H. R. R. R. Co.* *supra*.

A person may walk or drive carefully in the darkness of the night, relying upon the belief that the corporation has performed its duties, and that the street or walk is in a reasonably safe condition.

Dill. Mun. Corp. § 1007; Davenport v. Ruckman, 37 N. Y. 568; *Kent v. Lincoln*, 32 Vt. 591; *Sleeper v. Sandown*, 52 N. H. 244.

As is said in *Davenport v. Ruckman*, "He walks by faith justified by law."

I wish to cite to the court *The Bernina*, which is cited in 24 Cent. L. J. 170 (No. 8, Feb. 25, 1887), as overruling *Thorogood v. Bryan*, *supra*, thus "strangling" the doctrine there announced "in its birthplace."

Mr. W. G. Buxton, with **Messrs. Chase & Streeter**, for defendant:

Evidence that other people received similar accidents cannot be introduced.

Hubbard v. Concord, 85 N. H. 521; *Collins v. Dorchester*, 6 Cush. 396; *Aldrich v. Pelham*, 1 Gray, 510; *Robinson v. Fitchburg & W. R. R. Co.* 7 Gray, 92; *Hinckley v. Barnstable*, 109 Mass. 126; *Kidder v. Dunstable*, 11 Gray, 342.

Evidence of the effects resulting to other people or their teams, in driving over this stone,

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would depend upon so many other questions,—the rate of speed, the kind of vehicle, the load, the position of the party riding, the direction from which it was struck, whether by the fore or hind wheels,—that it must be within the discretion of the court whether it would be desirable or profitable to go into these collateral questions, and to what extent if at all.

Darling v. Westmoreland, 52 N. H. 411; *Cross v. Wilkins*, 43 N. H. 332; *Holyoke v. Grand Trunk R.* 48 N. H. 541; *Nutter v. Boston & Me. R. R.* 60 N. H. 483.

Questions of discretion not specially reserved will not be revised.

Dumas v. Hampton, 58 N. H. 184; *Bundy v. Hyde*, 50 N. H. 121, and cases cited.

To satisfy the jury that a person riding upon a stone of the dimensions of this one would be "shaken up" would hardly need evidence of the experience of other people. So, in case this evidence could have been admissible, the plaintiff has suffered nothing by its rejection.

It is well settled by the preponderance of authorities, and upon reason, that the negligence of the driver is to be imputed to the plaintiff,—so that in this case, if either Dearborn or the plaintiff did not exercise ordinary care, and by such care the plaintiff would have escaped injury, the plaintiff cannot recover.

Thorogood v. Bryan, 8 C. B. 115; *Cattlin v. Hills*, 8 C. B. 123; *Armstrong v. Lancashire & Y. R. Co.* 10 L. R. Exch. 47; *Lockhart v. Leichtenhaler*, 46 Pa. 151; *Puterbaugh v. Reasor*, 9 Ohio St. 484; *Allyn v. Boston & A. R. R. Co.* 105 Mass. 77; *Smith v. Smith*, 2 Pick. 621; *Shearm. & R. Neg.* 475.

In discussing *Thorogood v. Bryan*, *supra*, the leading case upon this subject, *Coltman, J.*, said (8 C. B. 129): "As I understand the law upon this subject, a party who sustains an injury from the careless or negligent driving of another may maintain an action, unless he has himself been guilty of such negligence or want of due care as to have contributed or conduced to the injury. In the present case, the negligence that is relied on as an excuse is not the personal negligence of the party injured, but the negligence of the driver of the omnibus in which he was a passenger. But it appears to me that, having trusted the party by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and her servants that if any injury results from their negligence he must be considered a party to it. In other words, the passenger is so far identified with the carriage in which he is traveling, that want of care on the part of the driver will be a defense of the driver of the carriage which directly caused the injury."

Mr. Justice Maule said: "On the part of the plaintiff, it is suggested that a passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He selects the conveyance. He enters into a contract with the owner, whom, by his servant, the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance, he is not obliged to avail himself of it. If there is negligence on the part of those who have contracted to carry the passengers, those who are injured have a clear and undoubted remedy against them. But it seems strange to say that, although the defendant would not

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under the circumstances be liable to the owner of the other omnibus for any damage done to his carriage, he still would be responsible for an injury to a passenger."

In this State we find no authority directly in point. Whenever the driver has been other than the plaintiff, it has been assumed that the plaintiff was responsible for the acts of the driver.

Norris v. Litchfield, 35 N. H. 276; *Cummings v. Center Harbor*, 57 N. H. 17; *Stark v. Lancaster*, 57 N. H. 88.

We submit that the instructions given by the court were correct, explicit, and covered the whole case; and embraced, although in different language, all that was material in the instructions asked for by the plaintiff.

Where proper instructions are given to the jury, it is no ground of exception that they are not given in the form requested.

Gordon v. Boston & Me. R. R. 58 N. H. 396; *Tucker v. Penlee*, 86 N. H. 167; *Walcott v. Keith*, 22 N. H. 196; *Clark v. Wood*, 84 N. H. 447.

The instruction that the occasion of the plaintiff's being in that part of the highway was to be taken into consideration as bearing upon the subject of ordinary care was correct.

Griffin v. Auburn, 58 N. H. 124.

In this case the court instructed the jury "that the plaintiff was bound to use reasonable and ordinary care; and that the knowledge or ignorance of the condition of the road, and his choice of track, were material facts to be considered on the question whether he used such care." It was held in that case that the instructions were correct.

If the instruction given, that the jury "might consider the occasion of their being in that part of the road," was submitting the question whether the plaintiff was using the highway as a way, there was no error.

Varney v. Manchester, 58 N. H. 430-438;

Cummings v. Center Harbor, 57 N. H. 17;

Hardy v. Keene, 52 N. H. 370.

The cases of *Stark v. Lancaster*, 57 N. H. 88, and *Stack v. Portsmouth*, 52 N. H. 224, relied upon by the plaintiff to sustain her request, are authorities only to the extent that the court, in refusing to order a nonsuit, did not err, but submitted the question to the jury whether the highway was defective. This is precisely what the court did in this case.

Jurors are presumed to be men of at least ordinary capacity and common intelligence, and could not have failed to understand the charge given, which was at least sufficiently favorable to the plaintiff.

Gordon v. Boston & Me. R. R. supra; *Cooper v. Grand Trunk R.* 49 N. H. 209.

When the law of a case is fully, accurately, and clearly stated in the instruction given the jury, and each party has an opportunity in argument to apply the law to his views of the facts, it is no error of law for the court to refuse to instruct the jury on the application of the law to the particular evidence.

Phenix Mut. L. Ins. Co. v. Clark, 59 N. H. 345; *Fogg v. Moulton*, Id. 499.

Clark, J., delivered the opinion of the court: The case raises the question whether a person who is guilty of no personal negligence, receiv-

ing an injury, while riding in the carriage of another, caused by a defect in the highway and the carelessness of the driver over whom he has no control, is prevented by the negligence of the driver from recovering against the town,—whether the negligence of the driver of the carriage is a defense to an action brought by a passenger personally free from fault for the recovery of damages for an injury happening from a defective highway. Upon the question whether the negligence of the driver or manager of a carriage is imputable to a passenger, the authorities are conflicting.

In the leading English case of *Thorogood v. Bryan*, 8 C. B. 115, a passenger in alighting from an omnibus was thrown down and injured by the negligent management of another omnibus, and it was held that an action could not be maintained against the owner of the latter, if the driver of the omnibus in which the passenger was riding, by the exercise of proper care and skill, might have avoided the accident which caused the injury. Although this case has been criticised by English judges we are not aware that it has been overruled in the English courts; and in *Armstrong v. Lancashire & Y. R. Co.* L. R. 10 Exch. 47, decided in 1875, it was followed and approved. In the latter case the plaintiff was injured by a collision of a train of the London & North-western Railway Company, on which he was a passenger, with some coal cars of the defendant company. The jury found that the collision was caused by the joint negligence of the London & Northwestern Company and the defendant; and it was held that the plaintiff was so far identified with the London & Northwestern Company that he could not recover. 12 Moak, Eng. Rep. 508.

In this country the doctrine of *Thorogood v. Bryan* has been approved and followed in some States, and in others it has been questioned and its soundness denied; and the weight of authority seems to be against it. Cases supporting it are found in Wisconsin (*Houff v. Fulton*, 29 Wis. 296; *Prideaux v. Mineral Point*, 43 Wis. 513); in Pennsylvania (*Lockhart v. Lichtenthaler*, 46 Pa. 151; *Forks Twp. v. King*, 84 Pa. 230); in Iowa (*Payne v. C. R. I. & P. R. Co.* 39 Iowa, 523); and in Vermont (*Carlisle v. Sheldon*, 38 Vt. 440). Two Massachusetts cases are cited as supporting the doctrine (*Smith v. Smith*, 2 Pick. 621, and *Allyn v. Boston & A. R. R. Co.* 105 Mass. 77); but all that was decided in *Smith v. Smith* was that one who is injured by an obstruction unlawfully placed in a highway cannot maintain an action for damages if it appears that he did not use ordinary care by which the obstruction might have been avoided; and *Allyn v. Boston & A. R. R. Co. supra*, merely decides that there was no evidence for the jury that the plaintiff was in the exercise of due care. The question does not arise in highway cases in Massachusetts and Maine as it is there held that a town is not liable for an injury caused by a defect of the highway and the negligent act of a third party combined; the construction given to the statute being that no action can be maintained unless the injury arises wholly from the defect. *Rovell v. Lovell*, 7 Gray, 100; *Shepherd v. Chelsea*, 4 Allen, 113; *Moulton v. Sanford*, 51 Me. 127; *Perkins v. Fayette*, 68 Me. 152.

The doctrine of *Thorogood v. Bryan* is denied in New York (*Robinson v. New York Cent. & H. R. R. Co.* 66 N. Y. 11; *Dyer v. Erie R. Co.* 71 N. Y. 228); in New Jersey (*Bennett v. New Jersey R. R. & Transp. Co.* 86 N. J. L. 225; *New York, L. E. & W. R. R. Co. v. Steinbrenner*, 47 N. J. L. 161, 171); in Ohio (*Transfer Co. v. Kelly*, 36 Ohio St. 86, 91); in Illinois (*Wabash, St. L. & P. R. Co. v. Shacklet*, 105 Ill. 364); in Kentucky (*Danville, L. etc. Tp. Road Co. v. Stewart*, 2 Met. (Ky.) 119; *Louisville, C. & L. R. R. Co. v. Case*, 9 Bush, 728); in California (*Tompkins v. Clay Street R. R. Co.* 4 West Coast Reporter, 537); and in the Supreme Court of the United States in the recent case of *Little v. Hackett*, 116 U. S. 366 (29 L. ed. 652).

The rule that the negligence of the driver or manager of a vehicle is to be treated as the negligence of a passenger, in an action by the passenger against the third party, is put upon the ground that the passenger, in selecting the conveyance, has placed himself in the care of the driver, and hence must be taken to be in the same position; and the driver, as to third persons, is to be so far regarded as the agent or servant of the passenger as to make the latter chargeable with the driver's negligence, and hence not entitled to recover although he may have been free from fault himself. In *Carlisle v. Sheldon*, 88 Vt. 440, which was an action for injury to a wife, caused by a defect in the highway, while riding in a carriage driven by her husband, the doctrine is stated by Kellogg, J., as follows: "The question is whether a lack of ordinary care and prudence on the part of the husband is in law, under the circumstances of the case, a bar to a recovery for an injury to the wife, when she herself was in the exercise of that degree of care, and was in no fault whatever. The wife was riding in a wagon drawn by a horse driven by her husband. She was a passenger over the highway, and she stands in no different position in respect to her rights, as against the town, from that which she would occupy if the driver of the vehicle in which she was carried had been, instead of her husband, one employed for that purpose. The negligence or want of ordinary care of her servant would have the same effect and be attended with the same legal consequences which would follow from her own negligence or want of care. If she had been a passenger in a stage-coach on this occasion, and had received the same injury, under precisely the same circumstances, although she might have had a cause of action against the proprietor for the negligence or want of care of the driver, we regard it as clear that no action could have been maintained against the town, because the proprietors and their driver would, in respect to the town, be treated as being her agents and servants, and their negligence or want of ordinary care would be attended with the same consequences which would result from her own negligence and want of such care. The passenger would, in respect to the town, stand upon the same footing that he would if he had himself been the driver. There is nothing in the marital relation which would change the situation of the wife in respect to her husband's negligence under such circumstances; for the same consequences would have followed if the relation, instead of being that of husband and wife, had been that

of parent and child, father and daughter, or master and servant; or if she had been an entire stranger, and had been carried by her husband, as a passenger, gratuitously and without any expectation of reward. She was under the care of her husband, who had the custody of her person and was responsible for her safety; and any want of ordinary care on his part is attributable to her in the same degree as if she were wholly acting for herself."

On the other hand, this doctrine is declared to be unsound, and in conflict with the principle that no one should be denied a remedy for injuries sustained without fault by him or by a party under his control or direction; that the relation of master and servant, or principal and agent, does not exist in cases where the passenger has no control over the driver; that it is the right to control the conduct of the agent, which is the foundation of the doctrine that the master is to be affected by the acts of his servant, and that no one is responsible for the negligence of another unless the latter is his servant or agent. In *Robinson v. New York Cent. & H. R. R. Co.* 66 N. Y. 12, which was the case of a person injured by a collision of the defendant's train of cars with a carriage in which the plaintiff was riding by invitation of the owner, who was driving, and whose negligence it was claimed contributed to the injury, Church, Ch. J., says: "The court charged the jury that if the defendant was negligent, and the plaintiff was free from negligence herself, she was entitled to recover, although the driver might be guilty of negligence which contributed to the injury. In determining this question it is important to first ascertain the relation which existed between the plaintiff and Conlon, the driver. It is very clear, and was found by the jury, that the relation of master and servant did not exist, nor was Conlon in any sense the agent of the plaintiff. * * * It is therefore the case of a gratuitous ride by a female upon the invitation of the owner of the horse and carriage. The plaintiff had no control of the vehicle, nor of the driver. In its management. It is not claimed but that Conlon was an able-bodied, competent person to manage the establishment, nor that he was intoxicated or in any way unfit to have charge of it. Upon what principle is it that his negligence is imputable to the plaintiff? It is conceded that if by his negligence he had injured a third person, she would not be liable. She was not responsible for his acts, and had no right and no power to control them. True, she had consented to ride with him, but, as he was in every way competent and suitable, she was not negligent in doing so. Can she be held by consenting to ride with him to guaranty his perfect care and diligence? There was no necessity for riding with him. It was a voluntary act on the part of the plaintiff, but it was not an unlawful or negligent act. She was injured by the negligence of a third person, and was free from negligence herself; and I am unable to perceive any reason for imputing Conlon's negligence to her. * * * It is no excuse for the negligence of the defendant that another person's negligence contributed to the injury, for whose acts the plaintiff was not responsible."

Bennett v. New Jersey R. R. & Transp. Co. 86 N. J. L. 225, was the case of a passenger in a

horsecar, injured by the negligent management of a locomotive by the defendant's engineer, and it was held no defense to show contributory negligence in the driver of the horsecar. In delivering the opinion of the court, Beasley, *Ch. J.*, said: "The proposition claimed to be law is that where a passenger enters a public conveyance he, in some sort, becomes affected by the negligence of the agents of those in charge of such conveyance, at least to the extent of debarring him from suits against third parties for injuries occasioned by the joint carelessness of such third parties and that of the servants having the control of the vehicle in which he is riding. This position has for its support the case of *Thorogood v. Bryan*. The authority is in every respect in point. * * * The reason given for the judgment is that the passenger in the omnibus must be considered as identified with the driver of the omnibus if he voluntarily becomes a passenger, and that the negligence of the driver is the negligence of the passenger. But I have entirely failed to perceive how it is that the passenger in a public conveyance becomes identified, in any legal sense, with the driver of such conveyance. Such identification could only result in one way; that is by considering such driver the servant of the passenger. I can see no ground upon which such relationship is to be founded. In a practical point of view it certainly does not exist. The passenger has no control over the driver or agent in charge of the vehicle. And it is this right to control the conduct of the agent, which is the foundation of the doctrine that the master is to be affected by the acts of his servant. To hold that the conductor of a street car or of a railroad train is the agent of the numerous passengers who may chance to be in it would be a positive fiction. In reality there is no such agency, and if we impute it, and correctly apply legal principles, the passenger, on the occurrence of an accident from the carelessness of the person in charge of the vehicle in which he is being conveyed, would be without any remedy. It is obvious in a suit against the proprietor of the car in which he was a passenger, there could be no remedy, if the driver or conductor of such car is to be regarded as the servant of the passenger. And so on the same ground each passenger would be liable to every person injured by the carelessness of each driver or conductor, because, if the negligence of such agent is to be attributed to the passenger for one purpose, it would be entirely arbitrary to say that he is not to be affected by it for other purposes."

The recent case of *Little v. Hackett*, in the Supreme Court of the United States, was the case of a person hiring a public hack, and injured by a collision of the hack and a railway train, caused by the negligence of both the managers of the train and the driver of the hack, over whom the passenger exercised no control, except in directing where he wished to be conveyed. Speaking for the court, *Mr. Justice Field* said: "Cases cited from the English courts, as we have seen, and numerous others decided in the courts of this country, show that the relation of master and servant does not exist between the passenger and driver, or between the passenger and the owner. In the absence of this relation, the imputation of their negli-

gence, when no fault of omission or commission is chargeable to him, is against all legal rules. If their negligence could be imputed to him, it would render him equally with them responsible to third parties thereby injured, and would also preclude him from maintaining an action against the owners for injuries received by reason of it. But neither of these conclusions can be maintained; neither has the support of any adjudged cases entitled to consideration. The truth is, the decision in *Thorogood v. Bryan* rests upon indefensible ground. The identification of the passenger with the negligent driver or the owner, without his personal co-operation or encouragement, is a gratuitous assumption. There is no such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver or person managing it is his servant. Neither of them is a servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world. * * * There is no distinction in principle whether the passenger be on a public conveyance like a railroad train or an omnibus, or be on a hack hired from a public stand in the street for a drive. Those on a hack do not become responsible for the negligence of the driver if they exercise no control over him further than to indicate the route which they wish to travel or the places to which they wish to go. If he is their agent so that his negligence can be imputed to them to prevent their recovery against a third party, he must be their agent in all other respects, so far as the management of the carriage is concerned, and responsibility to third parties would attach to them for injuries caused by his negligence in the course of his employment. But, as we have already stated, responsibility cannot, within any recognized rules of law, be fastened upon one who has in no way interfered with and controlled in the matter causing the injury. From the simple fact of hiring the carriage or riding in it no such liability can arise. The party hiring or riding must in some way have co-operated in producing the injury complained of before he incurs any liability for it." *Little v. Hackett*, 116 U. S. 366, 374, 375, 379 (29 L. ed. 652). These remarks apply with equal force to the case of a person hiring a passage in a private conveyance or accepting a gratuitous invitation to ride in the carriage of another. The foregoing are actions by passengers injured by the negligence of the driver or manager of the conveyance in which they were riding, coupled with the negligence of the managers of another public conveyance, but there is no distinction in principle between them and the case of a passenger in a private carriage injured by the negligence of the driver and a defect in the highway.

The question whether the negligence of a driver over whom a passenger has no control is a bar to an action by the passenger for injuries caused by an insufficient highway has never been directly raised or determined in this State. It has sometimes been assumed, without being questioned, that the passenger was responsible for the driver's care. The question can only arise in cases where the passenger has no authority or control over the driver, and where the relation of master and servant, or principal and agent, does not exist between the passenger

and driver. It does not arise in an action by the owner of a team injured by a defective highway while in the possession and control of a bailee. Property cannot of itself exercise care or be guilty of negligence. It has no right or duties independent of the owner, and as towns are liable for damages happening to travelers only, the owner of a team injured by a defective highway, to recover against the town, must show that at the time of the injury it was being used for traveling purposes, and managed with reasonable care; and therefore the owner is bound by the degree of care exercised by the party to whom he has entrusted the care of his property. To recover for a personal injury, a traveler must show that he was personally exercising due care; and to recover for an injury to property, it must appear that the property was used and managed with due care at the time the injury was received. Hence cases for injury to a horse or carriage in the control of a bailee, like *Norris v. Litchfield*, 35 N. H. 271; *Cummings v. Center Harbor*, 57 N. H. 17, and *Stark v. Lancaster*, 57 N. H. 88, are not authority for the doctrine that a passenger, personally exercising due care, is necessarily chargeable with the negligence of the driver or manager of the vehicle in which he is riding.

In the absence of any relation of master and servant or principal and agent, when each is independent of control by the other, why should a passenger be chargeable with the driver's negligence any more than the driver with the passenger's negligence? In traveling in the night an obstruction in the highway, unknown to the driver but known to a passenger, causes an injury to both. By informing the driver the accident would have been avoided, and the passenger was chargeable with negligence in failing to give the information. The passenger cannot recover. Would his negligence preclude the driver, who was in no fault, from recovering? A traveler on foot is responsible only for his own negligence. Why should a traveler in a carriage be held responsible, not only for his own negligence but also for the negligence of a driver over whom he has no control? It is contended that towns are only required to keep their highways safe for careful driving, and therefore a passenger is necessarily affected by the driver's negligence. There is no absolute legal test of the sufficiency of a highway. Like the question whether a person is a traveler upon the highway, it is ordinarily a question of fact. *Varney v. Manchester*, 58 N. H. 430. A highway is not required to be entirely free from defects, but it must be suitable for the travel thereon. Gen. Laws, chap. 75, § 1. It must be reasonably safe. But it cannot be said as matter of law that a highway sufficient with a safe horse, carriage, and driver is a reasonably safe highway; nor that a highway to be reasonably safe must be sufficient to prevent accidents with a vicious horse, a defective carriage, or a careless driver.

The fact that an injury to a traveler on a highway was caused by the combined effect of the unsafe condition of the road and the negligence of a third person is no defense to the party who is bound to keep the highway in repair. *Shearn & R. Neg.; Winship v. Enfield*, 42 N. H. 197; *Norris v. Litchfield*, 35

N. H. 271; *Cooley, Torts*, 684. A traveler is required to exercise reasonable care in the use of a highway—in the selection of his horse, harness, and carriage; and if he exercises such care, the fact that the vices of the horse or defects in the harness or carriage may have concurred with the unsafe condition of the highway in causing an injury is no defense to the town. *Clark v. Barrington*, 41 N. H. 44; *Tucker v. Henniker*, 41 N. H. 317. In harmony with this rule and upon principle, we think that a traveler should be held to the exercise of reasonable care only in the selection of a driver; and being in no fault in the choice of his conveyance, and having no control over the management of the team, he should not be held responsible for the negligence of the driver, which he could not reasonably anticipate or prevent. In *Plummer v. Ossipee*, 59 N. H. 55, which was an action by a wife for injuries from an obstruction in a highway while riding with her husband, the defendant claimed that the husband was a fast and careless driver, and introduced in evidence particular instances of his fast and careless driving, and, subject to exception, the plaintiff was permitted to testify to other instances of his careful driving when she had been riding with him, and it was held that the evidence was relevant to the husband's character for driving safely or otherwise, and was also relevant to the question of the plaintiff's negligence in selecting a suitable driver on the occasion of the accident.

In this view the instructions to the jury as to the plaintiff's responsibility for Dearborn's negligence should have been qualified. If the plaintiff was in no fault in riding with Dearborn, and in no way controlled, or could control, his management of the team, she was not responsible for his negligence.

New trial.

Carpenter, J., did not sit; the others concurred.

Addendum by Clark, J.

Since the announcement of the foregoing opinion, and pending a motion for a rehearing, which, after reargument, was denied, the case of *Thorogood v. Bryan*, 8 C. B. 115, and *Armstrong v. Lancashire & Y. R. Co.* L. R. 10 Exch. 47, have been overruled in the English court of appeal in the case of *The Bernina*, 12 Prob. Div. 58. In delivering his judgment, after an extended review of the English and American cases, *Lord Esher, M. R.*, said: "After having thus laboriously inquired into the matter, and having considered the case of *Thorogood v. Bryan*, 8 C. B. 115, we cannot see any principle on which it can be supported; and we think that, with the exception of the weighty observation of *Lord Bramwell*, though that does not seem to be a final view, the preponderance of judicial and professional opinion in England is against it, and that the weight of judicial opinion in America is also against it. We are of opinion that the proposition maintained in it is essentially unjust, and inconsistent with other recognized propositions of law. As to the propriety of dealing with it at this time, in a court of appeals, it is a case which from the time of its publication has been constantly criticised. No one can have gone into or have abstained from going into an

omnibus, railroad, or ship on the faith of the decision. We therefore think that now that the question is for the first time before an English court of appeal, the case of *Thorogood v. Bryan*, 8 C. B. 115, must be overruled."

Lindley, J., said: "The doctrine of identification laid down in *Thorogood v. Bryan*, 8 C. B. 115, is to me quite unintelligible. It is in truth a fictitious extension of the principles of agency, but to say that the driver of a public conveyance is the agent of the passengers is to say that which is not true in fact. Such a doctrine, if made the basis of further reasoning, leads to results which are wholly untenable, e. g., to the result that the passengers would be liable for the negligence of the person driving them, which is obviously absurd, but which of course the court never meant. All the court meant to say was that for purposes of suing for negligence the passenger was in no better position than the man driving him. But why not? The driver of a public vehicle is not selected by the passenger otherwise than by being hailed by him as one of the public, to take him up; and such selection—if selection it can be called—does not create the relation of principal and agent, or master and servant, between the passenger and the driver. The passenger knows nothing of the driver, and has no control over him; nor is the driver in any proper sense employed by the passenger."

Lopes, J., said: "What is meant by the passenger being 'identified with the carriage' or 'with the person having its management' I am at a loss to understand. In *Armstrong v. Lancashire & Y. R. Co.* L. R. 10 Exch. 47. Pollock, B., said he understood it to mean 'that the plaintiff, for the purposes of the action, must be taken to be in the same position as the owner of the omnibus or his driver.' If that is the true explanation, then the passenger, who is blameless, is to be in the same position as the driver, who committed a wrongful act, or his master, who is responsible for the negligence of his servant. This is in accordance neither with good sense nor justice. * * * The more the decision in *Thorogood v. Bryan*, 8 C. B. 115, is examined, the more anomalous and indefensible that decision appears. The theory of the identification of the passengers with the negligent driver or owner is, in my opinion, a fallacy and a fiction, contrary to sound law, and opposed to every principle of justice. A passenger in an omnibus, whose injury is caused by the joint negligence of that omnibus and another, may, in my opinion, maintain an action, either against the owner of the omnibus in which he was carried, or the other omnibus, or both. I am clearly of opinion that *Thorogood v. Bryan*, 8 C. B. 115, should be overruled." 57 Am. Rep. 483, 494, 507, 508, 510.

William W. FLANDERS

v.

Simon GREELY et al.

A vested remainder may be conveyed in mortgage.

(Merrimack—Decided July 15, 1887.)

1 N. H.

BILL in equity to foreclose a mortgage given by Simon Greely, one of the defendants, to the plaintiff, April 8, 1887, to secure a note for \$59.55, dated January 1, 1861. *Case discharged.*

Facts agreed.

Some time prior to February 24, 1846, Insley Greely, of Wilmot, died leaving a widow, Dolly Greely, and eight children, of whom Simon Greely was one, and the defendant Sarah Sargent was one. Insley Greely left a will, whereby he gave, "unto my beloved wife, Dolly Greely, all my real estate and personal property, while remaining my widow, after paying my honest debts;" to his three daughters, Mary, Sally, and Cinda, \$100 each. Then follows: "My will is, as Cinda is out of health, that if she remains so and is unable to support herself, that she shall have it from my property, and have one half of the house. My will is that if either of the three girls, or all of them, should live unmarried, that they should have the privilege of half of the house after paying the above and my wife is done with the property. My will is that what is left be divided among my children, equal."

The testator left personal property appraised at \$282.64, the "Mountain Farm" appraised at \$600, and an undivided half of the "Homestead Farm" appraised at \$650,—in all \$1,532.64.

Dolly remained his widow until her death in 1871. During her lifetime she exercised possession over all the property of the estate, taking the income; and on January 1, 1850, she conveyed away the Mountain Farm by deed.

The mortgage from Simon Greely to the plaintiff was of "all his right, title, and interest in and to the Homestead Farm aforesaid."

After the death of Dolly Greely, the daughter Sarah presented a claim against her father's estate for six years' services in care of her mother,—\$702.

John Greely, the executor, had not settled his account in the probate court; and an agreement under seal was executed by all the heirs, including Simon, for the appointment of referees "to adjust, consider, allow, and determine the amount Sarah Greely shall pay to each of the heirs after the debts against said estate are paid, by the heirs giving the said Sarah Greely a good, valid deed." The only estate at that time remaining was the Homestead Farm.

April 18, 1871, the referees reported:

"We find the estate of Insley Greely to be indebted in the sum of \$800.

"To Sarah Greely, for six years' work, \$600.

"To John Greely, executor of said estate, the sum of \$194.78.

"We also find estate, in our judgments and belief, to the amount of \$800.

"Therefore the referees award, declare, determine, and say that the said Sarah Greely shall be allowed her claim of \$600 against said estate, and that the said Sarah shall pay to the said John Greely the sum of \$194.78, and that she is to pay no more money to any heir whatever of Insley Greely's estate."

Accordingly the several heirs, including Simon, made and executed to Sarah releases of their respective rights in the homestead, and Sarah afterwards conveyed the same to the defendant Prescott, as set forth in the plaintiff's bill.

Messrs. William W. Flanders and Bing-ham & Mitchell for plaintiff:

That the plaintiff's mortgage conveyed to him an interest in the land cannot be doubted.

"Every kind of interest in real estate may be mortgaged, if it be subject to sale and assignment. It does not matter that it is a right in remainder or reversion, a contingent interest, or a possibility coupled with an interest, if it be an interest in the land itself."

Jones, Mort. § 186; *Neligh v. Michenor*, 11 N. J. Eq. 539.

A contingent interest under a will may be quitclaimed, and therefore mortgaged.

Wilson v. Wilson, 32 Barb. 328.

"An estate in remainder in fee, after a life estate, may be mortgaged, although, by the will creating the estate, power is given to third persons to sell the land for the purpose of a division among the devisees."

Re John & Cherry Sts. 19 Wend. 659. See also *Smith v. Provin*, 4 Allen, 516.

Mr. Edgar H. Woodman, for defendants:

From internal evidence, the will of Insley Greely appears to have been written by himself, and without making use of the words and forms which serve to give certainty to the intentions of the testator. But it is abundantly settled that in a devise no technical words are necessary, but that the intention of the testator, as collected from the whole will, is to govern.

Hall v. Chaffee, 14 N. H. 215; *Fogg v. Clark*, 1 N. H. 168; *Hall v. Hall*, 27 N. H. 287; *Greenl. Cruise*, p. 265.

The court will be guided, not by the letter, but by the spirit, of the instrument.

Claggett v. Hardy, 3 N. H. 151.

In this case the testator evidently meant his wife to have not only the use and income of all his property, but to have the power of disposal as well; for it is only "what is left" that is to be divided among the children, while the first clause gives, not the "income" or "use," but "all my real estate and personal property, while remaining my widow."

See *Jones v. Bacon*, 68 Me. 34; *Johnson v. Battelle*, 125 Mass. 453.

When the widow died in 1871, she still remained his widow; and the defendant contends that she took a fee, defeasible only upon her remarriage, and with the power of disposal until her death, and consequently that the interests of the children in the homestead did not vest upon the death of the father.

Eaton v. Straw, 18 N. H. 320-331.

That the mother, Dolly Greely, so understood, and that all the children acquiesced in that understanding, appears from the fact that she conveyed a part of the real estate by her own deed, and used the proceeds, presumably in paying the legacies mentioned in the will, as there seems to be no other source from which they could have been derived. By the will, all the estate is given to the wife after payment of the debts; and afterward is given away legacies to the amount of \$300 and the use of a part of the house, when there is no way to pay them except by disposing of a part at least of the real estate, and using part of the homestead also.

The land, being devised after payment of debts and legacies, must be held to be charged with them.

Gilchrist, Ch. J., 23 N. H. 155, and cases

cited. See *Pickering v. Pickering*, 15 N. H. 281-290.

It has been held in this State that a devise of lands charged with the payment of a legacy gives a fee without words of inheritance, since the testator shall be presumed as intending a benefit to the object of his gift.

Wallace v. Wallace, 23 N. H. 155; *Bell v. Scammon*, 15 N. H. 390.

The settlement of the estate of Insley Greely out of court was assented to by the heirs, and is consequently binding upon them and their privies in estate. The interest of the plaintiff was not of such character as would give him any right to interfere with the settlement. Whether the interests of the children came by devise from the father, or by descent from the mother, Simon Greely's interest was the same; and the matter of the award was a simple and direct way of determining that interest. It is not necessary to claim that the award was valid or binding; it is enough to show that the heirs acted in good faith, recognizing its fairness as a method of determining the interests of the different children by disinterested persons. And, collaterally, the award is competent to show that Simon Greely not only had nothing of value in the estate, but that he never received anything as compensation when he joined with the other heirs in perfecting a title for Sarah Greely.

Even if the widow took but a life estate, with power of disposal, the interests of the children were contingent upon how much was disposed of by the widow in her lifetime, and was not an interest in "land," and subject to mortgage, but only a possible interest in what might be left, whether it all consisted in personal property, the proceeds of land, or the land itself.

McKenzie's App. 41 Conn. 607; *Hall v. Chaffee*, 14 N. H. 225; *Harris v. Knapp*, 21 Pick. 416.

It is well settled that a mere possibility or expectancy of acquiring property, without any present interest in it, is not a subject of mortgage.

Bayler v. Commonwealth, 40 Pa. 37; *Low v. Penn.* 108 Mass. 347.

And it seems to us that there are equities in this case which should be considered by the court, and which should act as an estoppel to this plaintiff in his attempt to foreclose upon property in possession of Sarah Sargent, for a debt due him from Simon Greely.

The plaintiff obtained the mortgage in question twenty years ago, and for security on a note now more than twenty-six years old.

The widow of Insley Greely died only four years after the mortgage was given, and in the same year the referees made their award, upon which the children acted, and the homestead (upon one eighth of an undivided half of which the mortgage is claimed to operate) passed into the possession of Sarah Greely, and has so remained ever since, although a mortgage has been given by her to secure a loan from Simon G. Prescott, as mentioned in the plaintiff's bill. The plaintiff has remained passive for fifteen years without any suggestion to the parties in possession that he claimed any interest, although living within a stone's throw of the premises; and he should now be estopped from setting up a title that would practically oblige

1 N. H.

Sarah Sargent to pay from her own estate a bill which she never contracted, and in which she never had any interest whatever.

See *Davis v. Handy*, 37 N. H. 65; *Simons v. Steele*, 36 N. H. 73-79; *Corbett v. Norcross*, 35 N. H. 99; *Richardson v. Chickering*, 41 N. H. 385; *Runlet v. Otis*, 2 N. H. 167.

Allen, J., delivered the opinion of the court:

The interest of Simon Greely, the mortgagor and one of the children of Insley Greely, the testator, in the Homestead Farm at the time the mortgage was made was that of a residuary devise in common with his brothers and sisters. That interest vested in the devisee on the testator's death, subject to the payment of debts and legacies, the widow's use of the property during widowhood, the conditional support of the daughter Cinda, and the privilege of a home to the three daughters if they should remain unmarried. That interest, therefore, was one that might be conveyed and passed by the mortgage. *Jones*, Mort. § 136; 3 Washb. Real Prop. pp. 88-90, 801, 302.

The claim of Sarah, one of the defendants, arose subsequent to the death of the testator, and cannot be made a debt against his estate, to the payment of which Simon's interest is subjected or postponed. The other children might join in the payment of the claim, and they are bound by their submission to arbitration and by the award of the arbitrators. The mortgage was made prior to the submission and award, and, in fact, prior to the existence of most of the claim; and the plaintiff was not a party to the proceeding, and in no way recognized or consented to it; and his interest as mortgagee cannot be affected by it. The debts, legacies, rights of the widow and daughters, to which Simon's interest was by the will subjected, are, so far as the case shows, satisfied. The debts and legacies are paid; the death of the widow and two of the daughters, and the marriage of Sarah, were events which terminated their respective interests in the land, upon Simon's share of which no charge remains except the mortgage to the plaintiff, who is entitled to a decree of foreclosure of Simon's interest in the homestead.

Case discharged.

Clark, J., did not sit; the others concurred.

Wilder P. CLARK

v.

Sarah L. JACKSON.

1. The purchase, by a mortgagee, of the equity of redemption, at a sale by the mortgagor's assignee in insolvency, has the effect of a legal foreclosure, and satisfies the mortgage debt to the extent of the value of the premises so acquired.
2. By such purchase the mortgagee is not estopped from claiming that the property is of less value than the amount of the debt; and a writ of entry may be maintained upon a mortgage of other land, given to secure the same original debt.

(Cheahire—Decided July 15, 1887.)

1 N. H.

WRIT of entry on a mortgage of land in Rindge, dated March 31, 1881, to secure notes of that date amounting to \$5,000. *Action sustained.*

Facts agreed. On the same date a mortgage of certain lands in Massachusetts was given to secure the same notes.

The mortgagor, a resident and citizen of Massachusetts, was declared insolvent under the laws of that State; and his assignees, on the 24th of June, 1884, sold at auction his equity of redemption to the plaintiff, who bid off the same for a nominal sum because he believed that to be the least expensive way of foreclosing his mortgage. The value of the mortgaged property in Massachusetts was much less than the amount due on the mortgage debt at that time, and the plaintiff now seeks to apply the demanded real estate to the payment of the amount still due.

The defendant contends that the plaintiff is estopped from maintaining this suit by bidding off the equity of redemption in Massachusetts.

Prior to the assignees' sale, the defendant attached the demanded premises on a claim against the mortgagor which arose after the mortgage; and, having obtained judgment, duly levied his execution thereon. The plaintiff knew of the attachment and the commencement of the levy before he purchased the equity of redemption.

Messrs. B. Wadleigh and C. F. Webster, for plaintiff:

By a legal foreclosure the mortgagee acquires the mortgaged property, and to the extent of its value it extinguishes the mortgage debt, but no farther.

2 *Jones*, Mort. § 950, and authorities cited; *Green v. Cross*, 45 N. H. 574.

The purchase of the equity of redemption by a mortgagee has the same effect.

Ibid.; *Post v. Trddesmen's Bank*, 28 Conn. 420; *Findlay v. Hosmer*, 2 Conn. 350; *Spencer v. Harford*, 4 Wend. 881; *Puffer v. Clark*, 7 Allen, 80.

The union of the titles of the mortgagor and mortgagee in the latter or his assignee is tantamount to a foreclosure, and is payment of the mortgage debt to the extent of the value of the premises.

2 *Jones*, Mort. § 951, and authorities cited.

Messrs. Batchelder & Faulkner and H. W. Brigham, for defendant:

By the Massachusetts Statute, chap. 118, § 27, the mortgagee had the right to have the value of his security determined by a sale of the property, the proceeds of the sale applied to his debt, and then prove the balance of his claim; or to release his mortgage to the assignees and then prove the whole of his claim. "If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt."

The assignees had the right, also, if they considered the property of greater value than the debt, to sell the equity of redemption for the benefit of the estate, without request from the mortgagee. The fact that they offer it for sale is proof that they consider the property of greater value than the mortgage, otherwise it would be idle to go through the form of a sale.

Re Lambert, 2 Nat. Bankr. Reg. 426; *Re Bowie*, 1 Nat. Bankr. Reg. 628.

The proceeds of such sale are held "to be the price or value of the interest so sold, and with a knowledge of the incumbrances."

Re Mobane, 8 Nat. Bankr. Reg. 347; *Re McClellan*, 1 Nat. Bankr. Reg. 889; *Second Nat. Bank v. Nat. State Bank of Newark*, 17 Nat. Bankr. Reg. 49.

The mortgagee did not avail himself of the provision of the statute to have the value of his security determined; and, after thus acquiescing in the position taken by the assignee, he ratified it by purchasing the equity at auction, paying a consideration therefor, and taking a deed from him. By the statute above quoted he was barred from proving his claim against the insolvent, and after purchasing the equity without any understanding with the assignee or the insolvent that he was purchasing for any other purpose than to become the sole owner of the property, he placed himself in such a position that, had the insolvent failed to procure a discharge, he could not have enforced his claim against him or his representatives. And we submit that, when the holder of a note has, by his acts, placed himself in such a position toward the maker that he cannot exact payment of him or his representatives, he cannot, afterwards, set up nonpayment of the same note against the rights of others. The plaintiff could have taken no action upon his note after the maker went into insolvency, until he had brought himself within the provisions of the statute we have cited.

Lanckton v. Wolcott, 6 Met. 805.

This he elected not to do, and, having taken a different course, must abide by the results of his action.

By purchasing the equity and taking the deed, the two estates became merged in Clark, and the debt became extinguished.

Norris v. Morrison, 45 N. H. 499.

Blodgett, J., delivered the opinion of the court:

For the purposes of this case it is agreed that the value of the Massachusetts lands was much less than the amount of the mortgage debt, and that the plaintiff purchased the equity of redemption for a nominal sum at the auction sale by the mortgagor's assignee in insolvency, "because he believed that to be the least expensive way of foreclosing his mortgage." Under these circumstances, and as against those lands, the union of the titles of the mortgagor and the mortgagee undoubtedly became perfected in the latter, and his remedy exhausted, but the mortgage debt was neither satisfied in fact nor extinguished in law. To hold otherwise would obviously be inequitable, and in such case it is held that the union of titles will not of itself be considered merger, so as to operate as payment or satisfaction of the mortgage debt; and this is the rule both at law and in equity.

Walker v. Baxter, 26 Vt. 710.

To the extent of the value of the property acquired, at the time when the mortgagor's right therein was extinguished, the plaintiff's mortgage debt is to be regarded as satisfied, and his mortgage lien released, but no further.

A foreclosure upon the property would have had this effect (*Smith v. Packard*, 19 N. H. 575; *Green v. Cross*, 45 N. H. 574; *Fletcher v. Chamberlin*, 61 N. H. 438; 2 Jones, Mort. §950);

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and no reason is perceived why the purchase of the mortgagor's equity should not have the same effect. The process of foreclosure is only one of the ways and remedies of a mortgagee to obtain an absolute title to the property. Among others, he may obtain such title by becoming the purchaser of the equity of redemption at a sale by the mortgagor's assignee in insolvency, or on execution, both of which may often be a convenient and inexpensive mode of procedure; and as the law gives the mortgagor the same right to redeem from a sale as from a foreclosure, and imposes the same accountability for rents and profits upon the mortgagee, there would seem to be no difference in principle between the one mode and the other in respect to the mortgage debt; and we are of opinion there is none.

Such, also, is the weight of authority. "The purchase of the equity of redemption by the mortgagee at a sale by the mortgagor's assignee in insolvency, or on execution, is not at law a satisfaction of the mortgage debt, and the mortgagee is not estopped from claiming that the property is of less value than the amount of the debt." 2 Jones, Mort. § 950; *Murphy v. Elliott*, 6 Blackf. 482; *Johnston v. Watson*, 7 Blackf. 174; *Speer v. Whitefield*, 10 N. J. Eq. 107; *Lydecker v. Bogert*, 38 N. J. Eq. 136; *Walker v. Baxter*, *supra*; *Findlay v. Hosmer*, 2 Conn. 350; *Post v. Tradesmen's Bank*, 28 Conn. 420. And see *Marston v. Marston*, 45 Me. 412; *Puffer v. Clark*, 7 Allen, 80; *Spencer v. Hartford*, 4 Wend. 381; *Hatz's App.*, 40 Pa. 209.

The plaintiff may therefore maintain this action, and if no other means are or have been taken to ascertain the value of the Massachusetts lands embraced in his mortgage, it may be proved on the trial under the plea of *nul disceisin*. *Green v. Cross*, *supra*.

Case discharged.

Carpenter, J., did not sit; the others concurred.

BROWN

v.

WEST.

To a writ of entry to foreclose a mortgage the defendant pleaded a former judgment upon the same mortgage, and payment of the amount thereupon adjudged to be due. Replication, that one of the mortgage notes then due was not included in the judgment. Rejoinder, that the amount of the former judgment was the sum adjudged to be due on all the notes secured by the mortgage. The plaintiff having demurred to the rejoinder the demurrer was overruled.

(Hillsborough—July 15, 1887.)

ON demurrer to rejoinder. Demurrer overruled.

Writ of entry to foreclose a mortgage. Plea, that the plaintiff at a former term recovered judgment for the possession of the demanded premises under and by virtue of the same mortgage. Replication, that the former judgment

was a conditional judgment for the sum of \$3,980.79, the amount due upon four notes secured by said mortgage, from which the premises were redeemed, and that the plaintiff brings this action to foreclose the mortgage because of the nonpayment of an additional note for the sum of \$800 secured by said mortgage, and not included in said conditional judgment. Rejoinder, that in the former action the court adjudged the sum of \$3,980.79 to be the amount due upon all the notes secured by said mortgage, and rendered said conditional judgment therefor, which amount, with all lawful costs, was paid by the defendant to the plaintiff, and the mortgaged premises redeemed from said mortgage; and that the plaintiff was thereby estopped to maintain that said \$800 note was not included in said judgment, and also estopped to maintain this action. The plaintiff demurred.

Verdict. Salloway & Topliff, for the plaintiff.

Mr. B. Wadleigh, for the defendant:

The plaintiff alleges that this writ of entry is brought on account of said note for \$900 (which became due on the 21st of May, 1877, about three years before the recovery of said conditional judgment), and that the same is still unpaid and due to the plaintiff.

The defendant, in her rejoinder, alleges that, upon the facts pleaded, the mortgaged premises were redeemed from the mortgage, and that the plaintiff was thereby estopped to maintain that said \$800 note was not included in said judgment, and was also estopped to maintain this action.

The demurrer admits:

1. That this writ is brought for the same entry and disseisin that the prior writ was brought for.

2. That the \$800 note on account of which this writ is brought became due two years before the commencement of said prior suit, and nearly three years before the rendition of said conditional judgment.

3. That the plaintiff was, when she brought the prior writ, and long before, and ever thereafter until the payment of the amount of the conditional judgment in the same, the sole owner of said mortgage and all the unpaid notes secured thereby.

4. That the court adjudged, when said conditional judgment was rendered, that there was due to the plaintiff on all the notes secured by the mortgage the sum of \$3,980.79.

5. That, by the facts pleaded, the mortgaged premises were redeemed from said mortgage, and that the plaintiff is estopped to maintain that the \$800 note was not included in said judgment, and is estopped to maintain this action.

The conditional judgment was for the sum which the court adjudged to be due on all the notes secured by the mortgage.

Gen. Laws, chap. 232, § 12.

The amount due on the \$800 note, and on all the other notes, is *res judicata*, and cannot now be inquired into.

Freem. Judg. § 249, and authorities cited.

The writ in this suit is dated August 1, 1885, more than eight years after the \$800 note became due, and more than five years after the rendition of the conditional judgment. To

allow the correctness of the former judgment to be inquired into would not only overturn the long-settled and reasonable rule, but would establish a most dangerous precedent.

Clark, J., delivered the opinion of the court: The facts alleged in the rejoinder and admitted by the demurrer are sufficient to constitute a defense to the plaintiff's action.

Demurrer overruled.

Smith, J., did not sit; the others concurred.

Charles B. GAFNEY, Exr.,

v.

Susan KENISON *et al.*

1. **Where a testator directed that an ample sum of money be put in some savings bank, the income to be sufficient to keep his burial lot in good condition and enlarge the same if necessary, the court at the trial term, upon a bill in equity by the executor for instructions, may fix the sum to be so invested.**
2. **A provision in a will that the income of a certain fund shall be applied for the relief of the most destitute of the testator's relatives is not void for uncertainty, but a charitable trust is thereby created, to be executed by the executor according to his discretion, under the supervision of the court.**
3. **A direction by the testator that certain legacies be set off to the legatees in real estate, by three experienced and disinterested persons, will be upheld; and if the parties interested do not agree upon the persons to make the set-off, the court will appoint.**
4. **Questions which have not yet arisen in the course of administration will not ordinarily be considered by the court; but a further application for direction may be made by the executor, if necessary, when they do arise.**

(Carroll—Decided July 15, 1887.)

BILL in equity by the executor of the will of Josiah Thurston for direction as to certain clauses of the will. *Case discharged.*

Section 10 contains the following: "I give and devise to my beloved brother William Thurston the sole use of the farm he now occupies, for the term of his natural life, and after his decease to his son, Josiah W. Thurston, during the term of his natural life, and after his decease I give and devise the same to his oldest child." The farm consisted of two tracts in Effingham about a mile apart. There was also a piece of meadow land, about 8 acres, in Freedom, two miles away, occupied as part of the farm at the date of the will. Does the devise cover the meadow land? Does the estate go to the oldest child of Josiah W. Thurston who was living at the death of the testator, or to the oldest child who may be living at the death of Josiah W.?

In section 15 the testator directed his executors

to put in some savings bank "an ample sum of money, the income of which sum always to be sufficient to keep said lot (burial lot) in good condition, and to enlarge the same if necessary." What is "an ample sum of money?" Does the language warrant the investment of any sum for the purpose named?

Section 18 authorizes the executor to sell real estate, at public or private sale, to pay legacies, without license from the probate court. Section 19 directs that all the residue of the estate be sold "as above provided," the proceeds safely invested, and the interest applied for the term of ten years, "for the relief of the most destitute of my relatives, not to extend beyond the children of my brothers and sisters and their families."

The codicil provides that any part or the whole of the legacies made by the will or codicil "may be set off to the legatees in real estate instead of money, if my said executors think it for the best interest of my estate, * * * said set-off to be made by three experienced and disinterested persons." Can the legacies be set off in real estate? Who shall designate the men to set off the same?

Messrs. Worcester & Gafney, with *Mr. A. L. Foote*, for plaintiff:

As to the tenth section of the will, it would seem that the time for vesting is at the death of Josiah W. Thurston, and that his eldest child then living should take the farm.

Thus, it has been held in American courts that, where no time is fixed for the payment of a legacy to the children of A, it is due at the death of the testator, and only the children then in existence, including a child *en ventre sa mère*, can take. But where there is a postponement of the payment of the legacy until a period subsequent to the death of the testator, every person answering to the description at the time fixed for the division will be entitled, although not *in esse* at the death of the testator, unless there is something in the will to show that the testator intended to limit the legacy to such of the class as answered the description at the time of his death.

Redf. pt. 2, pp. 380, 381.

In *Knight v. Knight*, 8 Jones, Eq. (N. C.) 167, it was held that where there is no intermediate estate the class is enumerated at the decease of the testator, but, if there be, at the termination of such estate. And this seems to be the general rule. So also in *Wessinger v. Hunt*, 9 Rich. Eq. 459.

The farm consisted of three pieces of land: one where the buildings were, of but 2 or 3 acres; and the others about one half or three fourths of a mile distant from the buildings; but all at the date of the will and since occupied by William Thurston and his son as one farm. It would seem that they all made the one farm occupied by William Thurston.

The provision for "an ample sum of money, the income of which sum always to be sufficient to keep said lot in good condition, and to enlarge the same if necessary," seems void for creating a perpetuity. It would seem so unless it is a charitable trust. And it does not seem to be a charitable trust.

Bequests to build a monument for the testator are not charitable, nor for repairing a vault

containing his remains. But such trusts will be enforced against the heir.

Redf. pt. 2, p. 777; *Mellick v. Asylum*, Jacob, 180.

It has been decided in England that a gift to repair a tomb forever, not being a gift to charity, is not maintainable on account of its perpetuity.

Lloyd v. Lloyd, 2 Sim. N. S. 255; *Carne v. Long*, 6 Jur. N. S. 689.

But how far trusts for maintaining and keeping in repair the vault or tomb of the donor are to be regarded as charitable, the cases are not entirely clear.

Redf. pt. 2, p. 777, note.

Sir Thomas Plumer, M. R., in *Mellick v. Asylum*, Jacob, 180, puts the question upon the true ground. The learned judge said charitable uses are "when the donor appropriates a gift either to charity or to some public purpose, such as the repair of bridges, ports, and havens, etc., not operating in any manner to the benefit of himself. But the Statute of Mortmain * * * does not apply to property expended like this by the party on himself, for the gratification of his own vanity, on an object which, instead of having any similitude to charity, is the very reverse of it. * * * It stands on the same footing as an expensive funeral."

Id. 778, note.

It has been long settled that a bequest to relations applies to the person or persons who would, by virtue of those statutes (statutes of distribution), take the personal estate under an intestacy, either as next of kin or by representation of next of kin.

2 Jarm. 2, p. 660; Redf. pt. 2, pp. 409, 410, ed. 1866.

But where the words of the will clearly indicate that others not entitled under the statutes were intended to take, they will be admitted.

Redf. pt. 2, p. 410; 2 Jarm. p. 661; *Greenwood v. Greenwood*, cited 1 Bro. Ch. 81.

In this case the testator has explained who he means by "relatives" by the clause "not to extend beyond the children of my brothers and sisters and their families." This clause makes a conclusive definition of the word "relatives" in the will, different from its usual legal definition, which is those who would take under the Statute of Distribution.

It extends the meaning of "relatives" beyond the usual legal significance of the word, so that it includes the children of his brothers and sisters.

A question to be answered is, Who are meant by the "families?"

"Family" is not a technical word, and is of flexible meaning. In one sense it means the whole household, including servants and perhaps lodgers. In another it means everybody descended from a common stock, i. e., all blood relations; and it may include the husbands and wives of such persons. In one sense the family of A includes A himself. A must be a member of his own family.

The word "family" has been variously construed, according to the subject-matter of the gift.

Some of the later authorities have decided that, in a gift to the family, either of the tes-

tator or some other person, the primary meaning of the word "family" is children, and that there must be some peculiar circumstance arising either in the will itself or from the relation of the parties, to give it another.

2 Jarm. 629, 630, 5th Am. ed.; 3 Ch. Div. 672; *Wood v. Wood*, 3 Hare, 65.

But it is evident that every case must depend upon its own peculiar circumstances.

Redf. pt. 2, p. 396, ed. 1886, citing 2 Jarm.

But the testator provides for the most destitute of his relatives, etc.

The older authorities hold that the additions "most deserving" and "poor" are to be disregarded as too uncertain, and therefore inoperative.

Widmore v. Woodroffe, Amb. 686, S. C. 1 Bro. Ch. 13, is the leading and it seems about the only English authority on the subject.

The effect of that case seems, after all, only to decide that the class of relatives among whom the poorest is to be sought are those who would take under the Statute of Distribution, and forbids going outside of that class in order to find recipients of the testator's bounty.

Authority is not wanting to show that, as between those who are within the statute, the qualification is not to be disregarded.

2 Jarm. 668, 5th Am. ed.; *Brunsdon v. Woodroffe*, Amb. 597; *Dick*, 380; *Gower v. Mainwaring*, 2 Ves. Sr. 87, 110; *Howard v. American P. Soc.* 49 Me. 288; *Goodale v. Mooney*, 60 N. H. 528; *Swasey v. American B. Soc.* 57 Me. 528; *Beardsley v. Selectmen*, 53 Conn. 489; 55 Am. Rep. 152.

So it would seem that the bequest of the income to the most destitute of the testator's relatives was one that the court would uphold.

Yarr. E. A. & C. B. Hibbard, D. R. Hastings, and F. Weeks, for defendants.

Blodgett, J., delivered the opinion of the court:

1. The devise of the William Thurston farm includes the meadow land. It was generally known as a part of the farm when the will was executed, and the fair presumption is that the testator so regarded it. Moreover, if there is any doubt on this point, the donees are entitled to the benefit of it. *Parsons v. Winslow*, 6 Mass. 178.

2. The question in whom the title of the farm will vest upon the decease of Josiah W. obviously does not concern the executor, and therefore is not properly before the court, and cannot be considered. *Hodgdon v. Darling*, 61 N. H. 582. The object of a bill of this kind is to instruct the trustee in his duties for his protection. *Greely v. Nashua*, 62 N. H. —.

3. The executor has authority to complete the burial lot. *Bell v. Briggs*, 63 N. H. 592.

By "an ample sum of money" the testator meant a sum large enough so that the income of it would forever be sufficient to keep his lot in repair, and enlarge it if necessary. The language used is sufficient for these purposes, and the sum of money to be invested is reasonably capable of ascertainment. The amount to be invested may be determined at the trial term. Limiting the answer to the question of the sufficiency of the language to warrant the

investment, as we do, it is unnecessary to go further.

4. Section 18 of the will empowers the executor to sell so much of the testator's real estate at public or private sale, without license from the probate court, as he may deem advantageous and for the best interests of the estate, for the purpose of paying any or all the legacies given in the preceding sections. This is what the section says in plain words, and there is no ground for any other construction.

The words "as above provided," in § 19, refer to the authority conferred by § 18, and mean that the executor may sell without license from the probate court, and at public or private sale.

5. The provision that the proceeds of the sales made under the preceding part of § 19 shall be safely invested, and the income thereof be applied by the executor for the relief of the most destitute of the testator's relatives, etc., may be considered as creating a charitable trust, to be administered by the executor according to his discretion, under the supervision of the court. 2 Perry, Tr. 3d ed. § 699, and authorities cited. Anciently such a trust would have been held void for uncertainty; indeed, *Webb's Case*, 1 Rolle, Abr. 609, is directly in point, it having there been held that, if a man devise to twenty of the poorest of his kindred, this is void for the uncertainty who may be adjudged the poorest. But at the present day the mere uncertainty of the persons, until they are ascertained, is no ground for avoiding the will. 1 Redf. Wills, 2d ed. 685, 686. Modern decisions to the contrary may be found (see 1 Jarm. Wills, 5th Am. ed. note); but an examination of the authorities generally will show that, in modern times, instances of testamentary gifts being rendered void for uncertainty have been of much less frequent occurrence than formerly, and that courts are now quite uniformly reluctant to admit uncertainty as a ground for avoiding the formal disposition of property.

The trust thus created by the testator is confined and limited by the language itself to such of his relatives as are not more remote than nephews and nieces and their families. By "the most destitute of my relatives" the testator meant those comparatively most destitute; and by "their families" he intended his brothers and sisters, their wives and husbands, and his nephews and nieces and their wives, husbands, and children. Who are relatively the most destitute legatees, to what extent they are severally to be relieved, and whether the relief is to be furnished in money or otherwise, must be determined by the executor, subject to the control of the court. More specific answers or more definite instructions cannot now be given, but if, in the execution of the trust, additional instructions become necessary in the opinion of the executor, or if any of the relatives embraced in the trust deem themselves aggrieved in the manner of its administration, application may be made to the court at any time, and further instructions will be given.

6. Inasmuch as the proceeds of the sales under § 19 are not to be divided until the expiration of the term of ten years, there is no occasion at this time to consider the numerous ques-

tions propounded by the executor as to the division of such proceeds, and his duties in connection therewith; and we decline to consider them. See *Hodgdon v. Darling, supra*. It is within the province of courts to decide upon the rights of parties as they exist in the present, but it is not within their province, nor will they assume jurisdiction, to decide in advance what such rights may be in the future.

7. Real estate may be set off to the legatees as provided in the last clause of the codicil. The "three experienced and disinterested persons" therein referred to may be agreed upon by the parties in interest; or, if they fail to agree, the appointment will be made by the court upon due application.

Case discharged.

Smith, J., did not sit; the others concurred.

Benjamin BEAN, *Plff. in Err.*,

v.

CONWAY SAVINGS BANK.

1. A party cannot complain of an error which has done him no harm.
2. A judgment is not reversible for error if, immediately after the reversal, the same judgment must be again rendered.
3. An irregularity in correcting a mistake apparent upon the record of a judgment is not ground for error.
4. Where conditional judgment in a foreclosure suit is rendered for a sum greater than the amount due upon the mortgage debt, the party aggrieved ordinarily has a simple and sufficient remedy by motion at the trial term to bring the action forward for correction of the error.

(Carroll—Decided July 15, 1887.)

WRIT of error, dated January 27, 1887, to reverse (as set forth in the assignment of errors) "a corrected judgment of the Supreme Court within and for the County of Carroll, made as of record January 30, 1884, in registry of deeds office, wherein the said Conway Savings Bank is plaintiff, and said Benjamin Bean is defendant." *Writ dismissed.*

The errors assigned are: "1. No motion was made to abate original judgment, as required by chap. 226, § 8, of statute aforesaid (Gen. Laws). 2. That defendant had no opportunity to present his objections to the corrected judgment, which the rule of court allows. 3. That the corrected judgment is an amount larger by the interest on first indorsement on note for sixteen days than was due to plaintiff from defendant at the time original judgment was rendered. 4. Because there was and is no motion in writing, etc., filed in court as required by chap. 226, § 18, of statute aforesaid (Gen. Laws) before the decree of correction was ordered."

The following facts appeared from the evidence: At the April Term, 1883, of the supreme court for this county, the defendants, plaintiffs in a foreclosure suit, recovered judgment

against the plaintiff, defendant in the original suit, conditional judgment being rendered April 21 for the sum of \$2,005.62 and costs of suit. A writ of possession issued June 25, by virtue of which the judgment creditors were put in possession of the mortgaged premises. The writ of possession and officer's return were recorded in the registry of deeds October 11, and returned to the clerk on the same day. In January, 1884, the plaintiff in error discovered that the computation of interest upon the mortgage debt was too large by the sum of \$28.02, and called the attention of the clerk to the error. He was informed that the mistake could be corrected, but he declined to have it done. The correction, however, was made; the sum of \$2,005.62 being erased, and the sum of \$1,977.60 being interlined in the record of the judgment and in the margin of the writ of possession.

Mr. Benjamin Bean, pro se.

Mr. J. C. L. Wood, for defendant.

Smith, J., delivered the opinion of the court:

The third error assigned is abandoned. The substance of the others is that the sum for which conditional judgment was rendered was changed in the record to the actual sum due, out of term time, without proper notice to the plaintiff in error and opportunity to be heard, and against his objection, after the writ of possession had been executed, recorded, and returned to the office of the clerk. It is an insuperable objection to the maintaining of this writ that the suit was not seasonably commenced. More than three years after judgment had elapsed when the writ was sued out. Gen. Laws, chap. 231, § 6.

The claim is made that it is not barred because it was brought within three years from the time the record was corrected. The judgment rendered at the April Term, 1883, was not reversed or annulled by the correction made in the record in vacation in January, 1884; nor was another judgment rendered by the change that was made. Whether the clerk could, of his own motion, or by direction of a justice in vacation, correct a mistake apparent upon the face of the record, is a question which need not be considered. If the mistake could not be corrected except in term time and upon notice to the parties, or upon a writ of error, the change made in the record was inoperative. If the clerk had power to correct the mistake, there was no error in what was done. Suppose the judgment is reversed. What then? Conditional judgment must be rendered for the sum inserted in January, 1884. When a judgment is reversed on error, such judgment is given as the court below should have given. *Bames v. Stevens*, 26 N. H. 117; *Bedel v. Goodall*, 26 N. H. 92.

A judgment is not reversed on error when justice requires the same judgment to be renewed. *Chamberlain v. Sterling*, 26 N. H. 115; *Burt v. Stevens*, 22 N. H. 229; *Claggett v. Simes*, 31 N. H. 56, 63.

A party cannot complain of an error which has done him no harm (*Johnston v. Jones*, 66 U. S. 1 Black, 209 (17 L. ed. 117); *Chittenden v. Brewster*, 69 U. S. 2 Wall. 191 (17 L. ed. 839); *Brost v. Brock*, 77 U. S. 10 Wall. 519 (19 L.

ed. 1008); *Sanderson v. Taylor*, 1 N. H. (L. ed.) 258, 2 New Eng. Rep. 914, 64 N. H. 97; Bac. Abr. Error, K, 4); nor is a decree reversed, though erroneous, if no benefit will result to the complainant from the reversal (*Turner v. Ogden*, 66 U. S. 1 Black, 451 (17 L. ed. 208)). In this case the plaintiff was not harmed by the correction of the error apparent upon the face of the record. A smaller and correct sum was substituted for the incorrect sum inserted in the conditional judgment as the amount due upon the mortgage debt to be paid by him if he should choose to redeem.

No ground for relief is shown. The plaintiff complains, not of the original judgment, which was erroneous, but of the "corrected judgment" (so called), in which there was no error, and at most an irregularity only in the mode in which the correction was made. A writ of error does not lie for an interpolation in the record; nor are irregularities in judicial proceedings grounds for error, but for amendment by the court where the proceedings were had. *Claggett v. Simes*, 31 N. H. 22, 83.

If the plaintiff's position were sustained, the correction of the error of which he complains would leave the judgment standing against him for more than the amount due upon the mortgage debt.

If the mistake which was made in computing the amount due upon the mortgage debt needs a more formal correction, the plaintiff has an ample remedy by moving to bring forward the original action at the trial term for that purpose. *McIntire v. Carr*, 59 N. H. 207; *Abbott v. Renaud*, 1 N. H. (L. ed.) 237, 2 New Eng. Rep. 869, 64 N. H. 89; *Boody v. Watson*, 1 N. H. (L. ed.) 335, 4 New Eng. Rep. 553, 64 N. H. 163, 173.

Writ dismissed.

Clark, J., did not sit; the others concurred.

Emeline NUTTER

v.

Nancy M. VARNEY.

Questions of costs are not ordinarily reviewable at the law terms unless specially reserved.

(Strafford—Decided July 15, 1887.)

ON defendant's exceptions. *Overruled.*

Assumpsit. The referee found for the defendant. On motion of the plaintiff the cause was recommitted to the referee with instructions to report the facts without further hearing. Upon the return of the report, the plaintiff was allowed to amend by filing a count in trover, and the case was reserved.

At the June Law Term, 1886, the ruling permitting the amendment was sustained, and judgment ordered for the plaintiff on the amended count.

At this term the plaintiff moved for costs from the beginning of the suit. The defendant moved for costs to the time of the amendment, and that the plaintiff be allowed to tax only the costs after that time. The court granted the plaintiff's and denied the defendant's motion. The defendant excepted.

1 N. H.

Mr. F. Goodwin, for defendant.

Messrs. Worcester & Gafney, for plaintiff.

The plaintiff should have full costs from commencement to the end of her action.

The statute provides that costs shall follow the event of every action or petition.

"In this State costs follow the event of the action. According to the practice in this State, the event of the suit is in favor of that party who obtains the verdict of the jury in his favor, whether there is any offset in the case or not."

Eastman v. Holderness, 44 N. H. 18, 19; *Benjamin v. Wheeler*, 2 Allen, 235; *Framingham Mfg. Co. v. Barnard*, 2 Pick. 583.

Clark, J., delivered the opinion of the court:

Ordinarily questions relating to the allowance of costs are not open to revision at the law terms unless the question is referred to the law term by the presiding justice at the trial term. *Sanborn v. Sanborn*, 41 N. H. 306; *Bartlett v. Hodgdon*, 44 N. H. 472; *Smith v. Boynton*, 44 N. H. 529; *Harvey v. Reeds*, 49 N. H. 531. If the question was properly before us we see no error in the allowance of costs at the trial term. The event of the suit was in favor of the plaintiff (*Eastman v. Holderness*, 44 N. H. 18), and costs follow the event of every action or petition unless otherwise ordered by law or by the court. Gen. Laws, chap. 238, § 1.

Exceptions overruled.

Carpenter, J., did not sit; the others concurred.

PHILLIPS et al.

v.

JOHNSON.

BARRETT c. SAME.

A personal mortgage made to secure a liability assumed by the mortgagee for the mortgagor is invalid against the creditors of the latter, if the liability is not truly and specifically stated in the condition, or if its validity, truth, and justice are not verified by the affidavit.

(Grafton—Decided July 15, 1887.)

TRESPASS *de bonis*. Judgment for defendant.

Writs dated March 2, 1885. January 24, 1885, the defendant, a deputy sheriff, attached the goods as the property of Dennis Phillips, upon several writs sued out against him by his creditors. The plaintiffs claim under two mortgages of the same goods, made and executed by said Dennis January 23, 1885, one to Phillips & Clark, and the other to Barrett. The mortgage to Phillips & Clark was given to indemnify them against their liability on a promissory note for \$1,000, dated October 27, 1884, payable ten months after date to the order of the Littleton Savings Bank, signed by Dennis, and indorsed by the plaintiffs George W. Phillips and C. H. Clark. The note was made, signed, and indorsed on the day of its date, and said Dennis procured the money on it of the bank where it now remains unpaid.

The condition of the mortgage is:

"Provided, nevertheless, that if I, my executors, administrators or assigns shall pay or cause to be paid unto the Littleton Savings Bank, their executors or administrators, the sum of \$1,000, as shown by my note dated on or about the 27th of October, 1884, payable to said bank or order in ten months from date, and indorsed by said George W. Phillips and Charles H. Clark, then these presents shall be void."

The oath is:

"We severally swear that the foregoing mortgage is made for the purpose of securing the liability specified in the condition thereof, and for no other purpose whatever, and that said liability was not created for the purpose of enabling the mortgagor to execute said mortgage, but is a just debt honestly due and owing from the mortgagor to the Littleton Savings Bank.

Dennis Phillips,
George W. Phillips,
Charles H. Clark."

The consideration of the mortgage is stated as follows: "Know all men by these presents that I, Dennis Phillips, in consideration of \$1,000 liability incurred for me by George W. Phillips and Charles H. Clark, * * * the liability whereof I do hereby acknowledge, have granted," etc.

The mortgage to Barrett, and the liability intended to be secured by it, were in all material respects similar.

Upon facts not necessary to be reported, the defendant claims that the mortgages were not recorded or left for record at the time of the attachment, and the plaintiffs claim that the defendant had such notice of the mortgages as rendered a record unnecessary.

Messrs. Drew & Jordan, with Mr. W. S. Ladd, for plaintiffs:

I. There can be no reasonable doubt that, upon an inspection of the statute and of the condition of the mortgages, the court will find the terms of the statute to have been substantially complied with, and the entire object of the statutory provision fully met.

If, upon consideration of the whole document, the intention of the parties is apparent, any error of detail will be disregarded. Bell, J., in *Webb v. Stone*, 24 N. H. 286, says: "Substantial correctness, such as may prevent mistake or uncertainty as to the debt intended, is all that has ever been required." Such has been the uniform holding of our court. It has often been held in our State that misdescriptions of notes secured by mortgage, as to amount, date, time, and place of payment, names of payer and payee, etc., are not fatal so long as sufficient appears to identify or make certain the note, debt, or liability. The affidavit is merely for the information and protection of creditors.

Sumner v. Dalton, 58 N. H. 295, 296.

The condition and oath will inform anyone examining them what the character of the liability is. The New Hampshire court has been liberal as to construction and interpretation of these matters, making certain that which the parties intended should be.

Benton v. Sumner, 57 N. H. 117.

In *Parker v. Morrison*, 46 N. H. 280, and other cases cited to this point by the defendant, the oath was not varied, but like the oath in 400

Sumner v. Dalton, *supra*, followed the regular or printed form, using the word "debt."

In our mortgages the word "debt," wherever it occurred, was erased or crossed out, and "liability" written over it, most clearly revealing the intention of the parties, their understanding of the agreement, and varying the form of the oath, so as to make certain the validity of the liability.

II. The vital question, and probably the one requiring the most careful consideration here, is, Was there notice to defendant,—such notice as should have put a reasonable man upon inquiry?

Gen. Laws, chap. 137, § 17, among other things, provides that every town clerk shall keep a book of records for personal mortgages, and shall keep an alphabetical index of mortgagors and mortgagees, which records and index shall be open to public inspection.

The town clerk had such an index. In it, in proper place, had been entered the names of the parties to both of these mortgages. For forty-eight hours prior to the attachment these names had stood there upon that index. There was no secret about it. The index was open to all the world for inspection.

Ignorance of an important fact placed within one's reach cannot excuse him for not finding it out.

Janerin v. Janerin, 60 N. H. 169, 172; *Warren v. Swett*, 81 N. H. 332; *Patten v. Moore*, 32 N. H. 384; *Nute v. Nute*, 41 N. H. 69; *Cooper v. Newman*, 45 N. H. 337-342; *Cheshire Prov. Inst. v. Stone*, 52 N. H. 866; 2 Add. Cont. ed. 1883, 34 (*613); *Blaisdell v. Sterna*, 16 Vt. 179; *Stafford v. Ballou*, 17 Vt. 329; *McDaniels v. Flour Brook Mfg. Co.* 22 Vt. 274; *Adams v. Soule*, 33 Vt. 538; 8 Conn. 389; *Sterry v. Arden*, 1 Johns. Ch. 261.

Notice and knowledge are equivalent to record. If there had been no index, we very seriously doubt if the attachment could be maintained against the actual notice the defendant then and there had. Actual notice was given the defendant before the transaction was so far completed as to render the notice nugatory, and for that reason the mortgages must be upheld.

1 Pars. Cont. 79, and authorities; Jones, Chat. Mort. 2d ed. § 312, and authorities under note 8.

Notice to the officer was notice to the subsequent attaching creditor. He was acting for them; was their agent.

Tucker v. Tilton, 55 N. H. 223; *Young v. Walker*, 12 N. H. 502; *Barnes v. McClinton*, 3 P. & W. 67; Jones, Mort. § 584.

An attaching creditor is chargeable with notice in the same manner and with like effect as a subsequent purchaser.

McLaughlin v. Shepherd, 32 Me. 143; *S. C.* 52 Am. Dec. 646; *Matthews v. Demeritt*, 23 Me. 317.

Registration is simply to give notice. Notice without registration binds all who receive or have the means of receiving it.

Gooding v. Riley, 50 N. H. 400, and authorities cited; *Stevens v. Morse*, 47 N. H. 532; *Cushing v. Hurd*, 4 Pick. 253, 256; *Temple v. Hooker*, 6 Vt. 240; Id. 411-424; *Ludlow v. Gill*, 1 D. Chipman (Vt.), 49; *S. C.* 1 Am. Dec. 694, note 695.

Their duty was done when they left their mortgages at the town clerk's office for record. *Merrick v. Wallace*, 19 Ill. 486; *Riggs v. Boylan*, 4 Biss. 445; *Oats v. Walls*, 28 Ark. 244; *Piper v. Hilliard*, 58 N. H. 198; *Roberts v. Crawford*, Id. 499; *Jones, Chat. Mort.* 270; 86 Am. Rep. 238; 60 Am. Rep. 264; 38 Am. Rep. 285; *Jarvis v. Atkins*, 25 Vt. 635.

The statute required the indexing as well as the recording. The index or entry-book comes first. Entries in this are sufficient to protect the mortgagees. They could not be expected to stand around until the clerk should find time to spread the instruments upon the record. Who examines the record to see if his deeds and mortgages have been correctly recorded?

Wade, on Law of Notice, § 162, says: "If, then, the law is primarily for the protection of the subsequent purchaser, it would seem that any breach of duty by the officer was a violation of his rights in the premises, and the delinquent official should be required to answer to him. The conclusion seems to follow inevitably that, from the deposit of the instrument with the proper officer for record, it should be regarded as constructive notice to all persons who subsequently deal with the title, notwithstanding any errors by the officer in recording the instrument, or even when he neglects to record it at all."

See also *Throckmorton v. Price*, 28 Tex. 605; *McGregor v. Hall*, 8 Stew. & P. (Ala.) 397; 2 Am. Rep. 588.

This is no new doctrine.

1 Root, 61, 500; 2 Root, 296; *McDonald v. Leach*, Kirby (Conn.), 72.

As to what has been deemed constructive notice, see—

Partridge v. Smith, 2 Biss. 183; *Wyatt v. Barwell*, 19 Ves. Jr. 435; *Harrold v. Simonds*, 9 Mo. 326; *Barney v. Little*, 15 Iowa, 527; *Calkin v. Boeman*, 10 Iowa, 529; *White v. Hampton*, 13 Iowa, 259; *Bostwick v. Powers*, 12 Iowa, 456; *Shove v. Larsen*, 22 Wis. 142; *Bryant v. Boze*, 55 Ga. 498; *Colby v. Kennistoun*, 4 N. H. 266; *Rogers v. Jones*, 8 N. H. 264; *Brown v. Minter*, 22 N. H. 471, and authorities cited; *Hastings v. Cutler*, 24 N. H. 488; *Clarke v. Merrill*, 51 N. H. 418; *Ferrin v. Errol*, 59 N. H. 234; *Janerin v. Janerin*, 60 N. H. 169; *Lewis v. Lougee*, 63 N. H. 287; *Gooding v. Riley*, 50 N. H. 400.

Some of the New Hampshire cases, concerning what is sufficient to put a man on inquiry, are—

Cameron v. Little, 13 N. H. 26; *Warren v. Scott*, 31 N. H. 832; *Jordan v. Gillen*, 44 N. H. 428; *Cooper v. Newman*, 45 N. H. 342.

The town clerk's failure in any respect cannot impair the mortgagee's right, even though creditors were misled by his conduct.

Chase v. Bennett, 58 N. H. 428; *Scripture v. Francesstown Soapstone Co.* 50 N. H. 571, note; 15 Pick. 465, 468; 18 Pick. 314, 315; 105 Mass. 442; 18 Barb. 193; *Lewis v. Lougee*, 63 N. H. 287.

III. Are the mortgages void as against attaching creditors?

There is no secret trust when it appears from all the evidence that the permitted sale is honestly made for the purpose of extinguishing, so far as it may, the mortgage debt, and not for the advantage of the mortgagor. Such a sale,

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with such an application, has no tendency to hinder, delay, or defraud the unpreferred creditors.

Wilson v. Sullivan, 58 N. H. 265.

It cannot be presumed that the plaintiffs' mortgages are void from the fact that the mortgagor was in possession. The facts reported as to how,—under what agreement,—he was in possession, afford clear and ample explanation.

The doctrine of absolute fraud arising in a mortgage of merchandise, from the mortgagor's retaining possession, with power of disposal in the usual course of trade, is not supported by any preponderance of authority. It is contrary to sound principles of jurisprudence. It has no reason for its existence derived from general observation and experience. It is contrary to sound policy; and the qualifications of the doctrine made by leading courts in a large measure destroyed its force, and are indicative that the courts wish themselves well rid of the whole of it, and soon will be.

L. A. Jones, 5 South. L. Rev. N. S. 617; *Frankhouser v. Elliott*, 22 Kan. 127; *S. C. 81* Am. Rep. 171, note 178.

This rule has pretty generally prevailed in our State.

See *Haven v. Low*, 2 N. H. 13; *Ash v. Savage*, 5 N. H. 545.

Possession is not now regarded as being even *prima facie* evidence of fraud. It is only a circumstance to be considered in the light of all the evidence and explanations of each particular case.

Jones, Chat. Mort. §§ 321, 325, note 8.

Intention of the parties should have something to do with the question of fraud. Whoever the words of a deed, or of the parties without a deed, may have a double intentment, and the one standeth with law and right, and the other is wrongful and against law, the intentment that standeth with law shall be taken.

Co. Litt. 42. See also *Shore v. Wilson*, 9 Clark & F. 897; *Whart. Cont.* § 837; *Chitty, Cont.* p. 106; *Met. Cont.* p. 277; *Jones, Commercial Trade Cont.* §§ 223-225.

Messrs. Bingham, Mitchells, & Batchellor, with *Messrs. Aldrich & Remick*, for defendant:

The plaintiffs claim goods attached by deputy sheriff, by virtue of priority of two mortgage conveyances of the same property to them.

1. The mortgages are void as to third parties by the terms of the statute, the condition not expressing accurately the liability for which they were given, and the oath not being so varied as to verify the truth and validity of the liability.

Gen. Laws, chap. 187, § 9; *Parker v. Morrison*, 46 N. H. 280; *Belknap v. Wendell*, 31 N. H. 92; *Hill v. Gilman*, 39 N. H. 88-94; *Smith v. Moore*, 11 N. H. 55.

Every requirement of the statute in relation to the execution and acknowledgment of the mortgage must be complied with in order to give priority by record of it.

Jones, Mort. § 550.

The false description in the condition is in law a fraud on creditors of the mortgagor.

State v. Marsh, 36 N. H. 196.

The record of a mortgage not entitled to record is not constructive notice.

Locell v. Osgood, 60 N. H. 71.

2. The mortgages were not recorded within the meaning of the statute.

Gen. Laws, chap. 187, § 17; *Town v. Griffith*, 17 N. H. 165; *Lou v. Pettengill*, 12 N. H. 837; *Paulet v. Sandgate*, 17 Vt. 619.

As to what is recording, see—

Sawyer v. Adams, 8 Vt. 175.

The index is no part of the record, and of itself is not notice of the condition of title.

Curtis v. Lyman, 24 Vt. 388; *Mutual L. Ins. Co. v. Dake*, 1 Abb. (N. Y.) N. C. 881; 4 Cent. L. J. 340.

It is only as to what the record would show upon examination that the index is notice.

Jones, Mort. 558-555; *Barney v. Little*, 15 Iowa, 527; 4 Cent. L. J. 387.

The index being no part of the record, if the deed to which the index seems to refer is not upon the record, there is no record of it. Third parties are not required to go beyond the record to ascertain the condition of title.

Jones, Mort. 551.

It is no part of a purchaser's duty to examine the original papers to see if the recorder has correctly spread their contents upon the record. Persons interested in a title have a right to resort to the record to find out the contents of a conveyance and can be considered as having notice of it only as it appears of record. When the record itself is defective, it is notice of only what appears upon it.

Jones, Mort. 550.

The filing of a mortgage for record affords no notice if the original be withdrawn before it is recorded.

Jones, Mort. 543; *Worcester Nat. Bank v. Cheney*, 87 Ill. 602.

As to notice, see also—

Stowe v. Meserve, 18 N. H. 52.

The attachment was valid, and in law complete. It was completed as soon as the defendant had the goods in his control where he could, if necessary, handle or remove them, and had made the statement that he attached them,—any subsequent act being merely incidental to the attachment. The defendant did not release his control of the goods after the attachment.

Morse v. Hurd, 17 N. H. 246; *Huntington v. Blaisdell*, 2 N. H. 317; *Stowe v. Meserve*, 18 N. H. 52.

8. The permission of the mortgagee to sell the goods was not in writing or recorded, as is expressly required by statute.

Gen. Laws, chap. 187, §§ 13, 17; *Wilson v. Sullivan*, 58 N. H. 260; *Hill v. Gilman*, 39 N. H. 88-94; *State v. Plaisted*, 43 N. H. 413.

The claim of the plaintiffs is wholly unfounded and without right.

Carpenter, J., delivered the opinion of the court:

The statute provides that each mortgagor and mortgagee shall make and subscribe an affidavit in substance as follows: "We severally swear that the foregoing mortgage is made for the purpose of securing the debt specified in the condition thereof, and for no other purpose whatever, and that said debt was not created for the purpose of enabling the mortgagor to execute said mortgage, but is a just debt honestly due and owing from the mortgagor to the mortgagee;" that, "if such mortgage is given

to indemnify the mortgagee against any liability assumed, or to secure the fulfillment of any agreement other than for the payment of a debt due from the mortgagor to the mortgagee, such liability or agreement shall be stated truly and specifically in the condition of the mortgage, and the affidavit shall be so far varied as to verify the validity, truth, and justice of such liability or agreement;" and that "all willful falsehood committed in any such affidavit shall be decreed perjury and punished accordingly." Gen. Laws, chap. 187, §§ 6, 9, 11.

A debt due and owing from the mortgagor and mortgagees to the bank is described in the condition, but no liability of the mortgagor and the mortgagees, or liability assumed by the latter for the former, is specified or suggested. The mortgagees placed their names upon the back of the note before it was negotiated to the payee and were original promisors. Although styled indorsers, in legal effect, they are described in the condition as makers. *Martin v. Boyd*, 11 N. H. 385; *Benton v. Willard*, 17 N. H. 593; *Currier v. Fellows*, 27 N. H. 366. There is nothing in the condition or in the note itself from which it could be inferred that they were sureties. Upon the face of the papers they are principals. *Whitehouse v. Hanson*, 42 N. H. 9; *Maynard v. Fellows*, 43 N. H. 258.

The defect in the condition is not cured by the statement of the consideration of the mortgage. No reference to it is made in the condition. What the "\$1,000 liability incurred" for the mortgagor by the mortgagees was, is not stated. It might be the liability on the note for \$1,000, subsequently described, or it might be any other liability for that amount. It is not sufficient that one reading the mortgage would more naturally suppose it to be the former. The liability intended to be secured is not to be left to conjecture or inference. It must be truly and specifically stated. It is not necessary now to determine whether a true and specific statement of the liability in the body of the mortgage, so referred to that it might by construction be deemed a part of the condition, would be sufficient. *Stone v. Marvel*, 45 N. H. 481.

The affidavit is insufficient. It is not so far varied as to verify the validity, truth, and justice of the liability intended to be secured. It makes no allusion to any liability of the mortgagor to the mortgagees. It verifies nothing except the validity, truth, and justice of the indebtedness of the mortgagor to the bank. *Parker v. Morrison*, 46 N. H. 280. The parties could not be convicted of perjury if they were all principals upon the note; if the mortgagees were principals and the mortgagor their surety; or if the names of the mortgagees were not upon the note. In all these cases the affidavit would be strictly true.

It is not necessary to consider the other questions raised in the case.

Judgment for the defendant.

Allen and Bingham, JJ., did not sit; the others concurred.

WINNIPISEOGEE LAKE COTTON &
WOOLEN MFG. CO.

Town of GILFORD.

1. Rights in a reservoir of water are
1 N. H.

real estate, and taxable in the town where the land by which the reservoir is created is situated.

2. Upon the question of the value of such rights, evidence that they may be exercised for the benefit of mills situated in other towns or in another State is competent.

(Belknap—Decided July 15, 1887.)

A PPEAL from a refusal of the selectmen of Gilford to abate a part of a tax assessed by them in 1884. *Judgment on report.*

Facts found by referees:

The value of the plaintiff's property described in the petition, and taxable in Gilford in April, 1884, is \$275,000. The value of other property in Gilford compared with its assessed value in April, 1884, was in proportion of 100 to 65, or other property was assessed in said town at that date at 65 per cent of its value. The rate of taxation was 142½ cents on \$100. The value of the plaintiff's mills, other buildings, and estates in fee in said Gilford (not including dams, gates, flowage and reservoir rights, etc., in said town hereinafter estimated) is \$135,000. The value of the plaintiff's dams, gates, flowage and reservoir rights in said Gilford is \$140,000.

In ascertaining the value of the dam, gates, flowage and reservoir rights of the plaintiff in Gilford on the 1st day of April, 1884, the referees took into consideration that this property in Gilford has greater value because it can be controlled and profitably used in Gilford by the plaintiff for the benefit of mills situated elsewhere; and also that the market and taxable value of said mills and other estate and property of the plaintiff situated elsewhere is increased by reason of these reservoir rights being capable of being controlled for their benefit; and in finding the value of said reservoir rights situate in Gilford, the referees made such adjustment and apportionment of these valuable incidents or advantages between plaintiff's reservoir rights at Gilford and the mills and other estate and property of the plaintiff situate elsewhere benefited thereby, as seemed to them lawfully and justly to belong respectively to each class of said property, and as should avoid any double taxation.

It appearing that contracts existed between the plaintiff as owner of these reservoir rights in Gilford and certain millowners having privileges on the stream below (which contracts may be referred to), the referees, in estimating the value of the reservoir rights in Gilford, took into consideration the pecuniary advantages and disadvantages of this property by reason of these contracts.

The plaintiff moved to recommit the report to the referees, with instructions to report any facts that either party may request that they find proved on the evidence now before them. Motion denied, subject to exception. The question of law that the plaintiff desires to raise on the report is the right of the referees to consider the fact that the Gilford property is enhanced in value because it can be controlled and profitably used there by the plaintiff for the benefit of mills elsewhere. If this question is not fully presented by the foregoing

statement of facts, any question of discretion raised by the plaintiff's motion to recommit is reserved.

At the law term the plaintiff moved to recommit the report to the referees with instructions to report the following additional facts if they found them proved:

1. The mills "situated elsewhere," for the especial benefit of which these reservoir rights are controlled, are situated in Lowell and Lawrence, Massachusetts. The enhanced value of the Lowell and Lawrence mills, by reason of these reservoir rights being capable of being controlled, and being actually controlled, for their benefit, is fully included in the assessment of the mills in Massachusetts, and is fully taxed in Massachusetts, without diminution on account of any taxation (or liability to taxation) of the reservoir rights in New Hampshire. The reservoir rights, and the rights of control thereby exercised, are fully taxed in Massachusetts, where the benefit from the control is received.

2. The plaintiff owns no mills elsewhere than at Gilford in any way affected by the management of this property.

3. The stock of the plaintiff corporation is owned entirely by the Proprietors of the Locks and Canals on Merrimack River, at Lowell, Mass., and the Essex Company at Lawrence, Mass., both of them corporations under the laws of Massachusetts. The stock of the Locks and Canals Company is entirely owned by ten manufacturing corporations of Lowell.

4. Under the agreement with other riparian owners on the Winnipiseogee River, referred to in the report of the referees, it is found that, on an average of a series of years, 88 per cent of the available supply of water from the lake in its improved condition is used as a uniform flow in the Winnipiseogee River, and the remaining 12 per cent is discharged from the lake in such quantities and at such times as will best serve the interests of the stockholders of the plaintiff corporation. The natural supply from the lake in its improved state is always sufficient to furnish the above uniform flow for the Winnipiseogee River, and the amount of additional supply varies from year to year, being 12 per cent on an average, and is contingent upon the variation in the natural supply.

5. The plaintiff corporation was first chartered in 1831. The charter was amended in 1846. Both Acts may be referred to in argument. The stockholders of the plaintiff corporation are the Proprietors of the Locks and Canals on Merrimack River, in Lowell, Mass., and the Essex Company of Lawrence, Mass., both of them corporations under the laws of that State. The stockholders of the Locks and Canals Corporation are ten manufacturing corporations of Lowell. Soon after the amended charter in 1846 the plaintiff corporation commenced excavations and improvements at the outlet of Winnipiseogee Lake and on Winnipiseogee River, and they were continued until brought substantially to their present condition in 1851, and have so remained from that time to the present.

The report was not recommitted; but the plaintiff's motion was considered as an offer to prove the facts therein stated.

Mr. Daniel Barnard, with Messrs. T. J. Whipple and Jeremiah Smith, for plaintiff:

The town which claims the right to tax must show that the property comes within some description of property made specially liable to taxation by statute.

Nashua Sav. Bank v. Nashua, 46 N. H. 392.

If there is any water-power not real estate it is not taxable, for it cannot be taxed as personal property.

State v. Minneapolis Mill Co. 26 Minn. 229; *Morrill v. Saint Anthony Falls W. Co.* Id. 222.

Neither can water-power for mill purposes, not used, nor reservoirs, be taxed independently of the land connected with them.

Fall River v. Bristol County Comrs. 125 Mass. 567; *Cheshire v. Berkshire County Comrs.* 118 Mass. 386.

Mr. W. E. Buck, also for plaintiff:

The courts of Massachusetts have uniformly decided against this finding.

Pingree v. Berkshire County Comrs. 103 Mass. 76; *Farmington River W. Co. v. County Comrs.* 112 Mass. 206; *Cheshire v. Berkshire County Comrs.* 118 Mass. 386; *Fall River v. Bristol County Comrs.* 125 Mass. 567.

The doctrine of *Pingree v. Berkshire County Comrs.* is very clear upon the point at issue in the present case, and so also is that of *Fall River v. Bristol County Comrs. supra*; and there is nothing in the other cases which in any way denies this doctrine. By the decisions of the Massachusetts court, these reservoir rights are not taxable, and, in the valuation of reservoir privileges for taxation, no part of the value of the water-power created by the reservoir, and used with mills below, is to be included. No part, therefore, of the value of the Lowell and Lawrence water-power is to be included in the valuation of the Gilford estate; and, inasmuch as all the increased value of those estates from uses of the Gilford estate must come by an increased value of those water-powers, it is evident that no increased values of any Lowell and Lawrence estate should be included in the valuation of the Gilford estate; and it is wrong to in any way consider them in fixing the valuation thereof.

By a decision of the Massachusetts courts, and by the amended statement of facts in this case, it is shown that the full values of the Lowell and Lawrence estates are taxed in Massachusetts.

See *Lowell v. Middlesex County Comrs.* 6 Allen, 131.

It appears by this decision that the courts have decided that the city of Lowell shall tax the entire water-power at Lowell; and the Lawrence water-power, under the same jurisdiction, is necessarily taxed in the same manner. It is impossible to tax any portion of the value of these water-powers elsewhere, without a double taxation upon them; and it is equally impossible to take into consideration any part of their value in fixing the taxable value of other estates, without a double taxation to the extent that such values are taken into consideration. This court has no jurisdiction over the water-power of Massachusetts.

Whatever water-power is used with mills situated in Massachusetts becomes annexed to those mills, and is to be taxed with them, without re-

gard to the sources of such power; and even though the structures which are necessary to create the power lie in part in another State, and the water-power might equally well be used in that other State, nevertheless, it must be taxed with the mills to which it is incident, and not elsewhere.

In the case of *Boston Mfg. Co. v. Inhabitants of Newton*, 22 Pick. 22, it appeared that the Boston Manufacturing Company owned a dam half in Waltham and half in Newton, but the entire water-power was used with mills in Waltham, though it might have been used on the Newton side had the owners chosen to do so. Newton assessed the company for one half the water-power of the dam; and, on trial of this issue, Shaw, Ch. J., says: "The only question in this case is whether the town of Newton has a right to tax the plaintiff for the property, and under the circumstances mentioned in the agreed statement of facts. In the first place, the court are of opinion that water-power for mill purposes not used is not a distinct subject of taxation. It is a capacity of land for a certain mode of improvement, which cannot be taxed independently of the land. But the objection to this mode of taxation is not the only or principal objection to the tax in question. The court is of opinion that the water-power had been annexed to the mills, that it went to enhance the value of the mills, and could only be taxed together with the mills, as contributing to increase their value. As the mills were wholly situated in Waltham and were taxable there, they were not liable to be taxed in Newton."

This shows that if the Merrimack River at Lowell constituted the division line between Massachusetts and New Hampshire, and the water-power of the Lowell dam was all used in Massachusetts, none of its value could be taxed in New Hampshire, even though its very existence depended upon structures erected in New Hampshire. No more can any part of that value be taxed in New Hampshire if it depends upon structures higher up on the same stream, and within the State of New Hampshire.

See also *Slack v. Walcott*, 3 Mason, 508.

Messrs. Jewell & Stone, Albin & Martin, and S. C. Clark, with Mr. M. W. Tappan, for defendant:

The questions presented in this case are identical with those presented in *Cocheco Mfg. Co. v. Strafford*, 51 N. H. 455.

It was there held that "the water-power, furnished by the pond in its improved state, must, with the land to which it is incident, be regarded as real estate situated in Strafford, and subject to be there taxed, without being affected by the circumstance that the mills of the plaintiff, with the water-power attached, may be taxed in Dover."

See Id. 467.

The only real question before the court is whether or not the selectmen of Gilford should have considered the fact that the plaintiff's property in Gilford was enhanced in value because it could be controlled and profitably used there by the plaintiff for the benefit of mills elsewhere. If the law, as held in *Cocheco Mfg. Co. v. Strafford*, and which has been acquiesced in for nearly twenty years, is to remain the law in this State, the valuation put upon the plain-

tiff's property by the referees settles its value for the purpose of taxation.

Carpenter, J., delivered the opinion of the court:

Real estate must be taxed in the town where it is situated. Gen. Laws, chap. 53, § 2; chap. 54, § 11. The words "land", "lands," or "real estate" shall include lands, tenements, and hereditaments, and all rights thereto and interests therein. Gen. Laws, chap. 1, § 20. Easements are taxable; if appurtenant they are in general taxed with and as a part of the land to which they belong. Easements in gross must necessarily be valued and taxed separately from the land out of which they are granted.

Water-power, or rights in a reservoir of water, are an interest in the land upon and by which they are created; and, by the express terms of the statute, must be taxed in the town where the land of which they are a part is situated. Although they may be so far severed from that land, and annexed to land situated in another town, as to pass without special mention in a conveyance of the latter, their geographical location is not thereby changed. The title to and occupancy of the land creating water-power or reservoir rights may be in one person, and of the power and rights in another. In such case each must be separately assessed. The plaintiff owns both the reservoir rights and the dam, gates, land, and flowage out of which they issue. Its water rights have not been severed from its lands in Gilford and annexed to its mills and other real estate situated elsewhere. By a conveyance of the former they would pass, and by a conveyance of the latter they would not pass, without special mention. If the reverse were true, they would be none the less real estate situated in Gilford. They were properly valued and taxed with the lands in Gilford. *Cocheco Mfg. Co. v. Strafford*, 51 N. H. 455.

In the appraisal of a water-power, as of other property, all the facts and circumstances affecting its value are competent to be considered. The assessors may consider the original cost of the entire property, the quantity of land flowed, and its value for other purposes; the magnitude of the power, its location, and the place where it is or may be utilized; the uses to which it is or may be applied, together with the limitations, if any, either of the manner in which or of the purposes for which it may be employed; the income derived from it by way of rents or from its use by the owners, the expense of maintaining and managing it, the cost of equal power derived from other sources,—that is, its comparative economy; the effect which the appropriation of the land for the purposes and the use of the power has to increase or diminish the value of the owner's other lands, and their like effect upon the property of others,—in short, anything which might justly affect the judgment of a person desiring to purchase, in determining what price he would offer. *Cocheco Mfg. Co. v. Strafford*, 51 N. H. 455, 476-478; *Low v. Concord R. R. Corp.* 1 N. H. (L. ed.) 161, 2 New Eng. Rep. 275, 63 N. H. 558, 562.

If a soap factory tends to depreciate the value of adjacent lands, it may be less valuable than it would be if it enhanced their value. A cotton factory which increases the value of neighbor-

ing real estate may be worth more than it would be if it had a contrary effect.

The entire value of a parcel of land may consist in its capacity to render other lands valuable; as, if in a desert a single acre were found whereon artesian wells could be sunk, producing sufficient water to irrigate and make fertile the whole desert,—the acre would be of great value, because by means of it lands otherwise worthless could be made valuable. It could not be justly appraised without considering its effect upon them. But the increased value of the irrigated lands would not be the measure or form any part of its value. A fair appraisal of the acre would not include any part of the increased value of other land, nor would an appraisal of the irrigated lands at their full value include any part of the acre's value. It does not appear that any part of the enhanced value of the plaintiff's mills and other estate situated elsewhere was comprised in the valuation of its reservoir rights. The referees committed no error of law in considering that the value of the property is increased because it can be controlled and profitably used by the plaintiff in Gilford for the benefit of its mills situated elsewhere, and because, by its control and use in Gilford, the value of the mills and other estate situated elsewhere is increased. How much its value is augmented by these considerations is a question of fact, in the determination of which by the referees no error appears.

The additional facts which the plaintiff desires to have reported are not material. The authorities of Massachusetts cannot lawfully tax real estate situated in New Hampshire. If they do tax it, such taxation is immaterial on the question whether it shall be taxed here. The plaintiff's reservoir rights are a part of its real estate in Gilford, from which, except by their destruction, they can never in point of fact be severed. There may be for certain purposes a constructive severance, but it cannot change their actual location, or make them any the less a part of the land in Gilford.

It is immaterial where the property benefited by the use of the reservoir rights is situated. The rights are not less a parcel of the Gilford lands in case their exercise is beneficial to mills in Massachusetts than they would be if they were used and controlled for the sole benefit of mills in Gilford. It may be that the value of the mills in Massachusetts is increased by reason of the existence of the reservoir rights, and that of the rights by reason of the existence of the mills. If so, and each property is appraised for taxation at its full value, it does not follow that any portion of either property is included in the valuation of the other. The assumption that the plaintiff's reservoir rights are taxed with the Lowell and Lawrence mills, to the extent that the value of the mills is increased by reason of the rights, has no foundation. If by excavation on elevated land near a city, pure spring water were found sufficient to supply, by means of an aqueduct, all the inhabitants, the effect might be, not only to increase largely the value of the tract upon which the water is obtained, but also the value to some extent of every house and lot in the city. A taxation of the city lots and buildings at their increased value, as the law requires them to be

taxed (Gen. Laws, chap. 56, § 1), would not be a taxation of any part of the aqueduct company's rights or land, nor would a taxation of the latter at their full value be a taxation of the city property, although but for the city's proximity they might be substantially worthless.

The value of the plaintiff's property is not affected by the fact that the benefited mills in Lowell and Lawrence are owned, not by the plaintiff's corporation, but by the stockholders, who, in place of money dividends, take as their portion of the income the benefits accruing to their respective mills. The value of the aqueduct company's property would be neither more nor less if all the householders and lotowners in the city were its stockholders, and, instead of dividends in money, received water each in proportion to the amount of his stock.

If the plaintiff should sell and convey all its property in Gilford, upon condition that the purchaser regulate the flow of water as it is

now regulated, the right to the stipulated flow of water would be an interest in land situated in Gilford, and taxable. If the owner sells his dam and mills privilege, reserving a right to draw a specific quantity of water, the reserved right is real estate, and taxable. If the owner of a mill and a reservoir water-right in Gilford, worth \$21,000, sells all his real estate in Gilford for \$10,000, its full value, reserving all water-rights except power sufficient for the use of the Gilford mill, his reserved rights are worth \$11,000 and are taxable at that sum in Gilford. An owner of a valuable water-power cannot escape taxation by putting in another the title to the soil, which is generally of little comparative value in the absence of the power, and of no value for other purposes so long as it is used to create the power.

Judgment on the report.

Bingham, J., did not sit; the others concurred.

RHODE ISLAND.
SUPREME COURT.

Josiah M. FISKE

v.

George P. WETMORE.

A, under a claim of right had for more than twenty years maintained drains for the use of his land through L Avenue, a private way belonging to B, and this with the knowledge of B, when A received from B a deed of realty bounded on L Avenue. This deed contained, after the description of the realty conveyed, a clause, "It is distinctly understood by and between the parties hereto that there shall be no right of frontage on, or access to, the said L Avenue for any land of this grantee except for the parcel hereby conveyed." After receiving the deed, A continued his drains as before through L Avenue. Held:

(a) That the clause did not affect A's right of drainage fully acquired by twenty years adverse use before he took the deed.

(b) That the clause was to construe or explain the description in the deed, not to serve as a contract or release affecting rights already acquired.

(Newport—Decided July 30, 1887.)

CROSS-BILL in equity for an injunction. Heard on amended bill and answer. *Injunction denied.*

The question now presented is stated in the opinion. Former decisions in the case, setting forth the facts fully, are reported 2 New Eng. Rep. 626, and 4 New Eng. Rep. 794.

Mr. Samuel E. Honey, for complainant in cross-bill.

Mr. William P. Sheffield, for defendant in cross-bill.

Per Curiam:

Since the delivery of our opinion in March last (4 New Eng. Rep. 794), the complainant, Fiske, has amended his cross-bill, setting forth in the amendment that in February, March, and April, 1882, the defendant, Wetmore, constructed seven drains, besides the drain before complained of, connecting other parts of his estate with the Lawrence Avenue drain, and discharging through them into the Lawrence Avenue drain, and thence, by means thereof, upon the complainant's land, sewage, ordinary ground water, stable water, and the overflow from cisterns; and praying that the defendant may be enjoined from so doing. The defendant in his answer sets up a right to do so, acquired by adverse use continuously enjoyed since about 1851, with the knowledge on the part of William Beach Lawrence, the owner of Lawrence Avenue and of the land now belonging to the complainant, until his death in 1883; that such use was with claim of right. The complainant set the cause down for hearing on the amended bill and answer; and at the hearing contended that the defendant was precluded, or estopped, from making the defense as stated by reason of a deed to him from said Lawrence, bearing date August 12, 1872, conveying to him a lot of land adjoining his estate on Lawrence

Avenue. The deed, in so far as we need recite it for the purposes of this case, is as follows, to wit:

"Know all men by these presents: That I, William Beach Lawrence, of the city of Newport, in the State of Rhode Island, in consideration of \$12,405.80, paid by George P. Wetmore of said Newport, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell, and convey unto the said George P. Wetmore all that certain tract or parcel of land situate in said city of Newport and bounded as follows, viz.: northerly, on Le Roy Avenue; easterly, on Lawrence Avenue (which is to be 40 feet in width, and to extend from Le Roy Avenue on the north to Ruggles Avenue on the south); and southerly and westerly, by lands of this grantee. For a more full and particular description of the parcel of land hereby conveyed, reference may be had to the plat thereof hereto annexed. It is distinctly understood by and between the parties hereto that there shall be no right of frontage on, or access to, the said Lawrence Avenue for any land of this grantee except for the parcel hereby conveyed. To have and to hold the above granted premises, with all the privileges and appurtenances to the same belonging, to the said George P. Wetmore, his heirs and assigns, to his and their use and behoof forever."

The complainant insists that the clause, "It is distinctly understood," etc., amounts, by reason of the defendant's acceptance of the deed, to an implied covenant or agreement, on his part, that "there shall be no right of frontage on, or access to, Lawrence Avenue" for his other land; and that in equity he will be held, accordingly, not to have any right of frontage on, or access to, Lawrence Avenue for his other land, and consequently no right to maintain the drains complained of, the same being drains which lead from his other land into the middle of the avenue, to connect there with the Lawrence Avenue drain.

According to the answer, which is to be taken as true, the rights in dispute, if "knowledge" be equivalent to "express notice," which is not questioned, had been fully acquired by twenty years adverse use, when the deed of 1872 was executed; and therefore to give the clause in question the effect which the plaintiff claims for it is to give it the effect of a quit-claim, or release, of an existing easement appurtenant to the defendant's other land. The question is whether the clause ought to be construed so as to give it that effect.

The clause occurs in the part of the deed which is devoted to the description of the premises conveyed, and it is proper, therefore, to regard it as intended to be a part of the description, or as added thereto for the purpose of defining with greater precision the scope of the grant, if it can reasonably be so regarded, instead of as a clause intended to be operative outside of the grant, by way of release from the grantee. The language of the clause is not language of contract or agreement, but language of construction or explanation, as if the grantor were saying to his grantee, by way of precautionary observation, "I convey to you this lot bounding on Lawrence Avenue, and you thereby will become entitled to rights of

frontage on, and of access to, that avenue as appurtenant to the lot; but, remember, it is distinctly understood between us that there shall be no such right for the rest of your land." Such a remark could not be reasonably understood to import a surrender by the grantee of any right which he had previously acquired for his other land, but only as intended to guard against the possibility of his claiming any right for his other land as a result of the conveyance. It seems to us that there is little reason to doubt that this is what was meant by the clause.

It probably occurred to the grantor that the grantee might suppose that if he had access to Lawrence Avenue from the lot conveyed, he would only have to go from his other land over the lot conveyed in order to have the right virtually for his other land, and so he inserted the clause to prevent the supposition; or he may have feared that a conveyance of the lot bounding it on Lawrence Avenue might be taken as recognition of the avenue as a street, and that thus the grantee would claim to be entitled to rights of frontage and access, and inserted the clause as a safeguard. If the clause had been intended to operate as a surrender of any right on the part of the grantee, it would naturally have contained a statement that it was partly in consideration of the conveyance. But the conveyance purports to have been made wholly for other considerations. Indeed, it is highly improbable that, if the surrender of so valuable a right as that of drainage through Lawrence Avenue had been intended, language more apt for that purpose would not have been employed. Can such a right be properly denominated a right of frontage or a right of access? If it can be, it does not seem to us that it would ever be likely to be so denominated. We think, therefore, that the only reasonable construction of the clause is to confine it to the subject-matter of the conveyance, and to construe the clause as if it read "there shall be no right of frontage on or access to the said Lawrence Avenue for any land of this grantee, except for the parcel hereby conveyed, by virtue of this deed."

We will add that it increases our confidence in the correctness of this construction, that it is the construction which has practically been put upon the clause by the parties themselves; for it appears by the answer that the defendant continued to use the drain connecting his estate with the Lawrence Avenue drain without interruption, after the deed, in the same manner as before, and with the knowledge on the part of the grantor that he was so using it under a claim of right. It is incredible that this would have been allowed if the purpose, or any part of the purpose, of the clause had been to take from the defendant the right to such use.

Injunction denied.

Samuel T. DOUGLAS, Admr.,

v.

John B. HENNESSY.

1. **Covenant was brought on the promise** to pay expressed by the words, "to which payment well and truly to be

made I bind myself" in a bond with a condition of defeasance. *Held:*

(a) That these words contained a covenant to pay and that the action of covenant would lie.

(b) That no demand was necessary before action brought.

2. The defendant pleaded performance. *Held*, that the burden of proof was on the defendant to prove the allegations of his plea, although a breach of the condition of the bond was alleged in the declaration.

(Providence—Decided July 23, 1887.)

COVENANT. On defendant's motion in arrest of judgment and petition for a new trial. *Overruled.*

The former proceedings in this case are given in 1 New Eng. Rep. 885, and 3 New Eng. Rep. 525. After the opinion printed in 3 New Eng. Rep. 525, the case was, at the April Term, 1887, of this court, submitted to a jury, which returned a verdict that the bond in question was the defendant's deed, and that the defendant had not fulfilled the conditions of the bond as alleged in his plea of performance to the second count of the declaration. The defendant then moved in arrest of judgment and also petitioned for a new trial.

The condition of the bond, and other facts, are fully set forth in the previous reports of the case.

Messrs. James Tillingham, William H. Greene, and Patrick J. McCarthy, for defendant.

Messrs. William W. Douglas and Charles E. Gorman, for plaintiff.

Stiness, J., delivered the opinion of the court:

The plaintiff sues in an action of covenant upon a bond, alleging as a breach that the defendant has neither performed the condition nor paid the whole or any part of the penal sum. The defendant pleaded *non est factum* and a plea of performance. After verdict for the plaintiff, the defendant moved in arrest of judgment, upon the ground that an action of covenant will not lie upon this bond.

Although actions of covenant upon an ordinary bond with defeasance are not common, yet they are not without authority to support them. The difficulty in such cases lies in finding a promise in the instrument. In this case, upon other counts in the declaration, the court has decided that the recital of an agreement in a bond, upon which the obligation may be defeated, is not equivalent to a covenant to perform the agreement. *Douglas v. Hennessy*, 3 New Eng. Rep. 525. So in *Hathaway v. Crosby*, 17 Me. 448, cited by the defendant, the court found that the bond was strictly a bond of defeasance and not a covenant to perform the act recited in the condition. The action was in debt. A statute provided that in actions upon bonds with a penalty, with a condition which provides for the performance of some covenant or agreement, the jury may assess the damages sustained by breaches of the condition thereof. Hence the court held that, as there was no covenant to perform the condition, the

damages for its breach should not have been assessed by a jury. If the breach of the covenant sued upon is simply an omission to do the act, by the performance of which the bond might become void, an action of covenant will not lie; for in such cases there is no promise under seal to do it. Such was the case of *Pruett v. Clark*, 3 N. J. L. 517. But in the present case the covenant sued on is the promise to pay, which is claimed to lie in the words "to which payment well and truly to be made I bind myself," etc. The question, then, is whether these words import a covenant to pay.

In *Anonymous*, 3 Leonard, 119, case CLXIX., it was held that the words "I am content to give," etc., "did amount to as much as 'I promise to pay,'" etc., and that either debt or covenant would lie. *Norris's Case*, Hardres, 178, sustained an action of covenant on the words "I oblige myself to pay so much money at such a day and so much at another day."

March v. Freeman, 3 Lev. 838, was an action of debt on a sealed bill. The court says: "In every case where a covenant is to pay a certain sum, the party may have either debt or covenant for the money." In *Hill v. Carr*, 1 Ch. Cas. 294, frequently cited upon this point, the chancellor, Lord Nottingham, remarks: "And a covenant will lie on a bond, for it proves an agreement." In 2 Sedgwick on Damages, 7th ed. 263, the learned author says: "A bond undoubtedly proves an agreement; but is the agreement proved the one stated in the penalty, to pay the money for which the obligor declares himself bound, or in the condition?" If there be no agreement in the condition it would seem, necessarily, to follow that the only agreement possible is an agreement to pay the penalty.

In *United States v. Brown*, 1 Paine, 422, the action was covenant on bond, conditioned upon the faithful performance of the duties of an office. The court remarks that covenant might probably be maintained upon the penalty of the bond, if the breach was properly assigned, because it contained an acknowledgment of indebtedness and a promise to pay, and the breach would be the nonpayment of the money, but, as the breach alleged was misfeasance in office, an action of covenant would not lie.

Hill v. Rushing, 4 Ala. 212, was an action of covenant on an attachment bond, alleging as breaches that the defendants had not paid the penalty nor prosecuted the action. It was held that the action could be maintained.

State v. Woodward, 8 Mo. 338, was covenant on a sheriff's bond, alleging two breaches of the condition, followed by an averment that the defendants had not paid the penalty. The court says: "It is clear that, by the common law, an action of covenant was a concurrent remedy with debt on a single bill obligatory, or a penal bond subject to be defeated by the performance of conditions. In such an action the breach of covenant would be the nonpayment of the debt in the one case, in the other the nonpayment of the penalty." As the breaches assigned, however, were breaches of the condition, it was held that covenant would not lie. See also *Taylor v. Wilson*, 5 Ired. 214.

We think these authorities are sufficient to support the conclusion that an action of covenant may be maintained on the promise to pay, which the words of the bond import.

The defendant also petitions for a new trial upon the ground of two alleged erroneous rulings at the trial. First, that no demand need be shown to maintain the action. The covenant to pay being express and absolute, subject only to avoidance by performing the condition of the bond, we think that no demand was necessary. Such was the decision in *Ramsay v. Waltham*, 1 Mo. 395; *Gibbs v. Southam*, 5 B. & Ad. 911. Second, that the burden of proof, under the pleadings, was on the defendant to show performance. The pleas were *non est factum* and performance. Under a plea of *non est factum* the execution of the bond is all that is desired, and when that is established the issue must be found for the plaintiff. *Middleton v. Sandford*, 4 Camp. 84; 2 Greenl. Ev. § 292; *Mann v. Eckford's Exrs.* 15 Wend. 502. Under the plea of performance, the burden was on the defendant to establish it. The defendant could defeat the obligation upon either one of two conditions: (1) by conveying all the land, in case the debts described were paid; (2) by conveying so much of the land as was not required to pay them, if they were not otherwise paid. It was for him to show in which, if either, way his bond had become void. "If any of the covenants be in the disjunction, so as it is in the election of the covenantor to do the one thing or the other, then it ought to be specially pleaded, and the performance of it, for otherwise the court cannot know what part hath been performed." *Oglethorpe's Case*, 1 Leonard, 311, case CCCXXX.

In *Cook v. Herle*, 2 Mod. 188, "It was agreed that the assignment of a breach according to the words of the covenant is good enough, and that, if anything be done which amounts to a performance, the other side must plead it."

The fact that a breach is alleged in the declaration does not alter the rule of evidence under these pleadings. Thus in *Mann v. Eckford's Exrs.* 15 Wend. 502, 509, the court says, with reference to a demand: "If a demand had been averred in the declaration, the plaintiff would not have been bound to prove it. The plea of *non est factum* puts in issue nothing but the execution of the deed on which the action is brought; and, as a general rule, neither party can be either required or permitted to go beyond the issue joined."

The defendant being required to plead performance, and having pleaded it, we see no reason why the general rule, that the party who asserts a fact must prove it, does not apply to this case. We think there was no error in the ruling on this point.

Motion overruled; petition dismissed.

JAMES R. HODGES

v.
J. Russell BULLOCK *et al.*

1. The voluntary assignees for the benefit of the creditors of A filed a bill in equity against B, the copartner of A, for an account of the business and for the amount due A. In the examination before a master it appeared that A had taken funds from the partnership for his private use, and had purchased securities in his own name with

the funds. The master reported a balance due from A to B. The report was confirmed and the bill dismissed. Subsequently B filed a bill against the assignees, who had sold the securities, to compel the payment to him, as surviving partner.—A having died during the pendency of the former suit,—of the price received for the securities. Held, as it appeared from the record of the former suit that such suit involved a complete settlement of the copartnership concerns between B and the assignees, and that, pending the master's account, B had full knowledge of A's transactions, that B was estopped by the decree entered from claiming the securities or their price.

2. The right of a *cestui que trust* to follow a misapplied trust fund, and his right to hold the trustee responsible for the misapplication, are alternative, not concurrent rights.

(Providence—Decided July 30, 1887.)

BILL in equity to establish a trust and for an account. *Dismissed.*

The case is stated in the opinion.

Mr. James Tillinghast, for complainant.

Mr. William G. Roelker, with Mr. Francis W. Miner, for respondents:

In order to constitute *res judicata*, so as to estop the parties, the particular controversy sought to be concluded must have been necessarily involved and determined in the former record.

Packet Co. v. Sickles, 72 U. S. 5 Wall. 592 (18 L. ed. 553); *Wells, Res Adjudicata*, § 3 *et seq.*

Where the trust fund has consisted of money and been mingled with other moneys of the trustee in one indistinguishable mass, and the trustee has made investments generally from moneys in his hands and possession, the *cestui que trust* cannot claim a specific lien upon the property or funds constituting the investments.

Ferris v. Van Vechten, 73 N. Y. 121; *Trecothick v. Austin*, 4 Mason, 29; *Hill, Trustees*, 522.

The complainant is debarred from proceeding against these securities.

1. He has elected to hold Barstow personally by taking judgment in Eq. 1508 against his estate for the whole amount of Barstow's debt, including the money loaned Reynolds and Perry & Barnard. He did this knowing all the facts. His claim has become merged in the judgment. He may elect to hold Barstow personally for the money, or he may follow it into the securities and have them adjudged trust property. He cannot do both, and electing one remedy is waiver of the other.

Barker v. Barker, 14 Wis. 146.

2. Complainant claims as a creditor and *cestui que trust* under Barstow's trust deed. The deed itself expressly, in terms, conveys the Reynolds's mortgage and Barstow's right, claim, demand, and interest in Turnbull & Co. Hodges has had notice of the contents of the trust deed, for years. Under familiar principles he cannot at once affirm and disaffirm the trust deed; he cannot claim benefits under it and attack it.

Bump, Fr. Conv. 458-460, and cases cited;

Bigelow, Estop. 508-507; *Greens v. Sprague Mfg. Co.* 52 Conn. 352.

If allowed to recover here, it must be upon the express condition that he be debarred from claiming any benefit as a creditor under the trust deed. We submit that there was enough to put Mr. Hodges upon his inquiry, and make it his duty to have investigated these matters thoroughly at once, and discovered then all that he says he has discovered now. His neglect to do so, and acquiescence during many years without investigation, until after Barstow's death, is sufficient to charge him with constructive notice of the alleged frauds he complains of, which cannot now be explained, Barstow's mouth being closed.

The general rule is that, if facts are brought to the knowledge of a party which should put him, as a man of common sagacity, upon his inquiry, he is bound to inquire; and if he neglect to do so, he will be chargeable with notice of what he might have learned upon examination.

Bigelow, Fr. 288, note 2, and cases cited; *Tillinghast v. Champlin*, 4 R. I. 173.

Time will not begin to run until the party acquires, or might have acquired, the knowledge of the fact on which the trust is founded.

Hill, Trustees, 168, 169; 2 Pom. Eq. §§ 596, 597, 606, 610-614; 2 Lead. Cas. in Eq. 131 *et seq.*; 145, 155 *et seq.*

Durfee, Ch. J., delivered the opinion of the court:

The case made by the bill is this: The complainant and one William Barstow were formerly doing business as copartners under the firm name of William Barstow & Co. Barstow, having become financially embarrassed, conveyed all his property, except what was exempt from attachment by law, to the defendants in trust for his creditors. In October, 1877, the defendants brought a suit in equity against the complainant and Barstow for an account of the copartnership business and a winding up of the same, in order to reach Barstow's interest, if any, therein. Pending this suit, Barstow died, but the suit was revived against his administratrix. The master to whom the case was referred to take the account reported that there was due to the complainant, as of September 24, 1877, from Barstow, or his estate, the sum of \$43,354.82. The master also reported that this balance included certain amounts "taken out of the funds of the firm by William Barstow for his own private purposes, outside of the regular business of the firm," specifying among them large advances to Gideon Reynolds and to Perry & Barnard. The report was confirmed by decree entered February 18, 1882. The bill charges that the moneys so withdrawn and lent were not charged to Barstow, in his individual account on the books of the copartnership; but, having been withdrawn without the knowledge of the complainant, were carefully concealed from him, Barstow having had exclusive charge of the books and kept the same. The bill also alleges that Barstow took, as the complainant first learned in the course of the proceedings before the master, from Gideon Reynolds, certain mortgages to himself, in his own individual name, as security for the moneys lent

to said Reynolds, as above stated; and claims that Barstow held these mortgages in equity as trustee for the firm of William Barstow & Co., but charges that they passed to the defendants, as Barstow's, trustees or assignees, and have been sold by them for \$2,300, paid to them by the purchasers. The bill also alleges that, as the complainant first learned in the course of the proceedings before the master, Barstow took to himself, in his own name, from Perry & Barnard or their successors in business, George Turnbull & Co., for the money lent to Perry & Barnard, certain negotiable notes and securities; that said notes and securities were held by him in equity as trustee for the firm, but that they passed to the defendants, as his trustees or assignees, and the defendants have collected the sum of \$7,787.94 thereon. The prayer of the bill is that the defendants may be decreed to pay over said sums of \$2,300, and \$7,787.94, to the complainant, as surviving partner of the firm of William Barstow & Co.

The defendants set up in their answer, among other defenses, this, namely: That the complainant knew of the mortgages, notes, and securities last above mentioned, during the pendency of their suit against him and Barstow and before the report of the master or the final decree of the court therein; yet that the moneys for which said mortgages, notes, and securities were given, in so far as they were withdrawn from the firm, were included in the sum reported in said report, and adjudged in said decree to be due from Barstow to the complainant. The defendants, therefore, set up that the complainant is estopped from making any claim on account of said moneys, otherwise than under or according to said decree.

The decree referred to does not in terms give the complainant judgment against Barstow for the sum of \$43,854.82; but it confirms the report of the master, finding that said sum is due from Barstow to the complainant, and dismisses the bill. An inspection of the record of the suit in which the decree was entered shows that the suit involved a complete settlement of the copartnership concerns, as between the defendants and the complainant, the account taken being an account of all the assets and liabilities of the firm, showing first the balance due from Barstow to the firm, and then the balance due from Barstow to the complainant, Barstow's half of the surplus of assets over liabilities in the hands of the complainant being deducted from half the balance due from Barstow to the firm to make it. The partnership was thus completely wound up, and its affairs finally settled as between the defendants, as assignees or trustees of Barstow, and the complainant. While the account was taking, the complainant had full knowledge of the mortgages, notes, and securities, and if he was ever going to lay claim to them as property held in trust for the firm, then was the time for him to do it, so that, if the claim was good, they might have been included in the account as a part of the assets of the firm. It was no less the right of the defendants to have the claim then made, if it was ever to be made, than it was his right to make it; for if then made and allowed, the balance of account would have been materially different.

1 R. I.

E. E. R., v. VI.

The complainant did not then make it; on the contrary, he put forward a claim which was inconsistent with it, inasmuch as he caused or allowed Barstow to be charged as debtor to the firm and as debtor to himself, individually, for the very moneys secured in part by the mortgages, notes, and securities which he now claims as trust property belonging to the firm. The question is whether he is not estopped by the decree from making his present claim. We think he is. The defendants would clearly be estopped by the decree from making any claim against the complainant, as surviving partner of the old firm of William Barstow & Co., which would be inconsistent with it; and we see no reason why the estoppel should not be mutual, and the complainant, as surviving partner, be likewise estopped from making any claim which is inconsistent with it. The right of the *cestui que trust* to follow misapplied trust funds, or to hold the trustee to answer for them as a debtor, is an option or an alternative, not a concurrent right. "The *cestui que trust*," says Judge Story, "has an option to insist upon taking the property, or he may disclaim any title thereto and proceed upon any other remedies to which he may be entitled, either *in rem* or *in personam*. The substituted fund is only liable to his option. But he cannot insist upon opposite and repugnant rights." 2 Story, Eq. Jur. § 1262.

Bill dismissed, with costs.

Henry L. ALDRICH

v.

City of PROVIDENCE.

Opinion in support of, and filed subsequently to, decision reported in 4 New Eng. Rep. 752.

Per Curiam:

This is a petition to recover damages for land taken by the city of Providence for a public park, under a special statute. R. I. Pub. Laws, chap 481, of May 2, 1884. The court has decided against the claimant, and the question is whether a judgment should go against him with or without costs; his claim being that no costs are allowable in such a proceeding, unless there is provision for allowing them in the special statute, which here there is not.

The cases cited show that this is the English rule and the rule in some of the States, but it does not appear that there is in England, or in those States, any general statutory rule like ours. The general statutory rule in Massachusetts is that in civil actions the party prevailing shall recover his legal costs, and it has been held that this rule cannot be extended by any reasonable construction to proceedings like the proceeding here. *Hampshire, etc. Canal Co. v. Ashley*, 15 Pick. 496; *New Haven & N. Co. v. Northampton*, 102 Mass. 116. The rule prescribed by our statute is: "In civil causes at law the party prevailing shall recover costs except where otherwise provided." R. I. Pub. Stat. chap. 217, § 1. The rule is capable of a more liberable construction than the Massachusetts rule, "civil causes" being terms of wider meaning than "civil actions." In *Wheeler v. Wheeler*, 2 R. I. 1, a probate appeal was held to

be a civil cause within the meaning of the rule. We think the rule should be liberally construed, and should be held to apply to proceedings like this under special statutes, unless the special statutes, themselves, make express provision for costs.

Judgment will be entered for the city, with costs.

Erastus M. HUNT

v.

William H. WILLIAMS.

A drew an order on B payable to C out of funds which B was to receive from a contract for houses. It was accepted by B "when there is money in my possession" from the contract for the houses. A, already a debtor to B, had made a contract to build houses with a third party who was to pay the price by installments to B "on account of" A. After some payments had been made, A abandoned the contract, which was completed by B at a loss. In an action by C against B on the acceptance,—*Held:*

(a) That B was entitled to prove the circumstances in which the acceptance was made and the payments received, in order to show that the money received was not A's money.

(b) That if the money, when in B's hands, was ever the money of A, B could not retain it in set-off against A's indebtedness.

(c) That, in the circumstances, the question whether the money in B's hands was ever the money of A should be left to the jury.

(Providence—Decided July 30, 1887.)

EXCEPTIONS by plaintiff to the Court of Common Pleas in an action of assumpsit. *Sustained.*

The case was in the Supreme Court before, at March Term, 1886, when the following rescript was handed down:

The court is of the opinion that the defendant should have been permitted to show that no money came to his hands after the acceptance of the order in suit, which belonged, or which but for the order would have belonged, to Davidson; because such proof would show a want of consideration for the acceptance. Inasmuch as all such evidence was excluded, we sustain the exceptions and remand the case to the court of common pleas for a new trial.

A new trial was had accordingly, which resulted in a judgment for defendant.

The facts of the case are stated in the opinion.

Mr. Claudius B. Farnsworth, for plaintiff.

Mr. Dexter B. Potter, for defendant:

Primarily this was a debt contracted by one John Davidson with the plaintiff. The defendant had no knowledge of it in its inception. He was an entire stranger to the matter until August 7, 1884. The "order" was a request to the defendant. He accepted it; but he accepted it conditionally in the first instance. There is no pretense anywhere in the case that

any consideration passed from the plaintiff to the defendant because of the acceptance. This fact takes the case out of one class of legal liabilities for others' debts.

Neither is there any claim that the plaintiff was harmed by what the defendant did. The original debt remains due from John Davidson to the plaintiff. There was not any agreement that the original debtor should have the time of payment extended—a frequent cause of liability. This fact takes the case out of another class of liabilities for others' debts.

The case does not come under any other class, and there is no legal foundation left for the plaintiff to stand upon.

See *Leonard v. Vredenburg*, 5 Am. Dec. 817, 819; *Furley v. Cleveland*, 15 Am. Dec. 887, 898; *Anderson v. Davis*, 31 Am. Dec. 612; *Durham v. Arledge*, 47 Am. Dec. 544; *Liversidge v. Broadbent*, 4 H. & M. 603.

The defendant has had his new trial and showed the facts, coming exactly within the language of the rescript.

Durfee, Ch. J., delivered the opinion of the court:

This is assumpsit on an accepted order on the defendant by one John Davidson, in favor of the plaintiff. The order was written on the back of a bill of \$838.45 for bricks sold by the plaintiff to Davidson for use in building two houses called the Earle and Read houses. It was as follows:

Pawtucket, August 7, 1884.

Mr. W. H. Williams: Please pay to the Pawtucket Coal Co. the amount of the within bill, and apply the same to the next installment due from Mr. J. H. Harris on the Earle and Read houses.

John Davidson.

The defendant's acceptance was as follows:

Accepted, W. H. Williams, August 7, 1884, when there is money in my possession from the Earle and Read houses.

It appeared in evidence adduced by the plaintiff that he carried on business under the name of the Pawtucket Coal Co.; that at the date of the order there was an agreement between said Davidson and said Harris, which Davidson was then performing, by which he agreed to furnish materials and do the mason work in building the Earle and Read houses for the sum of \$7,057, to be paid by Harris in installments, as the work progressed, to the defendant "on account of said Davidson;" that Harris paid to the defendant under the contract on account of the houses the sum of \$2,100, on the 29th day of December, 1884, and the defendant paid the plaintiff \$100 on his claim, but did not then and has not since then paid him the residue thereof.

The defendant proved that, soon after the acceptance, Davidson, who had previously been at work on the houses under his contract, abandoned the work, whereupon the defendant took it and carried it out at an expense of \$789.80 so far; that Harris paid him said sum of \$2,100, and that afterwards he completed the houses. The defendant also testified, subject to exceptions, that at the time the acceptance was given he had advanced to Davidson the

sum of \$2,810.04 on account of the houses, and had received from Harris \$1,250, leaving a balance of \$1,560.04 then due, which sum, with the \$739.30, amounted to \$2,299.30, and more than absorbed the \$2,100 received. He also testified that at the completion of the houses he was a loser by about \$600; also that Davidson, from the commencement of the work on the houses to the present time, had always been largely indebted to him on that account; that Davidson had been indebted to him before contracting to build the houses, and that he himself had no interest in the contract except his hope that he would be able, by assisting Davidson, to collect his original debt, and so had the money paid to himself and passed through his hands "on account of said Davidson;" that when Davidson abandoned the contract he took it up to save himself from loss, if possible; and that the abandonment had occasioned the loss sustained.

At the close of the testimony the plaintiff asked the court to instruct the jury that, inasmuch as what remained of the \$2,100 received by the defendant from Harris, after deducting the \$739.30 expended by him, was more than enough to pay the acceptance, he the plaintiff, was entitled to a verdict, the defendant having no right to retain for his own advances; but the court refused, and instructed the jury that on the facts shown, about which there was no dispute, the defendant was entitled to a verdict, and the jury returned a verdict for the defendant accordingly.

We think the evidence relating to the circumstances under which the order was accepted and under which the money from the Earle and Read houses was received, was properly admitted, it being admissible for the purpose of showing that the money when received was not money in the defendant's possession belonging to Davidson; for, until the defendant had money in his possession belonging to Davidson, there was no consideration for the acceptance, and the plaintiff could not maintain any action thereon. We do not think the acceptance of a non-negotiable order, without any consideration for the acceptance, can bind the acceptor any more than the giving of a non-negotiable promissory note could bind the maker.

We think, however, that the evidence in regard to these circumstances was such that the plaintiff was entitled to go to the jury upon the question whether the money as received was the money of Davidson, for this was a question of fact, and upon the evidence as reported in the bill of exceptions is, in our opinion, not so clear but that the jury should have been left to decide. We think the position taken by the plaintiff, and supported by cases cited by him, is correct, namely: that if the money was ever Davidson's money while in the defendant's possession, it would be no defense to this action for him to say that Davidson was indebted to him, and that he had a right as against Davidson to retain it by way of set-off.

His only available defense here is that the money in his hands was never Davidson's money; and, on the evidence as reported, we can see only two ways in which he can claim to have proved it.

He might have claimed that the arrangement

between him and Davidson was such that he was to receive the money from Harris as payment for his advances until his advances were fully repaid. Under such an arrangement the money received would be his money until the advances were repaid, not Davidson's. The defendant did not directly testify that such was the arrangement, though we think the jury might have inferred from the circumstances testified to by him that this was, in effect, the arrangement as understood by the parties.

Or, secondly, the defendant might have claimed that, in completing the work on the Earle and Read houses after it had been abandoned by Davidson, he acted not for Davidson but wholly for himself, and that his application of the proceeds to Davidson's debt to him was purely gratuitous, something which Davidson could not have required; for Davidson, having abandoned the work voluntarily, was entitled to nothing for what he had done beyond what had been previously paid to him, unless the contract was completed for him by the defendant. *Copartners v. Gay*, 12 R. I. 806.

We do not think it is clear that the defendant did not do it for him; and therefore the question whether he did it or not, inasmuch as the plaintiff's right to recover may have been dependent on it, should have been left to the jury.

Exceptions sustained, and case remitted for a new trial.

Re STATE PRISON COMMISSION.

1. The governor has power to appoint persons to inquire into the truth of representations made to him of malfeasance and nonfeasance in the management of the State prison and other penal institutions, and to report the facts.
2. Persons so appointed will not, however, have power to summon witnesses and compel them to testify under oath.
3. Persons so appointed would not be officers within the meaning of Pub. Stat. chap. 23, § 5, and hence a commission issued to them would give them no power or protection which they would not have without it; but it seems that their report would be regarded as a privileged communication, and, as such, would not be actionable without proof of express or actual malice.

(October 5, 1887.)

UNDER art. 10, § 8, of the Constitution of the State, which provides that "the judges of the supreme court * * * shall * * * give their written opinion upon any question of law whenever requested by the governor or by either House of the General Assembly," the governor addressed the following communication to the justices of the court:

To the Honorable Judges of the Supreme Court:

I have the honor to submit the following matters for the consideration of the judges of the court.

Whereas representations have been made to

me of malfeasance and nonfeasance in the management of the State prison, and of some of the other penal institutions of the State under the charge of the board of State charities and corrections, of such a character that, if they should be ascertained to be true, it would be my duty to suspend, or, with the consent of the senate, to remove from office, the members of said board who have been responsible for such malfeasance or nonfeasance.

Wherefore, inasmuch as it is inconvenient, and perhaps will be impossible, for me in person to make due inquiry into the truth of the said representations, I request the written opinion of the judges of the court whether I may, as governor, in aid of the due execution of the duties of my office, and to enable me more certainly to take care that the laws be faithfully executed in accordance with right to all parties, appoint persons and commission them to make inquiry as to the truth of said representations, and to report to me the facts as they may ascertain them to be, with their recommendation to me thereon; and whether such commission may summon witnesses to matters pertinent to such inquiry, compel them to testify, and take their testimony under oath; and whether the members of such commission will be protected in acting thereon, and in making their report to me.

John W. Davis,
Governor.

OPINION.

To His Excellency, John W. Davis, Governor of the State of Rhode Island and Providence Plantations:

We have received from Your Excellency a communication asking for our opinion upon the three following questions, to wit:

1. Whether you have power to appoint and commission persons to inquire into the truth of certain representations which have been made to you of malfeasance and nonfeasance in the management of the State prison and some of the other penal institutions under the charge of the board of State charities and corrections, and report the facts.

2. Whether, if persons be so appointed and commissioned, they can summon witnesses and compel them to testify, under oath, to matters pertinent to the inquiry.

3. Whether they will be protected in acting under their commission and making report to you?

We think Your Excellency has power to appoint or employ others to make the inquiry for you and report the facts; but we are of opinion that the persons so appointed would not be offi-

cers within the meaning of Pub. Stat. chap. 23, § 5, which provides that "a commission shall issue to every person elected to office by the General Assembly, to every justice of the peace elected by any town, and to every person appointed to office by the governor," and that therefore their commission, if their appointment be by commission, will give them no power and no protection which they would not have without it. We think the offices meant in the section quoted are offices recognized or created by the Constitution or statutes of the State: not such appointments as are contemplated in your communication.

We think the second question must be answered in the negative. Members of commissions of inquiry appointed by the governor are not mentioned among the officers and persons upon whom power to administer oaths is conferred by statute, and we know of no rule or principle of the common law under which they can administer oaths, and, still less, under which they can summon witnesses and compel them to testify under oath before them. The way in which unwilling witnesses are compelled to testify is by fine or imprisonment for contempt. Power to punish for contempt is a high judicial power, exceedingly summary and absolute in its exercise. It seems to be confined at common law in England to the two Houses of Parliament and to courts of record; and in this country it has been held to have but little, if any, wider latitude. *Remington v. Peckham*, 10 R. I. 550. We do not think the power can be implied in favor of the commission, because Your Excellency has power to suspend, or, with the consent of the Senate, to remove from office members of the board of State charities and corrections for malfeasance or nonfeasance, or because it is declared by the Constitution that "the governor shall take care that the laws be faithfully executed;" for, as we remarked in the recent case of *Hanley v. Wetmore*, 1 R. I. (L. ed.) 179, 8 New Eng. Rep. 138, the governor, in performing his duty under this clause, "has no arbitrary power, but must himself proceed according to law."

The first part of the third question is answered by our answers to the first and second questions. We think that the report of the commission, of the facts elicited by their inquiry, would be regarded as a privileged communication, and as such would not be actionable without proof of express or actual malice.

THOMAS DUFFEE,
CHARLES MATTESON,
JOHN H. STINNESS,
P. E. TILLINGHAST,
GEORGE A. WILBUR.

1 R. I.

VERMONT.
SUPREME COURT.

E. P. JEWETT
v.
F. J. DIETUR.

The plaintiff was interested in an estate, as executor and also as legatee, to the extent of one third of the income, and the defendant was entitled to the other two thirds; under an arrangement between them, the plaintiff resigned and the defendant was appointed administrator; arbitrators decided what sum was to be paid annually to the plaintiff, and he assigned by writing, under seal, his interest in the estate to the defendant. *Held*, that parol evidence was admissible to prove the defendant's personal promise to pay the plaintiff \$400, which he had expended on the property of the estate prior to the assignment; and also the facts and circumstances which induced the making of the award and agreement.

(Washington—Filed September 24, 1887.)

ASSUMPSIT. Trial by court, September 1 Term, 1886, Powers, J., presiding. Judgment for the plaintiff. *Reversed pro forma.*

It appeared that the plaintiff was one of the executors of the will of T. J. Hubbard; that he had been in the management of the estate for some years; was entitled as legatee under the will to one third of the net income from the estate, and the defendant to the other two thirds, after deducting some small legacies; that plaintiff filed his account as executor for the year ending August 1, 1885, in the probate court, and, before the same was passed on by the court, proposed to the defendant, as he, the plaintiff, was getting old, to resign and make no objection to the appointment of the defendant an administrator *de bonis non* with the will annexed; but before this was done he wanted it fixed in some way so that he should receive a fixed sum each year under the will; and accordingly the parties by mutual consent submitted the same to arbitration, and an award was made in the premises, of which the following is a copy:

"The undersigned having considered the matter submitted to us by E. P. Jewett of the one part and F. J. Dietur of the other part, as to the sum and amount the said Jewett shall have from the estate of Timothy J. Hubbard, deceased, yearly, for one third of the income of the property of said estate during the lifetime of the said Jewett, as provided in the last will of the said Hubbard, do decide and award that said Jewett shall have and receive and be paid from said estate each and every year of the lifetime of said Jewett the sum of \$400, and in that proportion for any fractional part of a year, the first payment thereof to be made on the 1st day of August, A. D., 1886, and thereafter on the 1st day of August each year, for the term and period aforesaid.

"Dated at Montpelier, this 7th day of September, A. D. 1885."

On September 28, 1885, the plaintiff signed a

writing under seal, of which the following is a copy:

"In consideration of \$400 to be paid me according to the aforesaid award, and of the purchase from the executors of the lands owned by the estate of T. J. Hubbard in Waterville, Eden, and Belvidere, in the county of Lamoille, by the said F. J. Dietur, I hereby, for myself and my heirs and assigns, covenant and agree to abide by said award, and do hereby sell, assign, and transfer to the said F. J. Dietur all my interest in and to and under the will of the said T. J. Hubbard, except the sum of \$400 to be paid me annually as provided by the aforesaid award."

It was conceded that in 1885 the plaintiff repaired some tenements in the brick block in Montpelier owned by the estate, at an expense of \$1,500 or \$1,600, whereby the rental of that property was increased in the sum of \$225; and that this expense had been paid from the income of the estate. The plaintiff's evidence tended to show that, as part of the settlement above referred to, the defendant, in view of the fact that he was to receive all the income of the estate after August 1, 1885, and the repairs aforesaid were to enure to the defendant's benefit, agreed to pay the plaintiff \$400, to make up the loss of income the plaintiff had suffered prior to August 1, 1885, by reason of making such repairs; that this sum, though less than one third of such repairs, was agreed upon, and in consideration of the terms of the settlement aforesaid, and as part of it, the defendant promised to pay him this sum. The defendant conceded that it was agreed that the plaintiff should be paid this sum, but claimed it was to be paid by the estate, and not by him individually. The court found the agreement as claimed by the plaintiff. The court ruled that the division of income earned prior to August 1, 1885, should be made under the provisions of the will; and after that date the award was to be operative. The defendant claimed that the agreement of September 28 could not be disputed by parol proof; that the plaintiff's evidence tending to show the agreement to pay the \$400 on account of the repairs was not admissible; but the court ruled otherwise.

Mr. Geo. W. Wing, for plaintiff.

Mr. S. C. Shurtleff, for defendant.

Royce, Ch. J., delivered the opinion of the court:

This was an action of assumpsit, trial by court, and judgment for plaintiff. The only item of claim made by the plaintiff upon the trial about which there was any dispute was the item of \$400 referred to in the exceptions; and, inasmuch as it appears that the defendant conceded that the plaintiff was to be paid that sum, the only controversy concerning it seems to have been whether it should be paid out of the estate or by the defendant personally. The plaintiff claimed that it was agreed that he should be paid that sum in consideration of the repairs he had made upon property that belonged to the estate of Hubbard, and that the defendant promised to pay him. The court found the agreement as the plaintiff claimed, and that finding is conclusive if it was based upon competent evidence.

The defendant claims that the evidence introduced to support the finding was incompetent for the reason that it varied the written agreement of September 28. That agreement is operative to transfer to the defendant all the interest that the plaintiff had in and to and under the will of T. J. Hubbard, except the sum of \$400 to be paid to him annually, as provided by the award before that time made. It did not profess to transfer any claim that the plaintiff had against the defendant personally. The \$400 claim did not accrue to the plaintiff by virtue of or under the will of T. J. Hubbard, but was against the defendant personally, and based upon his agreement and promise to pay. The claim not having been transferred by that agreement, the evidence objected to and admitted did not have a tendency to alter or vary it.

The defendant further claimed that said agreement covered all rent earned and not collected prior to August 1, 1885. We think the construction the court put upon the agreement was correct. It should be construed in connection with the award made, and such other facts and circumstances as induced and influenced the making of the award and agreement. The award was to be prospective in its operation, and provided for the future income the plaintiff was to receive from the Hubbard estate; the first payment to be made on the 1st day of August, and each year thereafter; leaving the past income to which he was entitled to be adjusted and paid as provided by the will.

The only matter that appears to have been submitted to the arbitrators was for them to fix and determine the amount that should be paid to the plaintiff yearly as his portion of the income of the estate of Hubbard; and that was the only matter determined by the award. The defendant demanded the agreement as a guarantee that the plaintiff would abide by the award, and as evidence that he had no further or other claim to the estate than the payments provided for by the award. It was not intended and should not be construed as embracing income earned prior to August 1, 1885, to which the plaintiff was entitled under the will.

We do not find that any error occurred upon the trial, but, as the amount of the judgment to which the plaintiff is entitled has not been ascertained, *the judgment is pro forma reversed, and cause remanded.*

Horatio TEMPLETON

v.

O. C. CLOGSTON.

A count in trespass joined with a count in trover is bad on demurrer, unless it appears from the declaration that they are for the same cause of action. Thus, where the count in trespass alleged that the defendant broke and entered the plaintiff's close, and cut down and carried away 3,000 spruce trees, 1,000 hemlock trees, and 1,000 other trees; and the count in trover alleged that the defendant converted to his own use 250,000 feet of spruce lumber and 10,000 feet of hemlock lumber, etc., possessed

by the plaintiff,—*Held*, to be a misjoinder.

(Washington—Filed September 24, 1887.)

TRESPASS and trover. Heard on demurrer to the declaration, March Term, 1887. Washington County, Veazey, J., presiding. Judgment sustaining the demurrer. *Reversed pro forma.*

Messrs. J. A. Wing and S. C. Shurtleff, for the plaintiff:

The counts are sufficient.

United States v. Ordway, 30 Fed. Rep. 30.

There is not a misjoinder,

26 Chitty, Pl. 369; *Haskin v. Record*, 32 Vt. 575; *Hagar v. Brainerd*, 44 Vt. 294; *Black v. Howard*, 50 Vt. 27.

Messrs. Pitkin & Huse, for the defendant: Cited 1 Chitty, Pl. 199, 206; Rev. Laws, § 912; *Keyes v. Prescott*, 32 Vt. 86; *Skinner v. Wilder*, 88 Vt. 115; *Hagar v. Brainerd*, 44 Vt. 294; *Black v. Howard*, 50 Vt. 27.

The two counts do not embrace the same cause of action.

Royce, Ch. J., delivered the opinion of the court:

The declaration in this case was demurred to for misjoinder of counts; demurrer sustained and judgment for defendant.

The declaration contains two counts, one in trespass, the other in trover. No question is made but this would have been a misjoinder at common law, and if allowable at all, it is under our statute (Rev. Laws, § 912) which provides that "counts in trespass may be joined with counts in trespass on the case, including trover, in one declaration, if for the same cause of action."

It is not necessary that the declaration should contain any special allegation that the several counts are for the same cause of action. *Alger v. Curry*, 88 Vt. 382. But in that case no question is made but the counts were for the same cause of action.

It is sufficient if the court is satisfied from the declaration itself that the several counts are for the same cause of action. *Black v. Howard*, 50 Vt. 27. In this last case, which was *trespass quare clauum fregit*, with a count in case, the premises are described in the first count as the "home farm, so called," etc., of plaintiffs, and the trespass was the breaking in and tearing down of the "division fence" between the land of the plaintiff and the defendant. The second count is substantially like the first; and in the third count, which is the count in case, the premises are again described as "the home farm of the plaintiff," and the breach of duty alleged is the neglect of the defendant to build and maintain "a division fence" a part of the way between his land and the land of the plaintiff. Here was almost an identity of description, and the court, (Barrett, J.) says they "are satisfied that the third count was meant to cover and embrace the cause of action meant to be covered and embraced by the first two counts."

But we cannot be similarly satisfied in regard to the two counts of the declaration in the case at bar. The property is described in the first count as "a large amount of valuable trees

standing and growing on said lots, to wit, 3,000 spruce trees, 1,000 hemlock trees, and 1,000 other trees," etc.; in the second count as "a large amount of spruce logs and sawed spruce and hemlock lumber, to wit, 250,000 feet of spruce lumber and 10,000 feet of hemlock lumber," etc. Here plainly is not only no trace of identity, but rather great dissimilarity of description. The logs and lumber described in the second count not only may not have been the same trees that are described in the first, after they had been cut and part of them sawed into lumber, but indeed, if we are to take the description literally, they could not have been the same; for the "1,000 other trees" mentioned in the first count are not accounted for at all in the second,—all trace of them is lost.

If there had been an averment that the property described in the second was the same property described in the first count, it might have been necessary to consider whether a count for the conversion of the logs and lumber could be joined with trespass for entering and cutting down the trees, under the statute; but, for the reasons above expressed, we consider this declaration fatally defective without coming to that question.

On motion of the defendant, the judgment of the County Court is reversed pro forma, and cause remanded.

Charles A. REED

v.

F. L. NEWCOMB *et al.*

Since the Statute of 1884, No. 140, allowing a married woman to contract, sue, and be sued, **general assumpsit can be maintained against a husband and wife upon their joint promise**, whether made before or during coverture; and a declaration in the common counts will be sustained against them on general demurrer.

(Washington—Filed September 24, 1887.)

GENERAL assumpsit. Heard on general demurrer, September Term, 1886, Washington County, Powers, J., presiding. Judgment that the declaration is insufficient, and that the demurrer be sustained. *Reversed.*

The defendants were set up in the writ as husband and wife.

Mr. T. R. Gordon, for plaintiff, cited—*Holmes v. Reynolds*, 55 Vt. 89; Rev. Laws, § 2321; Acts 1884, No. 140.

Mr. T. J. Deavitt, for the defendants:

Our statutes have not varied the common law as to a married woman's capacity in making a contract, except in specific cases.

Ingram v. Nedd, 44 Vt. 462; *Dale v. Robinson*, 51 Vt. 20.

With nothing appearing in the record, the court will not presume it was for some cause in which the wife might be joined.

1 Chitty, Pl. 74, 79, note; *Rawlins v. Rounds*, 27 Vt. 17; *Gay v. Rogers*, 18 Vt. 842; *Carleton v. Haywood*, 49 N. H. 814; 1 Binn. 575; 2 Binn. 475. The statutes of 1880 and 1884 do not authorize a joint action.

1 Vt.

Walker, J., delivered the opinion of the court:

The question presented in this case arises upon the defendant's demurrer to the declaration, which is in the common counts in assumpsit. The defendants are husband and wife. The declaration counts upon a joint indebtedness existing in August, 1885. No specifications are referred to, and it does not appear what the joint liability declared upon is. The declaration is good, upon demurrer, for any indebtedness recoverable under the common counts in assumpsit for which the defendants are in law jointly liable.

If the indebtedness sued for is their joint antenuptial debt, a recovery may be had under the declaration. *Holmes v. Reynolds*, 55 Vt. 89.

So also may a recovery be had under the declaration upon the joint contract made during coverture with another person, since January 1, 1885. The common law by which a married woman was deemed incapable of binding herself by any contract whatever is not now in force in this State as to her contracts made with a person other than her husband. Act No. 140 of the Laws of 1884 gives a married woman power to make contracts with any person other than her husband, and to bind herself and her separate estate in the same manner as if she was unmarried; and she may sue and be sued as to all such contracts made by her either before or during coverture. This law removes the incapacity of a married woman to contract, and permits her to make contracts in the same manner and to the same extent as a *feme sole*, excepting with her husband, and enforces them. The power thus given to her to contract with other persons than her husband is unrestricted, and she may, jointly with her husband or other person, make contracts in all cases when she has legal capacity under this Act to contract. No reason of public policy now prevents, under this Act, the maintaining an action against the husband and wife upon their joint promise, whether made before or during coverture. *Holmes v. Reynolds, supra.*

As a recovery may be had under the declaration upon the joint promise of the defendants, it is good upon demurrer.

The judgment of the County Court is reversed, the demurrer overruled, and declaration adjudged sufficient; and cause remanded to the County Court to be proceeded with.

B. M. R. NELSON

v.

William C. BROWN *et al.*

1. Under the statute (Rev. Laws, § 771), an appeal is allowable only from final orders or decrees in chancery causes; and **interlocutory orders are not appealable**; thus the supreme court, of its own motion, will **remand a cause there on appeal from the order of the chancellor allowing an officer to amend return of service.**
2. A **final order or decree** is one that settles the rights of the parties under the issues made by the pleadings.

(Orleans—Filed October 14, 1887.)

BILL in chancery. Heard on the orator's motion that the officer who served original bill have leave to amend his return of service, February Term, 1887, Royce, *Chancellor*. Motion granted, and appeal by the defendants. *Appeal dismissed.*

The case is stated in the opinion.

Messrs. F. W. Baldwin, and Crane & Alfred, for defendants.

Messrs. Grout & Miles, for orator.

Powers, J., delivered the opinion of the court:

This case is important only as it illustrates a misapprehension existing to some extent in the profession, respecting appeals in chancery.

The orators, on motion, obtained leave of the court of chancery, to the officer serving the bill of complaint, to amend his return of service. The defendants asked for and were granted an appeal from the order granting leave to make such amendment.

The right to an appeal in chancery cases is conferred by Rev. Laws, § 771, which gives an appeal from any "final order or decree of the court of chancery."

A final order or decree is one that disposes of the merits of the case,—that settles the rights of the parties under the issues made by the pleadings.

Interlocutory orders made in the progress of the case towards a final decision are not appealable orders. If substantial errors are made in such interlocutory orders, remedy can be had only when the final decree in the case is before the supreme court for revision.

The order in this case was in strictest sense interlocutory. No right of the parties touching the merits of the case was affected by it.

The case, then, is not properly in the supreme court; and, although the parties do not raise the objection, the court, of its own motion, will in such cases remand the case to the court of chancery. *Hall v. Lamb*, 28 Vt. 85.

Appeal dismissed.

William G. CHURCH

v.

Enos STILES.

1. The rule that, where general terms are used in a deed, as "to" or "upon" a highway or railroad, it is presumed that the parties intended the conveyance to extend to the centre line, does not apply when the grantor does not own the fee of the highway, etc. Thus, the land was described as running "to the railroad; thence on said railroad $3\frac{1}{2}$ rods to stake and stones," etc. *Held*: (a) That the description covered land only to the line of the railroad premises; and (b) That the railroad is a monument; and this controls the boundary instead of the line running to the stake and stones.
2. When a grantee has all the land described in his deed, but not all the grantor agreed to convey, his remedy is not an action upon the covenants.

(Washington—Filed October 6, 1887.)

ACTION of covenant. Plea, the general issue and notice. Trial by court, March Term, 1886, Veazey, J., presiding. Judgment for the defendant. *Affirmed.*

The plaintiff put in evidence a warranty deed from the defendant to the plaintiff; and offered to show that, before said deed was executed, the defendant pointed out to the plaintiff a certain fence, some 20 feet or more east of the west line of the railroad land, as his true east line, and pointed out a stake and stones as the corner situated said distance east of the west line of the railroad lines, upon which the plaintiff relied. It was agreed that the railroad company had a deed of the land adjoining on the east of the land owned by the defendant when he deeded to the plaintiff.

Deed: "A certain piece of land in Middlesex, in the county of Washington, and State of Vermont, described as follows, viz.: Beginning at southeast corner of land owned and occupied by Mrs. Joel Cummins on north side of Winoski Turnpike, running northeast on said Cummins' line 8 rods; then turn northwest 1 rod; thence northeast by B. Barrett's line to the railroad; thence on said railroad $3\frac{1}{2}$ rods to stake and stones; thence southwesterly, parallel and within 1 foot of my buildings, which I now occupy, to the aforesaid turnpike road; thence on said turnpike to the place of beginning on above-mentioned corner of Mrs. Cummins,—meaning to convey about $45\frac{1}{2}$ rods northwesterly part of my home premises."

Messrs. T. R. Gordon and Heath & Willard, for plaintiff:

The defendant covenanted for the title of land of which he was not the owner.

Wilder v. Davenport, 58 Vt. 642.

It is a case of double description; and in such a case that description will, as a matter of law, be adhered to as to which there is the least likelihood that a mistake could be committed. This makes for the stake and stones, and would require that the line should run to them in preference to running on the side line. The stake and stones are expressly mentioned; the margin is not even referred to in the whole deed. They are visible and tangible; the margin is not. They reveal their own existence and location; the margin does not.

Miller v. Cherry, 3 Jones, Eq. 29; *Ferris v. Coover*, 10 Cal. 628; *Melvin v. Locks & Canals*, 5 Met. 28; *Eaty v. Baker*, 50 Me. 331; 8 Washb. Real Prop. 405.

It is presumed that the parties intended the conveyance to be to the centre of the railroad.

Ang. Highw. §§ 315, 380; 8 Washb. Real Prop. 4th ed. p. 420; 2 Smith, Lead. Cas. 216, 220; *Newhall v. Iveson*, 8 Cush. 598; *Berridge v. Ward*, 10 C. B. N. S. 400; *Winter v. Peterson*, 24 N. J. L. 527; *Kimball v. Kenosha*, 4 Wis. 331; *Chatham v. Brainerd*, 11 Conn. 60; *Buck v. Squires*, 22 Vt. 489; *Marsh v. Burt*, 34 Vt. 289; *Morrow v. Willard*, 30 Vt. 118; *Maynard v. Weeks*, 41 Vt. 619.

Boston v. Richardson, 13 Allen, 152, 153, is a clear enunciation of the law that the centre line is controlling when a highway or railroad is a monument or abuttal.

Mr. J. A. Wing, for defendant:

The deed did not cover any of the railroad land.

Parks v. Loomis, 72 Mass. 467; *Coles v. York*, 23 Reporter, 529.

When a piece of land is described as bounded on lands of another person, such lands are monuments and abutments.

Wilder v. Davenport, 58 Vt. 642; *Bundy v. Morgan*, 45 Vt. 46; *Idle v. Pearce*, 9 Gray, 350; *Boworth v. Sturtevant*, 2 Cush. 892; *Davis v. Rainford*, 17 Mass. 207; *Thatcher v. Howland*, 2 Met. 41.

The railroad was a fixed monument (*Boston v. Richardson*, 18 Allen, 152), and is controlling. No action of covenant can be sustained for land not included in the deed. The two descriptions cannot be reconciled, and the stake and stones, as a boundary, should be rejected.

Taft, J., delivered the opinion of the court:

I. This is an action upon the covenants in a deed, and it is conceded that the plaintiff has no right of recovery unless the description in the deed covers land owned by the railroad company, situate upon the easterly side of the land conveyed. The line bounding the land conveyed is described in part as running "to the railroad; thence on said railroad 3½ rods to stake and stones; thence southwesterly," etc. The plaintiff claims that the description covers land to the centre of the railroad track or roadbed, upon the familiar principle that where general terms are used in a deed, such as "to," "upon," or "along" a highway or railroad, the law presumes the parties intended the conveyance to be to the middle or centre line. In such cases that portion of the land in the limits of the road is not covered by the description in the deed, in express terms. The rule is one of construction, and is limited to those cases where the "grantor owns the fee" of the highway; for, if it was covered by the description in the deed, there would be no necessity of calling in the aid of a presumption. The grantor owning the fee, the law presumes he intended to convey it, and not retain a narrow and oftentimes a long strip of land, which for all practical purposes, would be of no value to him. But where the grantor does not own the fee of the land, the law will not presume that he intended to convey that which he did not own. The description covers land only to the line of the railroad premises.

II. But the plaintiff claims that, if the words of the deed do not describe the land to the centre of the roadbed, the line bounding his land runs from the point where it strikes the railroad land, to the stake and stones set twenty feet or more east of the west line of the railroad. The description, in terms, bounded the land upon the railroad land, and thus the latter becomes a monument; and this monument must control the boundary rather than the course claimed by the plaintiff. For, as was said by Peck, J., in *Bagley v. Morrill*, 46 Vt. 94: "Where there is a conflict between courses and distances on the one hand, and monuments on the other, mentioned in the description in the deed, the courses and distances must yield to the monuments."

In a late case in Maine it was held that, "where one accepts a deed bounding him by another's land, the land referred to becomes a monument which controls distances; and that

the law will not allow him to overlap and hold any portion of the other's land." *Bryant v. Maine Cent. R. R. Co.* 4 New Eng. Rep. 413.

It is evident that, when the deed in question was given, the parties supposed that the defendant owned to a line twenty feet nearer the centre line of the railroad than he did; but the description in the deed covered land only to the true railroad line. The plaintiff now has all the land described in the deed, and therefore the defendant is not liable upon his covenants, as there has been no breach of them. If the land described in the deed is not all that the defendant agreed to convey to the plaintiff, the remedy of the latter is not by way of an action upon the defendant's covenants.

The ruling of the county court upon the case before it was correct, and the judgment is affirmed.

Re HOWARD & LEAVITT, Insolvent Debtors.

1. On application of the debtors for a discharge under the insolvent law, and the question being whether they had "kept proper books of account" or not, the case was referred to a master, who failed to find as a substantive fact that such books were not kept.—*Held*, that the court will not infer the essential fact from the facts reported, and that a discharge should be granted,—distinguishing this case from *Durant v. Pratt*, 55 Vt. 270.
2. The court will send back a case to be recommitted to the master only when it thinks that otherwise great injustice would be done.

(Orleans—Filed October 13, 1887.)

APPEAL from the Court of Insolvency to the Court of Chancery by Hirshkind & Co., a creditor, on the question of the discharge of the insolvent debtors, Howard & Leavitt. Heard on a master's report, February Term, 1887, Royce, *Chancellor*. Ordered that the appeal be dismissed and a discharge granted to the insolvent debtors, and that the case be certified back to the Court of Insolvency. *Affirmed*.

Hirshkind & Co. objected to the granting of the discharge for the reason that the insolvent debtors, being merchants and doing business as copartners, did not, in the course of their copartnership business, keep proper books of account. The master reported no part of the evidence, but certain facts; as that Howard & Leavitt entered into a copartnership to deal in general merchandise; that after about one year they were burned out and ceased doing business; that they were regularly adjudged insolvent debtors; that they professed to do a cash business, but gave a short credit where persons were perfectly good; that they kept no books, except "each day's sales were kept on slips of paper, and at night the cash received during the day was added up and entered upon a book called the 'Sales and Cash Book,' and those slips upon which entries of goods sold upon credit were made, were put on file," etc.

Messrs. John L. Carr and C. A. Prouty, for the creditor :

It was the duty of the debtors to keep proper books of account.

Hammond v. Cooledge, 3 B. R. 71; *Re Solomon*, 2 B. R. 94; *Re Littlefield*, 3 B. R. 18; 3 B. R. 94.

Their books should show in an intelligible manner the nature and character of their receipts and disbursements.

Re MacKay, 4 Nat. Bankr. Reg. 66.

A merchant's books must show a true account of his standing at the date of his insolvency.

Re Garrison, 7 B. R. 287; *Re Archenbroun*, 12 Nat. Bankr. Reg. 17.

The statute lays down an arbitrary command that no discharge shall be granted unless such books have been kept.

Cases *supra*.

Messrs. N. Rand and Edwards & Burke, for the debtors:

If the books of the debtors will show their financial standing, they are entitled to a discharge.

Bump, Bankr. 711; *Re Keach*, 3 Nat. Bankr. Reg. 13; *Re Gray*, 2 B. R. 358.

If books be kept by a firm, the law presumes they are kept in regular form.

Re Mark Banks, 1 N. Y. Leg. Obs. 274; *Bump*, 9th ed. 713.

It is a question of fact whether the books are such as will give to a competent person examining them, a knowledge of the true state of the bankrupt's affairs. The report does not show that improper books were kept.

Re George & Proctor, 1 Lowell, 409; *Re Schumpert*, 8 Nat. Bankr. Reg. 415; *Re Reed*, 12 Nat. Bankr. Reg. 390.

A discharge will not be refused for not keeping proper books, without full evidence of the facts and their bearing upon the business.

Re Batchelder, 3 Nat. Bankr. Reg. 150.

Rowell, J., delivered the opinion of the court:

Whether the insolvent debtors "kept proper books of account" or not is conceded to be a question of fact, as it must be from its very nature; for, being paraphrased, the question is, as said by the Supreme Court of Massachusetts, whether the debtors kept such books of account as would enable a competent person to ascertain with reasonable certainty the true state of their affairs. *Wilkins v. Jenkins*, 136 Mass. 38.

It is also conceded that the master has not found as a substantive fact that such books were not kept; nor is it claimed that it devolved upon the debtors to make such proof; but it is claimed that, from the facts reported, this court can and ought to infer and find that such books were not kept, and *Durant v. Pratt*, 55 Vt. 270, is relied upon in support of the claim. But the cases are different. There the master reported evidence tending to show a payment, and left it to the court to say whether it showed it or not; and the court said it would consider the evidence the same as though taken under the former practice, and found payment. But here the master reports, not evidence, but facts, and submits those facts to the court, as if to have their legal quality determined. But the essential fact is lacking to disentitle the debtors to their discharge, and the court will not find

it, nor is it a necessary inference from what is found.

This court does sometimes, in its discretion and *sua sponte*, send back cases to be recommit- ted to the master or the referee for more definite or further findings. But this is rarely done, and only when the court conceives that other- wise great injustice would be done. We do not regard this case as one calling for the exercise of that discretion.

Decree affirmed, and cause remanded.

Joseph BROWN

v.

William H. DUBOIS, State Treasurer.

A seaman in the United States naval service during the war of the rebellion was not entitled, under the statutes, to the extra State pay of \$7 per month; even though he first enlisted into the military service and was credited on the quota of this State, and afterwards, under an Act of Congress, voluntarily enlisted into the navy. No one but a soldier in the military service of the United States was entitled to such pay.

(Washington—Filed October 14, 1887.)

PETITION for a writ of *mandamus*. *Dismissed.*

The facts and question presented are stated in the opinion.

Messrs. Bates & May, for the petitioner, cited—

Acts 1861, No. 2, § 10; also Id. Nos. 6, 9, 60, 64; Acts 1863, No. 8; Adj. General's Report, 1864, p. 300; 13 U. S. Stat. pp. 6, 7, 119, 402; Act of Congress, approved Feb. 24, 1864, chap. 12, § 7; Order No. 91 of the War Department.

When the soldier enlisted into the United States service the State no longer had control over him. He was doing his duty according to the terms of his enlistment contract when in the naval service.

Messrs. W. P. Dillingham and J. D. Denison, for the State Treasurer:

The relator must establish a clear and specific legal right, and that there is no other adequate legal remedy.

High, Ex. Rem. §§ 9, 10, 14; *State v. Babcock*, 51 Vt. 575.

His alleged right to the extra pay depends wholly on the statutes of this State.

Acts 1861, Nos. 2, 6, 7, 9, 43, 60, 61, 63, 64, 67.

By these, clearly, he is not entitled to the pay.

Walker, J., delivered the opinion of the court:

This is a petition for a writ of *mandamus*. The petitioner prays for a writ of *mandamus*, to be issued by this court, directing the defendant, as State Treasurer, to pay him extra State pay at the rate of \$7 per month from April 2, 1864, to May 27, 1865, during which time the petitioner was serving in the navy of the United States, in the war of the late rebellion of 1861.

The petitioner first enlisted June 28, 1862, as a private in Company A, 10th Vermont Regiment, for the term of three years, and, by the terms of his enlistment, he agreed to accept such bounty, pay, rations, and clothing as are or may be established by law.

He was mustered into the United States service on the 1st day of September, 1862, as a private soldier of said company, and was credited on the quota of the State of Vermont, by the government of the United States, for the term of three years.

He served in said company and regiment until April 21, 1864, when he voluntarily enlisted into the service of the United States, as a seaman in the navy, for the unexpired term of his enlistment for military service, under the Act of Congress, approved February 26, 1864, which provided that any person in the military service of the United States, who was a mariner by vocation, or an able seaman, or an ordinary seaman, might enlist into the navy for the unexpired term of his military service, under such rules and regulations as might be prescribed by the President of the United States.

Under this enlistment in the navy he served until May 27, 1865, when he was discharged. By his enlistment in the navy under the Act of Congress and the rules and regulations prescribed by the President, he ceased to be a member of Company A, 10th Vermont Regiment, and was not thereafter a member of any military organization of the State, or of the United States, during the period for which he claims extra State pay of \$7 per month. His name was no longer borne upon the military rolls of the government as a soldier thereof. His new enlistment and muster into the naval service ended his military service as a soldier in the army of the United States as a member of Company A, 10th Vermont Regiment, and was, in effect, a discharge from such military service. He was no longer entitled to draw pay from the State, or the United States, as a soldier in the military service; he was thereafter entitled to pay and allowances as a seaman in the naval service of the United States, including therein his share of prize money obtained from captures made by the vessel in which he served.

The right of any person in the United States service upon the quota of Vermont to \$7 per month extra pay from the State depends entirely upon the statute laws of the State. None are entitled to it except such as come within the provisions of the same. The right does not depend solely upon the fact that the person was credited upon the quota of men required to be furnished by the State; but upon the rank of the soldier and the organization in which the service was performed. The petitioner, while in the naval service as a seaman, was not entitled to the extra pay of \$7 per month from the State unless his right thereto is established by some statute law. All the Acts of the Legislature upon this subject restrict the extra pay granted by the State to soldiers serving as noncommissioned officers, musicians, and privates in the military service of the United States, in some Vermont regiment of infantry, cavalry, artillery, or detached companies of Vermont troops in other regiments of the United States service, mustered in an organized capacity by the authority or with the

consent of the governor of the State; and such soldiers are entitled to receive such extra pay only for the term of their service in such State organizations.

Act No. 8 of 1863, which was passed before the petitioner's enlistment in the navy, especially provides that noncommissioned officers, musicians, and privates then in the service shall be entitled to \$7 per month extra pay from the State only so long as they shall remain in Vermont regiments or in detached companies of Vermont men in other regiments of the United States service.

No Act of the Legislature grants this extra pay to commissioned officers, although they are credited upon the quota of the State. No statute law upon the subject of extra pay to persons serving in the war of the late rebellion has been brought to the attention of the court, and we are able to find none which authorizes the payment of \$7 per month extra pay to persons serving as seamen in the naval service. The provisions of no Act extend to any class except soldiers serving as noncommissioned officers, musicians, and privates in some organization in the army, under the authority or with the consent of the governor.

The evidence does not show that the petitioner is entitled to the extra pay he claims by his petition under any law of the State, and the petition is therefore dismissed, without costs.

Julia A. CONGDON

v.

J. M. CONGDON.

Under the statute (Rev. Laws, § 1426) affording relief to one who has been prevented from taking an appeal by fraud, accident, or mistake, a widow, living in another State, where her husband deceased, leaving an estate there, and also a farm in this State occupied by his parents, and his mother, having a life lease of it, is entitled to an appeal from the decision of the probate court, allowing a claim against the estate, when the widow did not know that administration had been taken here, and she was not wanting in reasonable diligence, and was justified in supposing that nothing was necessary to be done to protect her interest; and this on the ground that there was a mistake within the meaning of the statute.

(Orleans—Filed October 8, 1887.)

PETITION under Rev. Laws, § 1426. Heard on demurrer to the petition, September Term, 1886, Ross, J., presiding. As a matter of law, and not of discretion, the court sustained the demurrer, and adjudged the petition insufficient. *Reversed.*

The facts appear in the opinion.

Messrs. H. C. Wilson and L. H. Thompson, for petitioner.

Messrs. J. L. Lewis and C. A. Prouty, for defendant.

Veasey, J., delivered the opinion of the court:

The decision of the county court was evidently based on the theory that the statute does not cover the case as made by the petition; as it was a decision as matter of law, and not of discretion. The court could not exercise its discretion unless the facts alleged brought the case within the provisions of the law authorizing the proceeding. This remedy is limited to cases where "the petitioner has been prevented from taking or entering an appeal by fraud, accident, or mistake." Rev. Laws, § 1426.

1. The fraud alleged pertained to the allowance of the claim, and did not intervene to prevent taking or entering an appeal. The statute does not make it the duty of administrators to notify all parties personally, in interest in an estate, of the presentation or allowance of claims, and that he declines to appeal. All the notices which the law requires were given. The failure of the petitioner to appeal was not induced or influenced by any act of the claimant or administrator. Their alleged fraud did not prevent the appeal.

2. The petitioner living out of the State, and not hearing of the proceedings taken on her husband's estate in Vermont, was not such an accident as is contemplated by the statute. *Burbeck v. Little*, 50 Vt. 713. Nothing happened to mislead her, or to hinder or prevent any proposed action on her part, in respect to an appeal. Accident, in the sense of this statute, cannot be predicated when all the provisions of law as to notice are complied with, and all the proceedings regular, and nothing happens to the individual contrary to intention and the usual course.

3. Was there a mistake within the meaning of the statute? The petitioner's mistake was in supposing nothing was necessary to be done on her part in reference to her deceased husband's property in Vermont, in order to protect it and her interest therein. If she was reasonably justified in this assumption, we think it was such mistake as this statute was designed to remedy. It is a remedial statute, and should be liberally expounded and administered. In *Sleeper v. Oroker*, 48 Vt. 9, Peck, J., in discussing Rev. Laws, § 1428, which provides for setting aside justice judgments, and for appeals, in case of fraud, accident, or mistake, says: "There is no reason why a court of law should not grant relief in cases of this kind wherever a court of equity, if it had jurisdiction of such cases, would be warranted in granting such relief."

The situation of the petitioner, as shown by the petition, which was demurred to, was this: She lived in Boston, Massachusetts. Her husband had died there without issue, leaving an estate amounting to several thousand dollars, which was in regular process of administration in the probate court having jurisdiction. Previous to his decease he had made provision for the support of his parents in Vermont, where they lived, by a life lease of a farm to his mother; and aided them further by permitting them to use the personal property thereon belonging to him, and by constantly furnishing other means. The petitioner alleges that her husband owed no debts in Vermont at his decease. After that, the parents continued to live on said farm as before and in the use of the personal property thereon. The

petitioner had no suspicion of fraudulent practices against her husband's estate in Vermont. She had no occasion to believe and did not suppose it was necessary to have administration taken thereon until the termination of the life lease. These were the circumstances under which she neglected to guard herself and the estate against that which is alleged to have been a fraudulent claim of her husband's father. This was the mistake she made. If the neglect, such as it was, was the lack of reasonable diligence, she has no remedy under this statute, as repeatedly held. *Babcock v. Brown*, 25 Vt. 550. The attitude and relation of these parties, as revealed in the petition, would naturally inspire implicit confidence. The question comes to this: Was it negligence for this widow thus situated to be unguarded and not watchful against the fraud of a parent who had thus lived and was continuing to live uninterruptedly upon the charitable provision of the deceased son? We think the mistake was natural and even commendable,—such, indeed, as a prudent man would be likely to make under like circumstances. The relief sought is not to deprive of a right to prosecute a claim, but to prevent a wrong, by restoration to the previous condition.

The facts distinguish this case widely from that of *Burbeck v. Little*, *supra*. That case was put in the petition solely on the ground of accident, and disclosed nothing upon which to found a mistake.

We hold that the facts stated in the petition bring the case within the provisions of the statute; but as the petition was addressed to the discretionary action of the county court, by force of the statute it must be returned to that court.

Judgment reversed, and cause remanded.

STATE of Vermont.

v.

Foster S. DANA.

1. A person may be convicted on the **un-corroborated testimony of an accomplice**. Although his statements should be received with great caution, and the jury should always be so advised, yet, if they find it true, no confirmation is needed.

NOTE.—*Testimony of accomplices*. In the recent case of *People v. Ogle*, 2 N. Y. (L. ed.) 501, 7 Cent. Rep. 49, 104 N. Y. 511, it was held that it was not error for the judge to refuse to charge the jury, in relation to the acts necessary for the corroboration of an accomplice, "that they must be inconsistent with the innocence of the defendant, and which exclude every hypothesis but that of guilt;" and it was also held that the rule as to corroboration of an accomplice only requires a corroboration as to some material fact which goes to prove that the prisoner was connected with the crime.

The New York statute on the subject (Code Cr. Proc. § 399), is as follows. "A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime; and the corroboration is not sufficient if it merely show the commission of the crime, or the circumstances thereof."

In *People v. Everhardt*, 2 N. Y. (L. ed.) 505, 7 Cent. Rep. 53, 104 N. Y. 501, it was held that, under § 399 of the New York Code of Criminal Procedure, in order

3. Where the respondent was charged with committing incest with his niece, and she testified against him.—*Held* that the rule as to corroborative evidence merely required such confirmation of the particulars of the accomplice's story as convinced the jury of its truth.

3. Rev. Laws, § 2306, prohibits a marriage between a man and his brother's daughter; Rev. Laws, § 4246, provides that persons between whom marriages are prohibited by § 2306, and who commit fornication with each other, shall be punished as in case of adultery. The respondent was indicted for incest; and it was charged in substance that he committed fornication with his brother's daughter, and that he and she are "persons between whom marriage is prohibited." *Held*, in arrest, that the indictment is sufficient; and that it was not necessary to allege that the respondent had carnal knowledge of the person of the *particeps*; or that he knew of the relationship existing between them; or that marriage was prohibited between them by the laws of the State of Vermont.

(Washington—Filed October 15, 1887.)

INDICTMENT under Rev. Laws, § 4240, charging the respondent with having sexual intercourse with one Minnie C. Dana, the daughter of a brother of said respondent.

Trial by jury, September Term, 1886, Powers J., presiding. Verdict, guilty. The respondent moved in arrest, but the motion was overruled. *Affirmed*.

The said Minnie C. Dana was the principal witness against the respondent. The testimony on the part of the State tended to show that said Minnie C. was delivered of a child; that the respondent and Minnie C. lived near each other; and it was not controverted but that she was frequently at his house, and that they frequently met. The said Minnie C. testified that on a certain time, when she was at his house, he carried her into a bedroom, and against her will had sexual intercourse with her; that a few weeks afterwards, when she was at his house, and in the same bedroom, the respondent came in, closed the door by putting the blade of a jackknife over the latch in the

door, and again had sexual intercourse with her; and that at a certain time, after she knew she was pregnant, she met him near his house, not far from the "duguway," so called, told him of her condition, and asked him to help her. The mother of Minnie C. testified that she saw her and the respondent at the duguway, but that she heard no talk. The respondent admitted that he had the jackknife, and did not deny that he met her at the duguway, but denied that she told him that she was pregnant, on that or any other occasion, and claimed that he knew nothing about the matter until he was arrested.

The court charged in part as follows:

"Something has been said in the argument of this case respecting the testimony of this *particeps*,—this girl Minnie. It is said that she is an accomplice. And counsel request us to charge you that you have no right to convict a person upon the uncorroborated testimony of an accomplice. Well, it is true that there has been very much discussion in the books upon this subject; and there may be, perhaps, a seeming difference of sentiment respecting it. But the courts of this State have long ago laid down the rule that it is not precisely accurate to say that no conviction can be had upon the sole testimony of an accomplice. The question is one for the jury to consider in view of the fact that the accomplice is guilty of the same crime as the person on trial. It is always the province and right of the jury to judge of the credibility of testimony.

Messrs. S. C. Shurtleff and J. G. Wing, for respondent:

The said Minnie C. was an accomplice; and the court should have charged the jury that there could be no conviction on her uncorroborated testimony.

Rap. & L. L. Dict. 47 Ill. 152; *United States v. Jones*, 2 Wheeler, Cr. Cas. 451; *People v. Whipple*, 9 Cow. 707; *Rea v. Neal*, 32 E. C. L. 481; *Rea v. Addis*, 25 E. C. L. 452; *Reg. v. Dyke*, 34 E. C. L. 723; *Reg. v. Jellyman*, Id. 547; Roscoe, Cr. Ev. 121.

The evidence on the part of the State tended to prove rape; and a conviction for incest would not be a bar to a prosecution for rape.

State v. Smith, 43 Vt. 324.

As to corroborative evidence, see 1 Greenl. Ev. § 380.

The indictment was not sufficient. It should have been alleged that the respondent had

of an accomplice was held faulty, which failed to explain what is meant by the words "matters material to the issue," where the jury were informed that, as to such matters, there must be corroboration; and also where the instruction failed to tell the jury that the corroboration of the testimony of an accomplice should identify the person of the prisoner.

In *State v. Maney*, 1 Conn. (L. ed.) 238, 2 New Eng. Rep. 223, 54 Conn. 173, it was held that any fact or circumstance tending to corroborate any material part of the testimony of an accomplice was admissible for what it was worth, although it might not inculpate the accused.

In the same case it was also held that an instruction that if the jury, after making due allowance for the suspicious circumstances under which the testimony of an accomplice is given, were fully convinced of the prisoner's guilt, they could return a verdict of guilty, was not erroneous,—the attention of the jury having been directed to the evidence in the case tending to corroborate the accomplice.

In *State v. Chyo Chagik*, 3 Mo. (L. ed.) 536, 10 West. Rep. 303, an instruction in regard to the testimony

of an accomplice was held faulty, which failed to explain what is meant by the words "matters material to the issue," where the jury were informed that, as to such matters, there must be corroboration; and also where the instruction failed to tell the jury that the corroboration of the testimony of an accomplice should identify the person of the prisoner.

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carnal knowledge of, etc. (*Heard*, Cr. L. 728; *Bish*. Forms, 564); that he had knowledge of the relationship existing between him and the accomplice (*Rea v. Harrington*, 58 Vt. 181; *Lampkins v. Justice*, 1 Ind. 580; *Griggs v. Vickroy*, 12 Ind. 549).

Mr. E. W. Bisbee, *State's Atty.*, for the State: The indictment was sufficient.

Rev. Laws, §§ 2306, 4246; *Bish*. Stat. Cr. 732; *Hood v. State*, 56 Ind. 263; *Commonwealth v. Elwell*, 2 Met. 190; *Commonwealth v. Smith*, 103 Mass. 444; *Hicks v. People*, 10 Mich. 395.

Minnie C. Dana was not an accomplice.

Whart. Cr. Ev. 440.

But if an accomplice, she was a competent witness.

State v. Colby, 51 Vt. 291.

It only affected her credibility; and a conviction may be had upon her uncorroborated testimony.

1 *Phil*. Ev. 89; 1 *Greenl*. Ev. § 880; 1 *Bish*. Cr. Proc. § 1169; 1 *Chitty*, Cr. L. 604; *State v. Cunningham*, 31 Me. 355; *State v. Litchfield*, 58 Me. 267; *Commonwealth v. Price*, 10 Gray, 474; *Commonwealth v. Brooks*, 9 Gray, 299; *People v. Jenness*, 5 Mich. 305; *Gray v. People*, 26 Ill. 344; *State v. Williamson*, 42 Conn. 261; 25 *La. Ann*. 522; 52 *Miss*. 928.

Walker, J., delivered the opinion of the court:

This is an indictment under Rev. Laws, § 4246, which provides that persons between whom marriages are prohibited by Rev. Laws, §§ 2306, 2307, who intermarry, or who commit fornication with each other, shall be punished as in case of adultery. The indictment is in two counts, each of which charges that the respondent, Foster S. Dana, "did commit fornication with one Minnie C. Dana, the said Minnie C. Dana then and there being the daughter of the brother of the said Foster S. Dana; the said Foster S. Dana and the said Minnie C. Dana being persons between whom marriage is prohibited," etc.

The points urged in behalf of the respondent in the argument of counsel are raised upon exceptions taken to the charge of the court, and upon the respondent's motion in arrest of judgment.

The respondent's counsel requested the court to charge the jury in accordance with the following requests:

1. That, as this indictment is framed, Minnie C. stands as an accomplice.

2. That it is the duty of the court to advise the jury that when the crime charged is supported only by the uncorroborated testimony of an accomplice, it is the duty of the jury to acquit the respondent.

3. That facts and circumstances, about which there is no dispute, which are testified to by an accomplice, and which do not necessarily tend to fix the crime charged upon the respondent, are not corroborating evidence.

4. That in this case the fact that the accomplice was admitted to be at the defendant's house, or that he on several different occasions met her and talked with her, or that at that time he had a jackknife, and all similar facts and circumstances, about which there is no conflicting evidence, do not tend in this case to corroborate her.

5. That all facts or circumstances are to be construed as innocent unless they necessarily tend to show guilt of themselves, or are so connected with other facts as to show guilt.

1. We think the respondent has no ground of complaint of the charge of the court in respect to the subject-matter of his first two requests, which are considered below together; and that there was no error in the charge of the court as given, nor in its refusal to charge as requested in said two requests.

The court very fully instructed the jury as to what facts would constitute the complainant, Minnie C. Dana, a voluntary accomplice in the crime charged; and that, if they found such facts upon the evidence, then she was an accomplice; and properly advised the jury that although they had a right to convict the respondent upon the uncorroborated testimony of an accomplice implicated in the crime charged, if it satisfied them of his guilt beyond a reasonable doubt, yet they ought not to convict him upon the testimony of an accomplice alone, unless they found in the story of the accomplice itself such inherent evidence of truthfulness that they were forced to believe it; and that they ought to proceed with the greatest caution in rendering a verdict of guilty upon the uncorroborated statement of an accomplice; that such a witness is not entitled to the same amount of credit as a witness who is not clouded by any such character; and that ordinarily, when the testimony of an accomplice becomes material to establish the guilt of a respondent, there should be corroboration of it in some material respect—in some respect that goes to the essence of the crime itself—before it would be safe to render a verdict of guilty. The charge in other respects fully advised the jury as to the caution they should exercise in giving credit to an accomplice in a crime; and that ordinarily jurors should cast about for corroborative proof before they convict upon the testimony of an accomplice.

There is no rule of common law, nor of the statute law of this State, that a person shall not be convicted on the testimony of an accomplice unless corroborated by other evidence. In some States such a rule may exist, either from a code or statute law.

It is always a question for the jury, who is to pass upon the credibility of the accomplice, as they must upon that of every other witness. His statements should be received with great caution, and the court, as the court did in this case, should always so advise; yet, if the testimony of the accomplice obtains full credit with the jury, and they are fully convinced of its truth, they should give the same effect to his testimony as should be allowed to an unimpeached witness who is in no way implicated in the offense. Such testimony, if believed by the jury, will warrant a conviction. In all cases where the prosecution depends upon the uncorroborated testimony of an accomplice, the court, as before stated, should advise great caution on the part of the jury in giving credit to it; but the jury are not to be advised or instructed, as matter of law, that the prisoner in such case must be acquitted. It is not the duty of the court to advise the jury as to their conclusions upon the evidence which has been

given on trial for them to consider and weigh in finding whether the respondent is guilty or not guilty of the offense charged. The accomplice is a competent witness, and his testimony must receive such credit and weight as the jury find it entitled to. If the jury find his testimony to be true, the consequence is inevitable; it needs no confirmation from another witness. When his testimony is believed by the jury, it is unquestionably sufficient to establish the facts as to which he testifies, without any confirmation. It is not for the court to determine the credibility of the accomplice; and the court cannot, as matter of law, advise the jury that they must acquit the respondent by reason of lack of credibility of the accomplice when his testimony is not corroborated by other evidence. *State v. Potter*, 42 Vt. 495; *Lindsay v. People*, 63 N. Y. 143; *Roscoe*, Cr. Ev. 143; 1 Greenl. Ev. § 380; *Re v. Jones*, 2 Camp. 181; *Re v. Hastings*, 7 Carr. & P. 152; *Jordaine v. Lashbrooke*, 7 T. R. 601; *Re v. Atwood*, 1 Leach, C. C. 464.

In the case last cited the twelve judges were unanimously of the opinion that if the jury, weighing the probability of the accomplice's testimony, think him worthy of belief, a conviction supported by such testimony alone is perfectly legal.

2. As to the respondent's 3d, 4th, and 5th requests to charge, the court instructed the jury as follows: "It is claimed that the evidence of this witness (Minnie) is corroborated by the testimony of her mother and others who saw her in conversation with the respondent. Well, before you determine that, you must inquire what was that talk. If that was innocent conversation between an uncle and his niece, then, very plainly, there is nothing, in that, that points towards guilt at all. That talk, in other words, must be of the kind and character that she describes in order to warrant you, if you are satisfied that it took place, in relying upon it as corroborating her in any respect. If she met him at the 'dugaway,' or on any other occasion, and conversed with him upon the subject-matter of her trouble, and advised with him as to how she had best manage to get rid of her guilt, and he participated in that and talked with her about it, why, that, in and of itself, is a circumstance tending to show that he was in some measure responsible for it. On the other hand, if the talk was such as he represents it, a casual meeting of her and a casual talking, not on this subject, it is, of course, not of any importance. And so with other evidence as to corroborating circumstances introduced here on behalf of the State."

As it was competent for the jury to convict on the uncorroborated testimony of the accomplice, if they believed it to be true, it was not necessary for the court to state to the jury more fully than it did, in the extract from the charge above quoted, what constituted corroborative evidence, nor in what particulars confirmation should be had when necessary. The rule as to the manner and extent of corroboration required, when necessary, is said by some writers not to be definitely settled. Learned judges have differed somewhat on this subject. *Chief Baron Joy*, in his *Treatise on Evidence of Accomplices*, says: "The only rule which has the appearance of reason to support it is that which has uniformly and without an exception

been laid down and acted upon by the English judges, which is that the confirmation ought to be in such and so many parts of the accomplice's narrative as may reasonably satisfy the jury that he is telling truth, without restricting the confirmation to any particular points, and leaving the effect of such confirmation (which may vary in its effect, according to the nature and circumstances of the particular case) to the consideration of the jury, aided in that consideration by the observations of the judge."

This rule requires such confirmation as to the particulars of the accomplice's story as convinces the jury of its truth, and no more; and we think it a reasonable one, and an embodiment of the law upon that subject. It is not essential that the confirmation point directly to the respondent. It is corroborative if it be of any part of the material statements of the accomplice, and must be given its weight as such, the question being in all cases whether the jury, upon all the evidence, will believe the uncorroborated parts of the testimony.

When corroboration is necessary, it is not indispensable that such corroboration should be furnished by positive and direct evidence, but circumstances or facts proved or admitted, legitimately tending to show the existence of material facts, will be sufficient to authorize a conviction if they satisfy the jury of the truthfulness of the accomplice's story.

In the light of this rule we think the learned judge, in his charge as regards the respondent's 3d, 4th, and 5th requests, complied with the law, and we find no substantial error therein, nor in his refusal to charge as requested.

After verdict the counsel for respondent filed a motion in arrest of judgment for insufficiency of the indictment in the following particulars: (1) because it is not alleged therein that the respondent ever had carnal knowledge of the said Minnie C.; (2) because it is not alleged therein that the respondent knew the relationship existing between him and the said Minnie; (3) because it is not alleged therein that marriage between the parties is prohibited by the laws of the State of Vermont. The county court overruled this motion. These objections to the indictment will be considered in the order stated.

1. The indictment is based upon Rev. Laws, § 4248, which provides that persons between whom marriage is prohibited by Rev. Laws, §§ 2806, 2807, who intermarry or commit fornication with each other, shall be punished as in case of adultery. The offense is a statutory one. By it fornication is made a crime only when committed by persons within certain degrees of consanguinity. Its definition, and proceedings to punish persons charged with it, are dependent upon the statute itself.

The indictment charges that the respondent "did commit fornication with Minnie C. Dana," and alleges in apt language that the respondent is related to her within the degrees of consanguinity specified in §§ 2806, 2807; and that they are persons between whom marriage is prohibited. The allegations of the indictment bring the case within the provisions of the statute creating the offense, and are sufficient, if the crime is sufficiently described. It is objected that the averment that the respondent "did commit fornication" with the *particeps* is not sufficient in this, that there is no formal

allegation that he had carnal knowledge of her person. Fornication, at common law, is the illicit or sexual intercourse of two persons of different sexes when neither is married. It has at common law, primarily, no other meaning. When the general word "fornication" is used in an indictment for fornication as descriptive of the offense, it is an allegation of illicit intercourse of two unmarried persons of different sexes; and the allegation, "did commit fornication," etc., is a sufficient averment of carnal knowledge of the person. The word "fornication,"—as used in the indictment, in connection with the other averments necessary to bring the case within the provisions of the statute, clearly shows what offense is charged. The respondent could not be misled as to what charge was brought against him to which he was to plead, and against which he was to defend himself. There could be no doubt as to what offense he was to be tried for, or the judgment that ought to be rendered in case of conviction; and a record of the judgment would furnish a full defense, if the respondent should afterwards be prosecuted for the same crime. All the objects to be secured by requiring certainty in indictments are fully secured by it. The use of the general word "fornication," in the description of the offense, is approved by Wharton's Criminal Law, vol. 2, § 2267, and in Wharton's Precedents, §§ 1003, 1004. In the form of an indictment for fornication, there recommended to the pleader, the crime is described by using the general word as it is used in the indictment.

2. This is not a crime where the statute makes it necessary to allege and prove affirmatively that the respondent knew the relationship existing between him and the *particeps*. The respondent's knowledge of the relationship is not made an essential part of the crime. We have another statute which makes it a crime to carnally know a female child under the age of eleven years, with or without her consent. Would it be necessary to allege and prove affirmatively that the accused knew she was under

the age of eleven years,—a fact extremely difficult and in most cases impossible to prove? We think not. A more reasonable and practicable rule is that if a person willfully does an unlawful and criminal act, he takes upon himself all the legal and penal consequences of such act, regardless of his knowledge, unless knowledge is made an essential ingredient of the crime. This same question was raised and decided by the supreme court in the case of *State v. Wyman*, 1 Vt. (L. ed.) 280, 4 New Eng. Rep. 126, on an indictment upon the same statute, where the court held it was not necessary to allege knowledge of the relationship in such an indictment.

3. The essence of the crime charged in the indictment is the commission of fornication by persons within the degrees of consanguinity specified in §§ 2306, 2307. The statute creating the offense describes the persons who shall be punished for fornication as being the persons between whom marriage is prohibited by said sections. The indictment sets forth that the parties to the crime are related within the degrees of consanguinity mentioned in said sections, and that they are persons between whom marriage is prohibited. It is objected that the allegation as to prohibition of marriage is insufficient, in that it does not allege that marriage is prohibited between them by the laws of the State of Vermont. If the allegation that marriage is prohibited between the parties is necessary (which we do not decide), in addition to the allegation that the parties are related within the degree of consanguinity specified in said sections, it is sufficient to allege that marriage is prohibited between them, without adding the words "by the laws of the State of Vermont."

The conclusion, *contra formam statuti*, sufficiently shows that the offense charged in the indictment is an offense under statute law of the State of Vermont.

We think the respondent's motion in arrest of judgment was properly overruled.

The result is the respondent takes nothing by his exceptions.

MASSACHUSETTS.

SUPREME JUDICIAL COURT.

Re CIVIL SERVICE RULES.

OPINION of the Justices of the Supreme Judicial Court UPON QUESTIONS PROPOUNDED BY THE GOVERNOR AND COUNCIL upon a Rule submitted by the Civil Service Commissioners.

1. The effect of chapter 437 of Acts of 1887, exempting honorably discharged soldiers and sailors from the examination required by the civil service law (Acts 1884, chap. 320), and from the disability of age, etc., was not to remove such persons from the operation of the civil service law entirely, but left them subject to the operation of that law except so far as expressly exempted therefrom.
2. Hence, under Acts 1887, chap. 437, honorably discharged soldiers and sailors cannot be preferred for appointment to office without having made application for appointment to the Civil Service Commissioners as required by Acts 1884, chap. 320, and the rules made thereunder.
3. An answer to a general question as to the validity of a rule prepared by the Civil Service Commissioners in reference to applications for appointment from honorably discharged soldiers and sailors, declined.

(Filed September 22, 1887.)

ON July 20, 1887, at a meeting of the Governor and Council, the opinion of the Justices was asked upon the questions stated in the following order passed on that date:

Whereas the Civil Service Commissioners have prepared and submitted to the Governor and Council for approval, pursuant to chap. 320, § 2, of the Acts of the Legislature for 1884, the following civil service rule:

"Clause 1. Any person who served in the army or navy of the United States in the time of the war of the rebellion, and was honorably discharged therefrom, desiring, under chap. 437 of the Acts of 1887, appointment to office or employment in positions classified under the civil service rules, without having passed any examination provided for therein, shall file an application for such appointment, stating on oath (1) his name, residence, and postoffice address; (2) the office or employment he seeks; (3) the time of service in the army or navy, the regiment and company in which, or the vessel on which, such service was rendered, and the date of his discharge; (4) whether the applicant habitually uses intoxicating beverages to excess, or is a vendor of intoxicating liquor; (5) whether he has within one year been convicted of any offense against the laws of the Commonwealth; (6) that he desires appointment or employment without having passed the examination provided for by the civil service rules.

Such application shall be accompanied by certificates of good moral character and capacity

for performance of the duties of the office or employment. Such application, if for an office or employment in the service of the Commonwealth or of the city of Boston, shall be filed in the office of the commissioners; if for an office or employment in the service of any other city than Boston, it shall be filed with the civil service examiners for such city. Such applicant, if he expresses a desire not to pass the examination provided for by the civil service rules, shall be exempt therefrom.

"Clause 2. When requisition is made by an appointing officer, upon the commissioners, for names of eligible persons for appointment to office or employment in the public service, the commissioners shall certify the names of those most eligible on the proper register, as provided for by the civil service rules, and in addition shall, when so requested by the appointing officer, report the names of any honorably discharged soldiers or sailors of the war of the rebellion, who have filed proper and true applications for appointment to such office without examination. The appointing officer can appoint from the list of names so certified or reported to him."

And whereas the question of the approval of said civil service rule is now before the Governor and Council, and they wish to be advised as to its legality, under chap. 437 of the Acts of the Legislature for 1887;

It is therefore ordered that the opinion of the Justices of the Supreme Judicial Court be required upon the following important questions of law:

1. Under chap. 437 of the Acts of the Legislature of 1887, can persons who served in the army or navy of the United States in the time of the rebellion, and were honorably discharged therefrom, be preferred for appointment to office or employment in the service of the Commonwealth or the cities thereof, without having made application for appointment to office or employment to the Civil Service Commissioners as required by chap. 320 of the Acts of the Legislature for 1884, and the rules of the Civil Service Commissioners made thereunder?

2. Will the proposed civil service rule, set forth above, if approved by the Governor and Council, be valid?

OPINION.

To His Excellency the Governor and the Honorable Council of the Commonwealth of Massachusetts:

The undersigned, Justices of the Supreme Judicial Court, having considered the questions upon which their opinion is required by the Governor and Council, respectfully submit the following opinion:

The Statute of 1887, chap. 437, provides that "all persons who served in the army or navy of the United States in the time of the war of the rebellion, and were honorably discharged therefrom, may be preferred for appointment to office or employment in the service of the Commonwealth, or the cities thereof, without having passed any examination provided for by chap. 320 of the Acts of the year 1884, or by the rules of the Civil Service Commission made under the provisions of said Acts. Age, loss of limb, or other physical impairment, which shall not in fact incapacitate, shall not

be deemed cause to disqualify under this Act. But nothing herein contained shall be construed to prevent such persons from making application for such examination, or from taking such examination, provided they were entitled to do so under the rules of said commission."

It seems to us that this statute was intended to be an amendment of the statute of 1884, chap. 820, usually called the civil service law, the main purpose being to exempt honorably discharged soldiers and sailors from the examination required by that law and the rules established under it, leaving them subject to the operation of the law except so far as exempted by the amending Act. This is the natural and obvious meaning of the Act of 1887. If the Legislature had intended to provide that soldiers and sailors should be exempted from the operation of the civil service law, it is to be presumed that it would have said so in direct and explicit language, as is done in the 15th section of the Act of 1884, where it is provided that certain classes of officers "shall not be affected, as to their election or selection, by any of the rules made as aforesaid." The statute of 1887 does not provide that soldiers and sailors may be appointed to office or employment without making application to the Civil Service Commissioners. On the contrary, the structure of the Act shows that it was intended to be engrafted upon and to become a part of the Act of 1884 for the regulation of the civil service. The language used is, "may be preferred for appointment to office or employment," which implies that they are to be selected out of a list or number of applicants, and plainly refers to the 14th section of the civil service law, providing for giving preference to soldiers and sailors.

The provision that "age, loss of limb, or other physical impairment, which shall not in fact incapacitate, shall not be deemed cause to disqualify under this Act," implies that soldiers and sailors were to remain subject to the civil service law except so far as expressly exempted by this Act. This provision would be entirely useless if the purpose of the preceding clause was to take the appointment of soldiers and sailors out of the jurisdiction and supervision of the commissioners. Considered as a part of the civil service law, it has force and effect, because it exempts soldiers and sailors from the operation of the rules of the commissioners making, in certain cases, the age of the applicant a disqualification, and limits the power of the commissioners to make any rules in the future which are inconsistent with it. The civil service law made a radical change in the method of appointing such officers and servants as are within its scope. Its scheme is that all such appointments should be under the supervision of the Civil Service Commissioners, who are to determine the qualifications of the applicants for the offices or employment which they seek. The statute does not attempt to fully define the qualifications of such officers and servants, but it confers upon the commissioners the authority to make rules, not inconsistent with law, for their selection and appointment, which rules, when approved by the Governor and Council, have the force of laws, and are binding upon the appointing officers.

The statute and the rules made under it establish certain requirements or conditions which must be complied with before an appointment will be made. Thus, among other things, it is required that an application must be made to the Civil Service Commissioners, stating certain facts as to the name, age, residence, and previous history of the applicant. It is also provided that no person shall be appointed who is a vendor of intoxicating liquor, or who habitually uses intoxicating beverages to excess, or who within one year preceding his application has been convicted of any offense against the laws of this Commonwealth, and that certain officers shall be appointed for a probationary period. The rules, following the directions of the statute, further make specific and minute provisions for the personal examination of the applicant, designed as a test of his attainments and proficiency in the department of knowledge deemed necessary for his fitness for the position which he seeks.

The examination of the applicant is an important requirement of the statute and of the rules, but it is not the only material requirement. It cannot justly be said that the other requirements to which we have referred are parts or incidents of the examination. They are separate and independent requirements or conditions, and are so treated throughout the statute and the rules. The Legislature, in enacting the statute of 1887, had in mind the civil service law and the rules of the commissioners. The provision that soldiers and sailors "may be preferred for appointment to office or employment in the service of the Commonwealth, or the cities thereof, without having passed any examination provided for" by such law and rules, according to the natural import of the words used, refers to the personal examination provided for by the statute and rules. It cannot be held to repeal the statute of 1884, so far as it relates to soldiers and sailors, or to exempt them from the other requirements of the statute and rules, without greatly enlarging the language of the Legislature. We are therefore of opinion, in answer to the first question proposed, that, under chap. 487 of the Acts of the Legislature of 1887, persons who served in the army or navy of the United States in the time of the rebellion, and were honorably discharged therefrom, cannot be preferred for appointment to office or employment in the service of the Commonwealth, or the cities thereof, without having made application for appointment to office or employment, to the Civil Service Commissioners, as required by chap. 330 of the Acts of the Legislature of 1884, and the rules of the Civil Service Commissioners made thereunder.

The second question is general, and points out no particular question of law upon which our opinion is desired. We have doubts whether, within the fair intent of the Constitution, the executive or legislative departments can submit to the justices a law or a series of laws or rules, more or less complicated, and ask them to examine and ascertain what questions can be raised as to the validity of every clause, and to express an opinion in advance upon every such question. The practice always has been for the justices to confine their answer to the par-

ticular questions of law submitted to them. As the order of the Governor and Council points out no definite question except the one we have answered, we have considered no other. If we were to suggest questions which might arise as to the validity of parts of the rule proposed by the commissioners, and to express our opinion upon them, it would be going beyond our proper duty, and might be regarded as an interference with the independence of the executive department.

Justice Devens does not concur in this opinion, and requests us to state that, in his view, the statute of 1887, chap. 487, in providing that the soldiers and sailors therein described may be preferred for appointment without having passed any examination provided for by the Civil Service Act, or the rules of the Civil Service Commissioners made under the provisions of said Act, exempts them from any investigation by the Civil Service Commissioners of their qualifications, and leaves them to be determined by the persons competent to appoint, and that they are thus necessarily exempted from making application for appointment to the Civil Service Commissioners.

MARCUS MORTON,
WALBRIDGE A. FIELD,
WILLIAM ALLEN,
CHARLES ALLEN,
OLIVER WENDELL HOLMES, JR.,
MARCUS P. KNOWLTON.*

COMMONWEALTH of Massachusetts

v.

Michael W. DUNSTER.

A former conviction for maintaining between certain dates a tenement used for the illegal sale and keeping of intoxicating liquors is a bar to the whole offense set out in a subsequent complaint for maintaining the same tenement for a period including a portion of the time covered by the former proceeding; and the prosecuting officer cannot defeat the defense of such bar by entering a *nolle prosequi* on the second complaint as to a part of the offense, i. e., as to the part of the period alleged therein covered by the former proceeding.

(Worcester—Filed October 19, 1887.)

ON defendant's exceptions. *Sustained.*

Complaint for maintaining a tenement used for the illegal sale and keeping of intoxicating liquors.

The case is stated in the opinion.

Mr. J. E. Sullivan, for defendant:

The complaint on which this same defendant was convicted—and which conviction was pleaded in bar to this complaint—alleged but a single offense; and as the time in one is mentioned and included in the other, it must be the same time and therefore the same offense.

The offense not being divisible, a *nolle prosequi* applied to any part of the complaint must apply to the whole.

*Hon. Marcus P. Knowlton was appointed a Justice of the Supreme Judicial Court on September 14, 1887, vice Hon. William S. Gardner, resigned.
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A *nolle prosequi* may be entered as to the whole of an indictment or of a count, or as to any distinct and substantive part of a count or complaint.

Commonwealth v. M'Monagle, 1 Mass. 517; *Commonwealth v. Truck*, 20 Pick. 858.

The effect of permitting a *nolle prosequi* would be to allow the government to amend the complaint after the defendant has been once tried on it in the court below.

Mr. Andrew J. Waterman, Atty-Gen., for the Commonwealth:

It is clear that the district attorney may, before the impaneling of the jury, enter a *nolle prosequi* to the whole of an indictment, or of a count thereof, or of a substantive part of it.

Commonwealth v. Truck, 20 Pick. 868; *Jennings v. Commonwealth*, 105 Mass. 588; *Commonwealth v. M'Monagle*, 1 Mass. 517; *Commonwealth v. Holmes*, 119 Mass. 195; *Commonwealth v. Jenks*, 1 Gray, 490.

The complaint in the present case originally charged the defendant with the crime of maintaining a common nuisance from the 1st of May to the 17th of November, 1887. Before the impaneling of the jury, the district attorney entered a *nolle prosequi* to so much of the complaint as alleged any offense prior to October 5, 1886, thus leaving a complaint of maintaining a common nuisance from the 5th of October to the 17th of November, 1886.

The defendant, having been allowed by the court, retracted his plea of "not guilty," and pleaded in bar a former conviction.

The record shows the defendant to have been convicted and sentenced for the crime of maintaining the same common nuisance, as charged in the complaint in this case, from August 1 to October 4.

This is clearly not a sufficient plea in bar. There is no single day common to both complaints, and two distinct offenses are charged.

Commonwealth v. Connors, 116 Mass. 35; *Commonwealth v. Robinson*, 126 Mass. 264.

Morton, Ch. J., delivered the opinion of the court:

This is a complaint to the Central District Court of Worcester, which charges that the defendant, "on the 1st day of May, in the year eighteen hundred and eighty-six, at Worcester in said county, and on divers other days and times between that day and the 17th day of November in the year eighteen hundred and eighty-six, did keep and maintain a certain tenement there situate, then and there used for the illegal sale and for the illegal keeping of intoxicating liquors."

The defendant was convicted in the district court and appealed to the superior court. In the latter court, before impaneling the jury, the district attorney indorsed on the back of the complaint the following: "Now, before the impaneling of the jury, I *not. pros.* so much of the within complaint as alleges any offense or unlawful act prior to October 5, 1886." The defendant objected to the district attorney's right to do this, and afterwards filed a plea in bar, setting up a former conviction under a complaint charging him with keeping and maintaining the same tenement from the 1st day of August, 1886, to the 4th day of October, 1886.

It is too clear to admit of any doubt that the defendant's former conviction was a bar to the present complaint as it stood in the district court; as the complaint in this case embraced a portion of the time covered by the former complaint, and both complaints might be proved by the same evidence. The question is whether the district attorney, after the case was entered in the superior court, could avoid the effect of the former conviction as a bar, by entering a *nolle prosequi* in the manner attempted in this case.

Where a complaint or indictment contains several counts, each charging an offense, it is within the power of the prosecuting officer, before the jury is impaneled, to *nol. pros.* either count. So, where two offenses are improperly charged in one count, he may *nol. pros.* one of them; and where, as in the exceptional case of burglary, both breaking and entering with intent to steal, and larceny, are properly charged in one count, he may *nol. pros.* either of the charges. And, generally, where an offense is set out with aggravating circumstances which enlarge the offense, he may *nol. pros.* the aggravation, and obtain a conviction for the lesser offense, which is well charged. *Commonwealth v. M'Monagle*, 1 Mass. 517; *Commonwealth v. Briggs*, 7 Pick. 177; *Commonwealth v. Tuck*, 20 Pick. 356; *Commonwealth v. Jenks*, 1 Gray, 490; *Commonwealth v. Cain*, 102 Mass. 487; *Jennings v. Commonwealth*, 105 Mass. 586; *Commonwealth v. Holmes*, 119 Mass. 195; *Commonwealth v. Mead*, 10 Allen, 396.

But in all these cases the matter upon which the *nolle prosequi* operates is a distinct and independent charge; and, when entered, the *nolle prosequi* leaves an offense formally, as well as substantially, charged, being the same offense which is formally charged in the original complaint or indictment. The prosecuting officer cannot, by means of a *nolle prosequi*, put the defendant upon trial for an offense differing from any offense with which he is formally charged in the complaint or indictment. The difficulty in this case is that there is no distinct offense alleged upon which the *nolle prosequi* can operate and yet leave an offense sufficiently charged in the complaint upon which the defendant can be convicted. The offense charged in the complaint, of maintaining a liquor nuisance from the 1st day of May, 1886, to the 17th day of November, 1886, is a single and indivisible offense, of which the time alleged is an essential element. This is the offense, and the only offense, for which the defendant was tried in the district court. As we have said: The allegation of time is material; it operates not only to limit the testimony to acts within the time named, but also to protect the defendant from any further prosecution for his acts within the time alleged. It is not competent for the prosecuting officer, by entering a *nolle prosequi* as to a part, to amend a complaint in the material allegation of time; by so doing, he puts the defendant to trial upon an offense differing legally from that for which he was tried in the district court, and from the offense which is "fully and plainly, substantially and formally," described in the complaint which is before the superior court upon appeal.

In *Commonwealth v. Robinson*, 126 Mass. 259,

the defendant was complained of for keeping a liquor nuisance from January 1, 1878, to August 20 of the same year. He filed a plea of acquittal upon a complaint for keeping the same tenement from January 1, 1878, to May 28, of the same year. This court held that such acquittal was a bar, although the superior court confined the government to proof of facts subsequent to May 28, and prior to August 20. The prosecuting officer did not in that case enter a *nolle prosequi*, and in this respect the case differs from the case before us; but the principles upon which it proceeds are applicable, and seem to us to be conclusive of this case. The former conviction is a bar to the whole of the offense set out in the complaint; the prosecuting officer cannot defeat this defense by entering a *nolle prosequi* as to a part of the offense, any more than he can do so by confining his proof to facts not included in the former complaint.

Exceptions sustained.

COMMONWEALTH of Massachusetts v.

Patrick CUNNINGHAM.

(Worcester—Filed October 19, 1887.)

ON defendant's exceptions. *Sustained.*
Complaint for maintaining a tenement used for the illegal sale and keeping of intoxicating liquors.

The question presented is the same as that in *Commonwealth v. Dunster*, ante, p. 115.

Mr. J. E. Sullivan, for defendant.

Mr. Andrew J. Waterman, Atty-Gen., for the Commonwealth.

By the Court:

This case is governed by *Commonwealth v. Dunster*, ante, p. 115.

Exceptions sustained.

COMMONWEALTH of Massachusetts v.

Thomas GALLAGHER.

A complaint alleging that the defendant "is guilty of keeping and maintaining a certain tenement then and there used for the illegal keeping and illegal sale of intoxicating liquors" is equivalent to an allegation that "he did keep and maintain," etc.; and while such form of complaint is not to be commended, it is not uncertain and does not furnish reason for quashing the complaint.

(Plymouth—Filed October 19, 1887.)

ON defendant's exceptions. *Overruled.*
Complaint to the Third District Court of Plymouth, charging that the defendant "is guilty of keeping and maintaining a certain tenement then and there used for the illegal keeping and illegal sale of intoxicating liquors." At the trial in the District Court the defendant

moved to quash the complaint, which motion was overruled. At the trial in the Superior Court for Plymouth County, before Thompson, J., the defendant, after a verdict of guilty had been rendered by the jury, moved in arrest of judgment, on the ground that the complaint set forth no offense under the statutes of this Commonwealth; this motion was overruled, and the defendant alleged exceptions.

Messrs. Simmons and Pratt for defendant:

The faults of this complaint are: (1) it alleges that the defendant "is guilty," etc., on the 17th day of September, 1886, and on divers other days and times between that day and the day of making the complaint; (2) it alleges no facts, but states merely a conclusion of law.

The use of the present tense "is guilty" must refer to the date of the making of the complaint.

Whart. Cr. Pl. & Pr. 8th ed. § 183, and cases cited.

But the date is by the language of the complaint expressly excluded. The complaint, therefore,—its language being absolutely self-contradictory,—stands as though no allegation of time had been made, or as bad from repugnancy.

Id.

The complaint should have alleged that the defendant did certain acts which constitute an offense. It simply states the conclusion to be drawn by the jury from the evidence offered, under the instruction of the court, as to the law involved. In only two instances is the use of this form of pleading allowed by this court, viz.: in a complaint or indictment for embezzlement, under Pub. Stat. chap. 203, § 87, —and here the facts constituting the offense are first set out; and in a complaint for drunkenness, under Pub. Stat. chap. 207, § 26. In both of these cases the complaints follow the exact wording of the statute.

In the following cited cases—the only ones in this court in point—the learned justice says that such form of pleading is not to be commended:

Commonwealth v. Miller, 8 Gray, 484, 486;

Commonwealth v. McNamara, 116 Mass. 840.

This complaint does not follow the statute, and hence does not possess the single qualification which saved the complaints in the cases cited from being held absolutely bad.

Mr. Andrew J. Waterman, Atty. Gen., for the Commonwealth:

The motion in arrest of judgment was properly overruled.

No allegation of intent or knowledge, or negating any authority to keep or sell intoxicating liquors, were essential.

Commonwealth v. Bennett, 108 Mass. 27;

Commonwealth v. Edds, 14 Gray, 406; *Commonwealth v. Kelly*, 12 Gray, 175.

The complaint clearly charges the maintenance of a common nuisance. The allegation that the defendant "is guilty of keeping and maintaining" is equivalent to "did keep and maintain." Both forms allege an act done, to wit: keeping and maintaining a tenement used for the illegal keeping and sale of intoxicating liquors. Being "guilty is the state or condition of a person who has committed a crime."

Bouv. L. Dict.

2 Mass.

Per Curiam:

The allegation in the complaint that the defendant "is guilty of keeping and maintaining a certain tenement" is equivalent to an allegation that he "did keep and maintain a certain tenement." It means the same thing, and the defendant could not have misunderstood it. Taken in its context, it is susceptible of no other meaning. Though this form of allegation is not to be commended, it is not uncertain, and does not furnish reason for quashing the complaint.

Exceptions overruled.

COMMONWEALTH of Massachusetts v.

Joseph HARPER.

1. Under a **complaint charging** the defendant with **bringing into** a non-license **city intoxicating liquors**, he **having reasonable cause to believe** that such liquors were **intended to be sold in violation of law**, evidence of an officer as to his search of the consignee's place three days before the defendant's arrest, as to what he found there, and as to the consignee's acts and conduct, tending to prove that he kept a place for the sale of liquor, is **competent upon the proposition** (which it was necessary for the prosecution to show) that the **consignee intended to sell the liquor in violation of law**.
2. In such a case it is **competent** (upon the issue as to whether the defendant had reasonable cause to believe that the liquor was intended for illegal sale) for the prosecution to **show** that the **consignee** was generally known and **reputed to be a dealer in intoxicating liquors** at his place.

(Worcester—Filed October 19, 1887.)

ON defendant's exceptions. *Overruled.*

The complaint was made to the Central District Court of Worcester, and alleged "that Joseph Harper, of said Worcester, on the 12th day of June in the year 1886, at Worcester, in said county, unlawfully did bring into said Worcester certain spiritous and intoxicating liquors, he the said Harper then and there having reasonable cause to believe that the said liquors were then and there intended to be sold in violation of law, said Worcester then and there being a city in which licenses of the first five classes of § 10 of chap. 100 of the Public Statutes of said Commonwealth, to sell spiritous or intoxicating liquors, are not granted."

The trial was had in the Superior Court, Staples, J., presiding. It was admitted that in the city of Worcester no licenses of the first five classes mentioned in chapter 100 of the Public Statutes were granted. It was proved that the defendant brought into said city from the town of Millbury the spiritous and intoxicating liquors hereafter referred to. There was evidence tending to prove that on the day named in the complaint the defendant was found upon one

of the public streets of Worcester in charge of a wagon having upon it twenty-three separate packages of spiritous and intoxicating liquor, consigned to twenty-three persons in said city, and that the defendant had the custody and control of said liquors for the purpose of delivering them to the various consignees.

It was admitted by the prosecution that licenses of the first five classes aforesaid were granted in said city for the year ending May 1, 1886.

One of the consignees of a portion of said liquors was Frank Dolan, who, it was admitted by the prosecution, was a licensed dealer in spiritous and intoxicating liquors for the year ending May 1, 1886.

Against the objection of the defendant, the evidence of the assistant marshal of Worcester, as follows, was admitted as tending to show the character of Frank Dolan's business and his purpose in regard to the whiskey consigned to him: "I know Frank Dolan and his place of business; was at his place June 9 last; went there with a search-warrant; when within 10 or 12 feet of the door Dolan jumped up and walked away rapidly; I followed on the run, and he ran to room near the door; he took a lager-beer bottle off of the shelf and poured it into the sink; he then put bottle under his coat; I took a bottle which he handed another man, which was half full of rum; there were small glasses over the sink, a half-pint bottle in the cupboard, and a tunnel; a pint bottle containing a very little whiskey; in the store in front found bottles and a barrel of 8 cent beer on draught." The defendant excepted to the admission of the evidence.

Against the objection, and under exception of the defendant, another witness was permitted to testify that Dolan, on June 12, was generally known and reputed to be a dealer in intoxicating liquors in this place and grocery store. This evidence was admitted by the court as tending to show reasonable cause of belief on the part of the defendant that the intoxicating liquor which he had on his wagon consigned to Frank Dolan was intended to be sold by Dolan in violation of law. Evidence tended to show that the defendant had for some time prior to May 1, 1886, been employed by a licensed wholesale dealer in liquors in Worcester as a driver delivering his goods about the city, and, among other places, to saloons, including Dolan's, and that just after the 1st of May he went to Millbury, and in the defendant's employment spent the chief part of his time in delivering liquor in Worcester from defendant's wholesale establishment in Millbury. The court instructed the jury that the evidence as to its being generally known and reputed that Dolan was a dealer in intoxicating liquors at this place is not evidence tending to show that Dolan intended to sell the intoxicating liquor which was consigned to be delivered to him contrary to law. That must be established by other evidence. This evidence of reputation can only be used or considered on the question of the defendant's reasonable cause of belief in the premises; the proposition that Dolan intended to sell the intoxicating liquor in violation of law having been first established by other competent evidence." The jury found the defendant guilty.

Mr. John Hopkins, for defendant.

Mr. Andrew J. Waterman, *Atty-Gen.*, for the Commonwealth:

All of the evidence offered as to the nature of Dolan's business, and his acts upon the approach of an officer, was clearly competent, and properly admitted with appropriate instructions.

Commonwealth v. Locke, 114 Mass. 204; *Commonwealth v. Kenney*, 115 Mass. 149; *Commonwealth v. Comiskey*, 18 Allen, 585; *Commonwealth v. Certain Intoxicating Liquors*, 107 Mass. 386; *Commonwealth v. Cotton*, 188 Mass. 500; *Commonwealth v. McLaughlin*, 108 Mass. 477; *Commonwealth v. Fisher*, 188 Mass. 504; *Briggs v. Rafferty*, 14 Gray, 525.

Morton, Ch. J., delivered the opinion of the court:

The complaint charges that the defendant brought into Worcester spiritous and intoxicating liquors, he having reasonable cause to believe that such liquors were intended to be sold in violation of law.

The evidence showed that the defendant brought into Worcester, from Millbury, various packages of liquor, some of which was consigned to one Dolan; and it was necessary for the government to show that the consignees intended to sell the liquors in violation of law. For this purpose, the evidence of the assistant marshal as to his search of Dolan's place in June, 1886, three days before the defendant was arrested, as to what he found there, and as to Dolan's acts and conduct, was competent. It tended to prove that Dolan kept a place for the sale of liquors, and that he intended to sell the liquor which the defendant was carrying to him. *Commonwealth v. Locke*, 114 Mass. 288; *Commonwealth v. Certain Intoxicating Liquors*, 107 Mass. 386; *Commonwealth v. McLaughlin*, 108 Mass. 477; *Commonwealth v. Kenney*, 115 Mass. 149.

It was competent for the government to show that on June 12, 1886, Dolan was generally known and reputed to be a dealer in intoxicating liquors at his place. It had some tendency to prove that the defendant, whose employment was carrying and delivering liquor from a wholesale establishment in Millbury to various persons in Worcester, had reasonable cause to believe that the liquors he was carrying to Dolan were intended for sale in violation of law. It was not used to show that Dolan intended to sell in violation of law; but the court carefully confined it to the issue whether the defendant had reasonable cause of belief that it was intended for illegal sale. Upon this issue it was admissible. *Sweetser v. Bates*, 117 Mass. 466, and cases cited.

Exceptions overruled.

COMMONWEALTH of Massachusetts
v.

Michael SHANNIHAN.

A complaint under Pub. Stat. chap. 88, § 2, for keeping open a shop on the Lord's Day, need not negative the exceptions made by Stat. 1887, chap. 391, to the general provisions of the first-named statute.

(Worcester—Filed October 19, 1887.)

ON defendant's exceptions. *Overruled.*

Complaint to the Central District Court of Worcester, alleging "that Michael Shannihan, of said Worcester, on the twenty-fourth day of July, in the year eighteen hundred and eighty-seven, the same being the Lord's Day, at Worcester, in said county, did unlawfully keep open his shop there situate, for the purpose of doing business therein, to wit, selling goods, wares, and merchandise therein, on said Lord's Day as aforesaid, the same not being works of necessity or charity."

The defendant moved in the Superior Court that the complaint against him be quashed, "because nowhere in the complaint is it alleged that the defendant does not come within the exceptions mentioned in chap. 391, § 2, of the Acts and Resolves of 1887."

The motion was overruled, and defendant alleged exceptions.

Mr. J. E. Sullivan, for defendant:

The complaint is dated July 25, 1887, and charges the commission of an offense July 24, 1887, and is founded on Pub. Stat. chap. 98, § 2. An Act to Further Regulate the Observance of the Lord's Day was passed and approved June 9, 1887. It follows that this complaint was made, and the offense committed, since the passage of the amendment.

The defendant claims that certain exceptions were made to chap. 98, § 2, and that this complaint should show that he does not come within the exceptions.

Up to the time this amendment was passed it was an offense to keep open a shop for any purpose.

Commonwealth v. Dextra, 143 Mass. 28.

This amendment excepts certain things for the doing of which it is lawful to keep open a shop.

Although the amendment is in a subsequent statute, it relates to and has reference to Pub. Stat. chap. 98, § 2, and is so incorporated in it, that said section can be read only in connection with the amendment. The exception in such cases must be negatived.

Steel v. Smith, 1 B. & Ald. 94, remarks of Justice Bayley.

Mr. Andrew J. Waterman, Atty-Gen., for the Commonwealth:

The motion to quash the complaint was for matter of form, and not of substance, and could not be made for the first time in the superior court on appeal.

Pub. Stat. chap. 214, § 25; *Commonwealth v. Lewis*, 128 Mass. 251.

By the Court:

This is a complaint under Pub. Stat. chap. 98, § 2, which prohibits the keeping open of a shop, warehouse, or workhouse on the Lord's Day. The second section of Stat. 1887, chap. 391, makes certain exceptions to this general provision; but, according to the rule established in this Commonwealth, such exceptions need not be negatived in a complaint or indictment. *Commonwealth v. Jennings*, 121 Mass. 47. The complaint in this case sets forth a complete offense: if the defendant is within any of the exceptions, it is matter of defense.

Exceptions overruled.

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COMMONWEALTH of Massachusetts

Luther B. BRUSIE.

1. It is not essential that a complaint charging the keeping of a tenement used for the illegal sale and keeping of intoxicating liquors should contain any other negation of authority to keep or sell intoxicating liquors; and if the defendant relies upon any appointment or authority to sell intoxicating liquors, it is for him to prove it.
2. Although a complaint "to either of the justices of the district court," etc., charging the keeping of a liquor nuisance is, in form, stated to have been sworn to "before the court," yet if it is apparent that it was received by a justice and sworn to before him, and that he issued a warrant thereon, it will be presumed that the justice acted under Gen. Stat. chap. 154, § 22 (which provides that a justice or special justice of a police or district court may receive complaints and issue warrants when the court is not in session), and that the court was not in session at the time.
3. Where the complaint is received and sworn to before a justice when the court is not in session, it is not necessary that the clerk should sign the jurat or the warrant, or that the warrant should bear the teste of the justice of the district court.
4. An objection, on account of any irregularity therein, to the form of a warrant returnable in a district court, must, when that court has jurisdiction, appear to have been taken there.

(Berkshire—Filed October 20, 1887.)

ON defendant's exceptions. *Overruled.*

The complaint was as follows:

Commonwealth of Massachusetts,
Berkshire, ss.

To either of the Justices of the District Court of Southern Berkshire, at Great Barrington, in said County, or any Justice of the Peace within and for said County, having authority to receive complaints and issue warrants:

E. L. Day, of Stockbridge, in said county of Berkshire, in behalf of the Commonwealth, on oath complains that Luther B. Brusie, whose other or true name is to your complainant unknown, defendant, of Great Barrington, said county, heretofore, to wit, on the first day of May, in the year of our Lord one thousand eight hundred and eighty-six, at Great Barrington, in said county, with force and arms aforesaid, in the county aforesaid, and on divers other days and times between that day and the twelfth day of October in the year of our Lord one thousand eight hundred and eighty-six, knowingly, willfully, and unlawfully did keep and maintain a certain common nuisance, to wit, a tenement in said Great Barrington, Massachusetts, situate on Railroad Street in said Great Barrington, then and on said other days and

times there used for illegal sale and illegal keeping of intoxicating liquors and illegal gaming, against the peace and dignity of the Commonwealth, and contrary to the form of the statute in such cases made and provided.

Dated at said Great Barrington, this twelfth day of October, A.D. 1886.

E. L. Day, Complainant.

Berkshire, ss.

Received and sworn to this 12th day of October, in the year of our Lord one thousand eight hundred and eighty-six.

Before the Court.

Norman W. Shores,
Justice of said Court.

The warrant was as follows:

Commonwealth of Massachusetts,
Berkshire, ss.

[L.s.] To the Sheriff of our County of Berkshire, or either of his Deputies, or any Detective of the Commonwealth, or either of the Constables of any Town within said County, or any Police Officer of the Town of Great Barrington, in said County, Greeting:

In the name of the Commonwealth of Massachusetts, you and each of you are hereby commanded forthwith to apprehend and bring before the District Court of Southern Berkshire, at Great Barrington, in said county, the body of the above named defendant, if he may be found within your precinct, to answer to the Commonwealth on the foregoing complaint this day made on oath before said court. And you are also required to summon the complainant and to appear and testify, in behalf of said Commonwealth, to what they know relative to the matter of said complaint, when and where you have the said defendant together with the foregoing complaint, and this warrant, with your doings thereon.

Given under my hand and seal of Court at Great Barrington, this 12th day of October, in the year of our Lord one thousand eight hundred and eighty-six.

Norman W. Shores,
Justice of said Court.

Other facts appear from the opinion.

Mr. H. C. Joyner, for defendant:

I. The motion to dismiss this complaint, filed in the district court, should have been sustained, because—

1. The complaint intends to charge the defendant with keeping a liquor nuisance.

The gist of this charge is that the defendant keeps a place or tenement where intoxicating liquors are sold without license or authority. The complaint must therefore contain the allegation that the sales are without license or authority.

2. The statute makes the sale of intoxicating liquors, the keeping of such liquors with intent to sell, and the keeping of a tenement or place where such liquors are sold, all unlawful under certain circumstances, and lawful under other circumstances.

In charging the unlawful act it must surely be necessary to allege the peculiar circumstance that distinguishes it from the lawful act; and that circumstance is that the act is without license or authority.

Accordingly, in complaints for illegal selling, or for keeping intoxicating liquors with illegal

intent to sell, it is always alleged that the act was without license or authority. The same allegation is necessary, and for the same reason, in a complaint for keeping a liquor nuisance.

The best precedents in Massachusetts criminal forms contain this allegation.

Heard, Cr. Law, p. 806; *Commonwealth v. Dunn*, 111 Mass. 425; *Commonwealth v. Lohy*, 8 Gray, 459.

II. The motion to quash, filed in the superior court, was seasonably made.

It was not merely an objection to the form of the complaint; it went, if good, to the jurisdiction of the court. To give either the district court or the appellate court jurisdiction of the case, the complaint must have been made and sworn to before a magistrate or court authorized to receive the complaint and issue a warrant. All these facts must appear upon the face of the papers.

Commonwealth v. Fay, 126 Mass. 235.

III. This complaint was made to the district court when the court was in session.

The justice of the court signed the jurat and the warrant as he had been accustomed to do, and as it was his duty to do when the court had no clerk. But after the clerk was qualified it was his, the clerk's, duty to keep a record of all the proceedings of the court.

Pub. Stat. chap. 154, § 9.

Also, "to sign all processes issuing from the court."

Pub. Stat. chap. 154, § 80.

The warrant must also bear *teste* of the justice or first justice of the court.

Pub. Stat. chap. 154, § 80.

The omission of all these requirements of the statute makes the papers fatally defective.

IV. It is claimed that *Sabins v. Jones*, 119 Mass. 167, is a precedent for this case. An examination will show that the questions raised in the two cases are wholly dissimilar.

Mr. Edgar J. Sherman, Atty-Gen., for the Commonwealth:

The defendant's motion to dismiss was properly overruled; both the complaint and warrant appear to be in proper form.

Pub. Stat. chap. 154, § 80.

The motion to quash the complaint was properly overruled.

The complaint was clearly sufficient; it charged the maintenance of a common nuisance. No allegation negating any authority to keep or sell intoxicating liquors was essential.

Commonwealth v. Bennett, 108 Mass. 27; *Commonwealth v. Eds*, 14 Gray, 406; *Commonwealth v. Kelly*, 12 Gray, 175; *Commonwealth v. Ryan*, 136 Mass. 436.

If the defendant relied upon any appointment or authority to sell intoxicating liquors, the burden of proof was upon him to show it.

Commonwealth v. Owens, 114 Mass. 255; *Commonwealth v. Rafferty*, 138 Mass. 574.

Devens, J., delivered the opinion of the court:

The motion to dismiss the complaint filed in the district court was there properly overruled. The complaint charged the keeping and maintaining a common nuisance by keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors.

No other allegation, negating an authority to keep or sell intoxicating liquors, was essential; and, if defendant relied upon any appointment or authority to sell intoxicating liquors, it was for him to prove it.

Commonwealth v. Bennett, 108 Mass. 27; *Commonwealth v. Ryan*, 136 Mass. 486; *Commonwealth v. Rafferty*, 138 Mass. 574.

In the superior court the defendant filed a motion to quash the complaint: 1. Because the person receiving the complaint had no authority to do so. 2. Because said complaint purports to have been made to the District Court of Southern Berkshire, while the fact is not certified to by the clerk of said court. 3. Because the warrant does not bear the *teste* of the first justice of said court, and is not signed by the clerk of said court.

Assuming that some of these objections are not merely formal, and that if well founded they would go to the jurisdiction of the court, the case at bar is covered by the decision in *Sabins v. Jones*, 119 Mass. 167. Pub. Stat. chap. 154, § 22, re-enacting Gen. Stat. chap. 116, § 16, provides that a justice or special justice of a police or district court "may receive complaints and issue warrants when the court is not in session." There is no evidence, as defendant claims, that the complaint was made to the court, or that the warrant was issued while the court was in session. It sufficiently appears by the record that the complaint was received by the justice, sworn to before him, and that he issued the warrant. Having authority to do this, it is to be presumed that he acted under that authority, and that the court was not in session at the time, although in form the complaint is stated to have been sworn to before the court. When the complaint is received and sworn to before the justice, and the warrant issued by him, it is not necessary that the clerk should sign the jurat or the warrant, or that the warrant should bear the *teste* of the justice of the district court. These requirements (Pub. Stat. chap. 154, § 80) apply to proceedings before the court, and not to those before the justice acting by the authority given him to be exercised when the court is not in session.

An objection to the form of the warrant on account of any irregularity therein, where the court below has jurisdiction, must appear to have been taken there. *Commonwealth v. Hart*, 138 Mass. 416.

Exceptions overruled.

COMMONWEALTH of Massachusetts
v.

Charles S. CLIFFORD.

1. Where a portion of the charge to the jury was objected to as being upon a matter of fact, and the judge thereupon withdrew it, and limited his instruction on the subject to the proposition that certain supposed facts, if proved, would warrant a verdict of guilty,—*Held*, that the latter statement was unexceptionable, and that such correction of the original statement removed the ground of complaint to it.

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2. The trial court may pass upon exceptions before they are filed or allowed, and if it adjudges them frivolous and intended for delay, it may immediately proceed to pass judgment.

(Worcester—Filed October 19, 1887.)

ON defendant's exceptions. *Overruled.*

Indictment for adultery, tried in the Superior Court, Knowlton, J., presiding. The jury returned a verdict of guilty.

The questions presented by the exceptions, and the facts connected therewith, are stated in the opinion.

Pub. Stat. chap. 153, § 5, is as follows: "The courts shall not charge juries with respect to matters of fact, but may state the testimony and the law."

Messrs. John Hopkins and Charles R. Johnson, for defendant:

The original charge is open to the criticism that it is a charge with reference to a matter of fact, and so is prohibited by Pub. Stat. chap. 153, § 5.

The statement "that the evidence alluded to was as strong as is usually found in such cases" is open to question as a matter of fact; courts and practitioners might differ as to the proposition. It was a statement of the judgment of the court and its conclusion upon a matter of fact, and was an interference with the province of the jury.

Commonwealth v. Barry, 9 Allen, 277.

The modified charge is open to all the criticism that may be made against the original. The jury would not be warranted in finding the fact of adultery from the circumstance that "a married man is found, with a woman not his wife, in a room with a bed in it, and stays through the night with her," unless that circumstance satisfied them beyond a reasonable doubt of the criminal act. The court cannot say, as a matter of law, that the circumstances put in evidence would so satisfy them, or that it ought to satisfy them. The court should in all cases be scrupulously careful not to invade the province of the jury by undertaking to decide on the weight or effect of evidence.

Garrett v. Manchester & L. R. R. Co. 16 Gray, 505.

The fact of adultery was to be determined as an inference of fact from the evidence adduced before the jury. It was their duty to pass upon this evidence. The court had no right to express an opinion upon its weight, or to indicate what the judgment of the court was as to the weight it ought to have.

Banfield v. Whipple, 14 Allen, 13.

The defendant alleged exceptions to a certain portion of the charge of the judge. His duty was to reduce the same to writing and file them with the clerk within three days after the verdict.

Pub. Stat. chap. 153, § 8.

No judgment could be entered in the case, which, in this connection, the defendant assumes means that no sentence could be imposed, unless the exceptions were adjudged immaterial, frivolous, or intended for delay.

Pub. Stat. chap. 153, § 11; *Commonwealth v. Gloucester*, 110 Mass. 497.

The language of the statute carries with it by fair implication the idea that the judgment of the court is on the immateriality and frivolity, and their purpose follows their filing and allowance.

See Pub. Stat. chap. 158, § 12.

What an exception is, first appears of record when it is allowed. What it is claimed to be by the party who alleged it, first appears when it has been summarily reduced to writing and filed. The statute does not provide for noting an exception.

Mr. Andrew J. Waterman, Atty-Gen., for the Commonwealth:

The instruction of the presiding justice, as modified, was clearly correct.

Commonwealth v. Bowers, 121 Mass. 45; *Thayer v. Thayer*, 101 Mass. 118.

The court properly imposed sentence.

Pub. Stat. chap. 158, § 12.

Holmes, J., delivered the opinion of the court:

1. This is an indictment for adultery. It is not denied that there was evidence for the consideration of the jury, but the principal exception taken is that the court charged the jury with respect to matters of fact. The instruction first given related to disputed evidence that the parties had occupied the same room, and was as follows: "If they occupied together the room known as the parlor, that is evidence enough to warrant you in finding adultery. That is as strong evidence as is usually found in adultery cases." This being excepted to, the court said: "I withdraw those instructions and instruct the jury as follows: If a married man is found, with a woman not his wife, in a room with a bed in it, and stays through the night with her there, that is sufficient to warrant a finding of adultery against him." This was also excepted to.

The first instruction did not express any opinion as to whether the facts testified to were proved, but went to the inferences to be drawn from those facts by way of presumption in case they were proved. Such inferences, however, are for the jury as a general rule, as well as the truth of the testimony. *Commonwealth v. Briant*, 142 Mass. 463.

But if the language first used went too far, the judge at once expressly withdrew and corrected it, upon his attention being called to it, and limited his statement to the proposition that the supposed facts, if proved, would be sufficient to warrant a finding of guilty. Even the latter form of expression might be used in such a way as to prejudice the jury; but on its face it only means that there is evidence to be considered by the jury, and that they have a right to infer guilt if that inference seems to them the true one. Such a ruling is unexceptionable, and the correction left the defendant without ground of complaint. *Eldridge v. Hawley*, 115 Mass. 410; *Goodnow v. Hill*, 125 Mass. 587.

2. Before the foregoing exceptions were reduced to writing and filed, the court adjudged them frivolous and intended for delay, and proceeded to sentence the defendant. This also is excepted to. We have no doubt of the power of the court to pass upon the exceptions before they are filed or allowed. The scope of

an exception is fixed by the ruling. The court knows what it rules, and in many cases can have no difficulty in pronouncing an exception frivolous at the moment when it is taken. If the language of the statute leads to any conclusion, it is to that which we have adopted. It is to the effect that if the exceptions appear frivolous, etc., sentence may be passed "notwithstanding the allowance of the exceptions;" that is, even if the exceptions are allowed. Pub. Stat. chap. 158, § 12.

Exceptions overruled.

Isaac N. TAYLOR, Jr.,

v.

Matthew CARROLL.

1. The following: "Northampton, June 2, 1886. I forbid you selling or delivering liquor to I. N. Taylor. (Signed) I. N. Taylor, Jr.,"—*Held*, to be a sufficient notice under Pub. Stat. chap. 100, § 25, which provides that the child of a person who has the habit of drinking intoxicating liquor to excess may give notice in writing, signed by him, to any person, requesting him not to sell or deliver such liquor to the person having such habit; and that if the person so notified sell liquor to the person having such habit, the person giving the notice may recover certain damages from the person notified, in an action of tort.
2. A child of the person having such habit may, after giving the requisite notice, maintain an action under said statute, although an adult and not dependent upon the parent for support.

(Hampshire—Filed October 19, 1887.)

ON defendant's exceptions. *Overruled.*

Tort to recover damages under Pub. Stat. chap. 100, § 25. At the trial in the Superior Court for Hampshire County, before Knowlton, J., the evidence tended to show that the father of the plaintiff had the habit of drinking intoxicating liquors to excess; that on or about June 2, 1886, the plaintiff gave the defendant a notice, which was as follows:

Northampton, June 2, 1886.

I forbid you selling or delivering liquor to I. N. Taylor. I. N. Taylor, Jr.

It appeared in evidence that the plaintiff was more than twenty-four years old; that since he was twenty-one years old he was able and competent to take care of and support himself; that during that time he did support himself without the aid or assistance of his father, and that his father did nothing towards his support. The court found as a fact that at the time the defendant received the written notice he knew that the plaintiff's father, the person named in it, had the habit of drinking intoxicating liquors to excess, and that the defendant understood the purpose for which the notice was given.

The defendant asked the court to rule: (1) the written notice claimed to have been given

by the plaintiff to the defendant was not a sufficient compliance with the provisions of Pub. Stat. chap. 100, § 25, and for that reason the plaintiff cannot recover; (2) the plaintiff having been more than twenty-one years old on September 1, 1885, and since that time not having been dependent upon his father for support, he cannot maintain this action. The court refused so to rule, and ruled that the notice was sufficient, and found for the plaintiff in the sum of \$150; and the defendant alleged exceptions.

Pub. Stat. chap. 100, § 25, is as follows:

"The husband, wife, parent, child, guardian, or employer of a person who has, or may hereafter have, the habit of drinking spiritous or intoxicating liquor to excess, may give notice in writing, signed by him or her, to any person, requesting him not to sell or deliver such liquor to the person having such habit. If the person so notified, at any time within twelve months thereafter, sells or delivers any such liquor to the person having such habit, or permits such person to loiter on his premises, the person giving the notice may, in an action of tort, recover of the person notified such sum, not less than \$100 nor more than \$500, as may be assessed as damages; provided that an employer giving such notice shall not recover unless he is injured in his person or property. A married woman may bring such action in her own name, and all damages recovered by her shall enure to her separate use. In case of the death of either party, the action and right of action shall survive to or against his executor or administrator."

Mr. John B. O'Donnell, for defendant:

Before the sale, delivery, or loitering complained of, "notice in writing" should have been given by the plaintiff to the defendant, "requesting" the defendant not to sell or deliver "intoxicating" liquor to his father. This he did not do. Instead of the required notice, he wrote on a piece of paper: "I forbid you selling or delivering liquor to I. N. Taylor." In no sense does this comply with the express requirements of the statute. In the first place, it is a command and not a "request." Secondly, it does not state the relation of the plaintiff to I. N. Taylor. Thirdly, it is not addressed to any one. Fourthly, it is wholly silent on the subject of loitering. And fifthly, it does not contain the word "intoxicating" liquor.

The word "child," in Pub. Stat. chap. 100, § 25, means a person under 21 years of age. The Legislature intended to give guardians and persons unconditionally dependent upon the persons having such habit a remedy for inability to perform his or her accustomed duties occasioned by the excessive use of intoxicating liquors. This remedy was not given indiscriminately to the outside world.

"The husband, wife, parent, child, guardian, or employer" shall have such remedy; but the employer is excluded from the benefits of the section unless he "is injured in his person or property;" thus showing that pecuniary loss is the reason for the enactment of this section of the statute.

The word "parent" is used in said section as the parent of the "child," the minor, the youth, who is legally dependent upon his parent for support, education, and maintenance. The 2 Mass.

word "child," in its largest sense, is seldom used except in testamentary documents. Ordinarily and generally when people use the word "child" they mean persons under twenty-one years of age. When they refer to descendants over twenty-one years of age, they use the words "son" or "daughter."

"Schooling and limit of labor of children employed in manufacturing and other establishments," does not mean persons over twenty-one years of age.

Pub. Stat. chap. 48.

"Care and Education of Neglected Children" does not mean persons over twenty-one years of age.

Pub. Stat. chap. 48.

"Stubborn children" does not mean persons over twenty-one years of age.

Pub. Stat. chap. 207, § 29.

Contingently and conditionally an adult son is liable for the support of his father.

Pub. Stat. chap. 84, § 6.

So is the grandchild so contingently and conditionally liable, but no provision seems to have been made to give him the benefit of said § 25 of chap. 100.

Pub. Stat. chap. 84, § 6.

Mr. John B. Bottum, for plaintiff:

The written notice was a sufficient compliance with Pub. Stat. chap. 100, § 25.

See Acts 1875, chap. 99, § 16; Acts 1869, chap. 415, § 40; Acts 1861, chap. 136, § 4; Gen. Stat. chap. 86, § 38; Acts 1855, chap. 215, § 21.

See *Kennedy v. Saunders*, 142 Mass. 11; *Tate v. Donovan*, 143 Mass. 590.

The age of the plaintiff, his ability to support himself, and his independence of support from his father, were immaterial as to the right of action, and were not absolutely essential in determining the sum to be assessed as damages.

It is a penal action, and the recovery is in the nature of a penalty; the main object is an aid in the enforcement of the liquor law.

Pub. Stat. chap. 100, §§ 24, 25. See also cases before cited, and *George v. Gobe*, 128 Mass. 289; *McNeil v. Collinson*, 128 Mass. 313; *McNeil v. Collinson*, 130 Mass. 167; *Day v. Frank*, 127 Mass. 497; *Roberge v. Burnham*, 124 Mass. 277; *Harrington v. McKillop*, 132 Mass. 567.

This action is unlike the one under § 21, which can be maintained only by one "who is injured in person, property, or means of support."

Pub. Stat. chap. 100, § 21; *Bryant v. Tidgewell*, 133 Mass. 86; *Moran v. Goodwin*, 130 Mass. 158.

Morton, Ch. J., delivered the opinion of the court:

We are of opinion that the notice in the case was a sufficient compliance with the statute. The meaning of the notice is clear. It is a notice by a son to the defendant, requesting him not to sell intoxicating liquor to his father. The signature imports that the signer is the son of the I. N. Taylor named in the body of the notice.

The defendant, upon receiving the notice, would naturally understand its meaning and purpose, and it is found that he did in fact so understand it. If he sold intoxicating

liquor to the father after receiving the notice, he did so at his peril. *Kennedy v. Saunders*, 142 Mass. 9; *Tate v. Donovan*, 143 Mass. 590.

The ground taken by the defendant, that the action cannot be maintained, because the plaintiff was of age and was not dependent upon his father for support, cannot be sustained. The statute provides that "the husband, wife, parent, child, guardian, or employer of a person who has or may hereafter have the habit of drinking spiritous or intoxicating liquor to excess" may give the notice and maintain the action provided by the statute. This does not limit the right to bring the action to a minor child. The statute contemplates that the habitual drunkenness of a husband or wife, parent or child, is a substantial injury to those bound together in domestic relations, and gives such a right to recover damages in the nature of a penalty, not only for any injury to the person or property, but for the shame and disgrace brought upon them. Unless this is the construction of the statute, the proviso that an employer "shall not recover unless he is injured in his person or property" is senseless. The right of a son to recover does not depend upon the question whether he is dependent upon and looks to the father for support; it depends solely upon the relation of father and son. An adult son may maintain the action after giving the notice required by the statute.

Exceptions overruled.

William M. BLISS, *Admr.*,

v.

Inhabitants of SOUTH HADLEY.

1. It is **not negligence, as matter of law**, on the part of parents, to **send a child about twenty months old into the street for air and exercise**, in the charge of a child eight years old; but the question is one of fact, depending upon how much the street was used, and upon the intelligence, capacity, and experience of the elder child.
2. **Children using a street for air and exercise** may be considered **travelers**, and the fact that they stopped for a few minutes to watch other children at play will not devest them of their rights as travelers.

(Hampshire—Filed October 19, 1887.)

ON defendant's exceptions. *Overruled.*

Action of tort to recover damages under Pub. Stat. chap. 52, § 17, for the death of an infant child of plaintiff, resulting from an injury alleged to have been caused by defects in two highways, known as Grant and Bridge streets in the village of South Hadley in the town of South Hadley.

The child whose life was lost (named Frank) was at the time of his death one year and ten months old; and the alleged injury occurred two weeks before. Plaintiff resided with his wife and children on Grant Street about five rods from its intersection with Bridge Street. On the opposite side of Grant Street, and extending to Bridge Street, the gutter between the worked roadway and the sidewalk was filled

with water by reason of an obstructed culvert, and had remained so for several years. The intestate fell into this water, and there was evidence tending to show that that was the cause of his sickness and death.

Upon the questions raised by the exceptions, the evidence was in substance as follows:

The plaintiff testified that he was away from home at the time of the accident. That the child Frank was strong and healthy and accustomed to be out on the street and about there. That plaintiff's elder son Leon, eight years old, was accustomed to take good care of Frank, and had been out with him many times. That plaintiff had noticed the place at the corner of Grant and Bridge streets. That there was water on Grant Street, at the corner of Bridge Street, across the road from where plaintiff lived, and it extended back from Bridge Street 15 or 20 rods on Grant Street. It might have been 8 feet across and 8 feet deep. Had been there for three or four years.

The mother testified that on the day of the injury she sent the younger child out with Leon to take air and exercise.

The boy Leon testified that he went out with Frank over the sidewalk across Bridge Street, where there were two boys about as large as himself playing, and that he stopped there a good while, Frank standing with him; that he did not have hold of Frank's hand, and the latter left him and went across the road towards their house; that Leon did not see him until he got half way across the road, when he ran after him, and he (Frank) fell into the water.

A neighbor of plaintiffs testified that she saw the children as they went out, and saw them go across Bridge Street and stand there with other boys. That she was where she could see the boys all the time. She looked up and saw Frank coming across the street, and halloed; but Leon did not hear her. She halloed again, and Leon ran, and he got perhaps half way across the street when she saw Frank fall into the water. She also testified that she had seen the children about together a great many times, and that Leon always took good care of the baby, but did not always keep hold of his hand.

The defendant asked the court to rule that there was no evidence that the plaintiff's intestate was in the exercise of due care, and no evidence that he was a traveler on the highway; and that on all the evidence on these points the plaintiff could not recover.

The court refused so to rule, and the jury found for the plaintiff; and defendant alleged exceptions.

Mr. J. C. Hammond, for defendant:

The plaintiff's intestate, Frank E. Bliss, was only about twenty months old, and was clearly incapable of taking care of himself, and was entitled to the care of others; and the negligence of the caretaker is imputed to him.

Wright v. Malden & M. R. R. 4 Allen, 283; *Callahan v. Bean*, 9 Allen, 401; *Gibbons v. Williams*, 185 Mass. 333; *McGeary v. Eastern R. R. Co.* 185 Mass. 363.

The case discloses no evidence that the plaintiff's intestate was a traveler, but it appears that he was playfully running away from his brother and fell into the water.

Blodgett v. Boston, 8 Allen, 237; *Tighe v. Lowell*, 119 Mass. 472.

The case discloses no evidence of due care on the part of those having the care of the intestate.

Wright v. Malden & M. R. R. supra; Stock v. Wood, 136 Mass. 353.

There are no circumstances of sudden danger excusing the negligence of the attendant, such as appear in *Collins v. South Boston Horse R. R. Co.* 1 Mass. (L. ed.) 637, 2 New Eng. Rep. 649, 142 Mass. 301-315.

The act of this infant child was not a natural and ordinary incident of travel, and is unlike the case of *Gulline v. Lowell*, 2 Mass. (L. ed.) 426, 4 New Eng. Rep. 236, 144 Mass. 491.

Mr. D. W. Bond, for plaintiff:

Whether it was negligence on the part of the parents not to have prevented the children from going upon the street was a proper question to be submitted to the jury under instructions.

Collins v. South Boston Horse R. R. Co. 1 Mass. (L. ed.) 637, 2 New Eng. Rep. 649, 142 Mass. 301; *Mulligan v. Curtis*, 100 Mass. 512; *Lynch v. Smith*, 104 Mass. 52.

Whether the boy Leon was in the exercise of due care was for the jury; and there was evidence upon which the jury had the right to find as they did. The care required of such a boy is the exercise of that degree of care which might reasonably be expected of children of his age, or which children of his age ordinarily exercise.

Collins v. South Boston Horse R. R. Co. 1 Mass. (L. ed.) 637, 2 New Eng. Rep. 649, 142 Mass. 301; *O'Connor v. Boston & L. R. R. Corp.* 135 Mass. 352.

There was evidence to be submitted to the jury whether the intestate was a traveler on the highway.

In *Mulligan v. Curtis*, 100 Mass. 514, the court (Hoar, J.) says: "Little children have a right to go into the street of a city for air and exercise."

There would seem to be the same right in the country as in the city.

The word "traveler," in the statute with reference to repairs of ways, it has been said, "may well embrace within its meaning, as applied to the subject-matter, everyone—whatever may be his age or condition—who has occasion to pass over the highway for any purpose of business, convenience, or pleasure. Nor is the motive or object with which a street or highway is thus used, if it be not unlawful, at all material in determining whether a person is entitled to an indemnity from a city or town for an injury occasioned by a defect."

Blodgett v. Boston, 8 Allen, 237, 240.

As to being a traveler, see *Hunt v. Salem*, 121 Mass. 294; *Purple v. Greenfield*, 138 Mass. 1; *Britton v. Cummington*, 107 Mass. 347; *Babson v. Rockport*, 101 Mass. 98; *Hamilton v. Boston*, 14 Allen, 475; *Blodgett v. Boston*, 8 Allen, 241; *Gulline v. Lowell*, 2 Mass. (L. ed.) 426, 4 New Eng. Rep. 236, 144 Mass. 491, 496.

McRton, Ch. J., delivered the opinion of the court:

It cannot be said, as matter of law, that it was negligence on the part of the parents of the intestate to send him into the street, for air and exercise, in the charge of his brother Leon, who was eight years old. It was a question of fact, de-

pending upon how much the street was used, and upon the intelligence, capacity, and experience of Leon, and was properly submitted to the jury. The evidence does not disclose any decisive act of negligence on the part of Leon, and it was for the jury to determine whether he was exercising reasonable diligence in the care of his infant brother.

It was competent for the jury to find that the boys were travelers. They were using the street for air and exercise. The fact that they stopped for a few minutes to watch other boys at play, was one of the natural and ordinary incidents of travel and did not divest them of their rights as travelers. *Gulline v. Lowell*, 2 Mass. (L. ed.) 426, 4 New Eng. Rep. 236, 144 Mass. 491.

Exceptions overruled.

William MURPHY

v.

James MURPHY.

1. On a claim of title under foreclosure of a mortgage by entry and three years' possession, the certificate of two competent witnesses to prove the entry, required to be sworn to before a justice of the peace, was sworn to before a notary public. *Held*, that as by statute notaries public had the same authority to administer oaths as justices of the peace, the oath of the witnesses to the certificate was legally administered by a notary public.

(Worcester—Decided October 21, 1887.)

EXCEPTIONS by defendant in a writ of entry to recover land. *Overruled.*

The premises were conveyed to demandant by mortgage deed dated April 18, 1866, and recorded within a few days thereafter. The plaintiff claimed title under a foreclosure of the mortgage for breach of the condition, by entry and three years' possession.

The case appears in the opinion.

Mr. David F. O'Connell, for defendant:

The certificate of entry should follow the express provisions of the Public Statutes. Proof of entry shall be made and sworn to before a justice of the peace, and not before any other magistrate.

Mass. Pub. Stat. chap. 181, § 2; *Thompson v. Kenyon*, 100 Mass. 108; *Ellis v. Drake*, 8 Allen, 161; *Hawkes v. Brigham*, 16 Gray, 561.

The foreclosure will be ineffectual unless the certificate was properly executed by the proper magistrate.

Robbins v. Rice, 7 Gray, 202.

Mr. Frank P. Goulding, for plaintiff:

The statute does not provide for a judicial proceeding before the magistrate, but for a mere ministerial act; it is sufficient if the oath is administered by an officer qualified generally to administer oaths.

Pub. Stat. chap. 181, § 2.

The direct terms of the statute are decisive: "Notaries public shall have the same authority to administer oaths as justices of the peace."

This includes all the cases where a justice of the peace may administer an oath.

Id. chap. 18, § 1.

The revision in the General Statutes, and in the Public Statutes, did not alter the law; and the original statute conferring this authority on notaries public is in terms which render the construction we contend for indisputable: "Notaries public, duly commissioned and qualified in this Commonwealth, are hereby empowered to administer oaths in all cases in which the same may now be lawfully done by justices of the peace."

Stat. 1851, chap. 29.

The phrase, "before a justice of the peace," found in Pub. Stat. chap. 181, § 2, is a survival from the original statute, enacted before the authority was given to notaries to administer oaths.

Rev. Stat. chap. 107, § 2.

By Rev. Stat. chap. 85, § 36, general authority to administer oaths was conferred on justices of the peace in all cases where an oath shall be required, unless other provision is expressly made by law. But in that revision and in some subsequent statutes the old form of expressly saying the oath shall be administered by a justice of the peace is retained. For example, the Statute of 1840, chap. 87, § 1, re-enacted in Gen. Stat. chap. 112, § 6, and Pub. Stat. chap. 150, § 5, limiting the concurrent jurisdiction of this court to cases where the plaintiff, or someone in his behalf, makes oath or affirmation before some justice of the peace as to the amount of the matter sought to be recovered.

This form of enactment creates no exception to the general language of the Statute of 1851, chap. 29 (Pub. Stat. chap. 18, § 1), but merely imports that the oath is to be administered by a magistrate having the authority of a justice of the peace in the premises.

Field, J., delivered the opinion of the court:

The single exception of the tenant is that the certificate of the entry made for breach of condition of the mortgage was not sworn to before a justice of the peace, but was sworn to before a notary public. Pub. Stat. chap. 181, § 2; Gen. Stat. chap. 140, § 2; Rev. Stat. chap. 107, § 2; Stat. 1785, chap. 22, § 2; Stat. 1798, chap. 77, § 1. The provision requiring a certificate of the entry to be made and recorded, and, if not made by the mortgagor or the person claiming under him, to be made by two competent witnesses and sworn to before a justice of the peace, was first enacted in the Revised Statutes. See amendments to Revised Statutes proposed by the committee. Report, chap. 107, § 2, p. 134.

In Rev. Stat. chap. 85, § 35, it was enacted

that "every justice of the peace may administer oaths in all cases in which an oath is or shall be required, unless a different provision shall be expressly made by law." Of this section the Commissioners on the Revised Statutes say: "This section will probably add little or nothing to the authority of justices of the peace, but it may save trouble in future legislation, by preventing repetition in the numerous Acts in which an oath is required to be taken." Notes of Comrs. Rev. Stat. chap. 85, § 35; Gen. Stat. chap. 120, § 49; Stat. 1870, chap. 120; Pub. Stat. chap. 155, § 2.

By Pub. Stat. chap. 18, § 1, "notaries public shall have the same authority to administer oaths as justices of the peace." Gen. Stat. chap. 14, § 34. This was first enacted by Stat. 1857, chap. 29.

Before the Revised Statutes it was customary, in enacting statutes, when an oath was required, to designate in the statute the person, magistrate, or magistrates before whom the oath must be taken, although this was sometimes left to be determined by the context. After the Revised Statutes, unless a different provision was expressly made by law, a justice of the peace might administer any oath required to be taken, and the statutes requiring an oath were often silent in regard to the person or magistrate before whom it should be taken. In administering an oath to the witnesses who have made a certificate of an entry upon land for breach of the condition of a mortgage, there is nothing in the nature of a judicial proceeding. A justice of the peace was the person designated to administer the oath, because he was the magistrate usually designated to administer oaths in proceedings not judicial, and of which no record other than the *jurat* of the magistrate was required. The purpose of the statute was to require the certificate to be verified by an oath in such a manner that the witnesses could be convicted of perjury if it was false. The phraseology of the Revised Statutes has been retained in the General Statutes and the Public Statutes, because no substantial change of the law was intended, and probably without any reference to the authority given to notaries public to administer oaths. As it is now the intention of the statutes that notaries public shall have the same authority to administer oaths as justices of the peace have, we think that a notary public had an authority to administer the oath in this case, and that, taking all the statutory provisions together, Pub. Stat. chap. 181, § 2, must be construed to mean that the certificate must be sworn to before a person having the authority of a justice of the peace to administer an oath.

Exceptions overruled.

CONNECTICUT.

SUPREME COURT OF ERRORS.

GRAVEL HILL SCHOOL DISTRICT
v.
OLD FARM SCHOOL DISTRICT.

1. Under Rev. Stat. p. 135, § 7, the **authority of the superior court to act on an appeal from the action of a town meeting, upon an application to transfer certain territory from one school district to another, is not affected by the prior action of the town, and is subject to no limitations except those imposed by the preliminary notice and the warning of the town meeting.**
2. **Action under a notice and warning describing the territory sought to be transferred is not limited to ordering or refusing the transfer of the exact territory described *in toto*, but may apply to a part only of such territory.**
3. **After rejection of the application by the town, the superior court is not confined, on appeal, to sustaining or reversing *in toto* the action of the town, but may order the transfer of a part only of the territory described in the notice and warning.**

(Hartford—Filed September, 1887.)

APPPEAL by the defendant, the Old Farm School District, from a judgment of the Superior Court for Hartford County, on an appeal by the Gravel Hill School District from the action of a town meeting of the town of Bloomfield, refusing an application made by said Gravel Hill School District, for the transfer to it of certain territory included within the Old Farm School District. *Affirmed.*

The facts and questions presented are stated in the opinion.

Mr. Leonard Morse, for defendant:

The court should either have sustained the action of the town or *in toto* reversed it.

1. It was not competent for the town, under the warning, to have set off from one district to the other a fraction of territory materially less than that described in such warning.

1. The statute (Rev. 1875, p. 135, § 5), provides that, "when it is proposed to * * * alter * * * any school district or districts, notice that such change is proposed" shall be posted, etc.

The word "such," according to Webster, is defined as "of that kind," and as "of that particular quality or character specified." The words "such change" accordingly mean a change "of that kind," or a change "of that particular quality or character specified;" that is, a change of a definite kind,—not a change simply, but a change which is clearly covered by the terms of the warning.

The statute should be construed in the light of, and in pursuance of, the general statute (Rev. Stat. 1875, p. 83, § 1), which provides that the warnings of the meetings of all public communities shall specify the objects for which such meetings are to be held.

1 Conn.

2. It was competent for the town to make such change only as was described in the notice, or, at most, a change the ordering of which would seem to the average voter reading the notice to be a natural and proper outcome of the meeting.

1 Dill. Mun. Corp. pp. 322-324; 39 Vt. 198; 44 Vt. 404; 1 Allen, 232; 10 Pick. 548; 57 Me. 804; 75 Me. 78; 55 N. H. 811; 5 Conn. 391; 8 Conn. 247; 18 Conn. 227; 53 Conn. 576.

II. Even if the town did have the power under the warning to make the change recommended by the committee, the statute does not intend that the superior court should have that power, under the facts in this case.

1. The words "said court shall have the same powers to act upon said application that said town had," mean that the superior court shall have the same powers to act upon such application as was made at the town meeting.

To 1865 it was the uniform policy of the State that the alteration of school districts should be made by the school societies or towns.

Stat. 1769, p. 380; 1784, p. 216; 1796, p. 378; 1805, p. 502; 1808, p. 582; 1821, p. 398; 1824, p. 353; 1838, p. 523; 1849, p. 302; 1854, p. 419.

No appeal was allowed. They had original and final jurisdiction.

The other New England States, except Rhode Island, have pursued the policy of vesting in the local communities, without supervision, the power to alter school districts; in some cases the districts proposed to be altered being the final tribunals.

Mass. Rev. Stat. 1882, p. 307, § 13; Me. 1888, p. 182; Vt. 1880, p. 167, § 545; N. H. 1878, p. 207, § 4.

In Rhode Island, districts are altered by the school committee of the town, subject to appeal to the commissioner of public schools for the State.

Rev. 1882, pp. 147, 151.

There is sound reason in allowing an appeal in the latter case, because original jurisdiction vests not in a community, but in a committee.

The appeal in this case was taken under a law first passed in 1865 (Pub. Acts 1865, p. 129). This law is opposed to the traditional theory of town government in the New England States, namely, that affairs pertaining solely to the town should be exclusively managed by the town. Statutes in derogation of long-established and uniformly-approved policy should be strictly construed.

Messrs. Johnson & Prentice, for plaintiff:

The real test of the jurisdiction of the court is to be found by an inquiry as to the jurisdiction of the town meeting from which the appeal was had.

By Rev. Stat. p. 184, § 1, towns are given the power, with certain limitations unimportant to this case, to form, alter, unite, and dissolve school districts and parts of school districts within their limits.

The law, however, provides this safeguard against surprise: that no action can be taken forming, altering, uniting, or dissolving any district, unless notice that such change is proposed shall have been given in a specified manner.

The language of this provision is as follows: "When it is proposed to form, alter, unite, or dissolve any school district or districts, notice

that such change is proposed shall either be posted," etc.

Rev. Stat. p. 185, § 5.

It follows, therefore, that the town meeting held on March 20, 1885, had full jurisdiction to make any alterations in the lines and boundaries of the two districts in question, within the proper limits of the notice given and of its warning.

The notice required by the statute is only a general one.

Kindred notices generally are only required to be reasonable, and to furnish reasonable information of the subject-matter, that parties in interest may not be surprised and their rights prejudiced without warning. Technical exactness is not required. "It cannot be necessary to state the business so fully and precisely that no opportunity for choice and no variation of mode shall be left to the meeting."

South School Dist. v. Blakeslee, 18 Conn. 227, 284; *Bartlett v. Kinsley*, 15 Conn. 327, 332; *Bull v. Warren*, 86 Conn. 83, 85.

Beardsley, J., delivered the opinion of the court:

On the 20th day of March, 1885, application was made to a town meeting of the town of Bloomfield to annex a part of the territory of the Old Farm School District, lying in that town, to the Gravel Hill District, lying partly within the town.

Notice that such application would be made, describing the territory proposed to be taken from the one district and annexed to the other, was given pursuant to the statute (Rev. Stat. p. 185, § 6), and a town meeting was duly warned to consider the application. The application was rejected by the town meeting, and thereupon the Gravel Hill District, proceeding under the statute, appealed to the superior court, which court rendered judgment that a part only of the territory applied for should be annexed to the Gravel Hill District. From this judgment the Old Farm District has appealed to this court, assigning as error that the court erred in adjudging that a fraction of the territory in question, materially less than that asked for, should be set out from the Old Farm District and annexed to the plaintiff dis-

trict; whereas it should have either sustained the action or *in toto* reversed it.

The statute before referred to (Rev. Stat. p. 185, § 7) provides that the superior court, on appeal, "shall have the same power to act upon such application that such town had." This language admits of no other construction than that the authority of the court to act is not affected by the prior action of the town, and is subject to no limitations except those imposed upon the town and court alike by the preliminary notice referred to and the warning of the town meeting. It is claimed that the court, under the notice and warning, could only wholly grant or reject the application.

The obvious design of the provision for notice to the districts to be more immediately affected by the proposed change is to give their inhabitants earlier and more direct notice of the application than would be afforded by the warning of the town meeting. No reason is suggested why such notice should be more minute or specific as to the character of the application than the warning of the meeting.

As to the requisites of such warnings, the court, in *Bartlett v. Kinsley*, 15 Conn. 327, says: "It cannot be necessary to state the business so fully and precisely that no opportunity for change and no variation of mode shall be left to the meeting." See also *South School Dist. v. Blakeslee*, 18 Conn. 284; *Bull v. Warren*, 86 Conn. 85.

It is not perceived upon what principle the applicants can object that only part of the territory applied for was taken from them. In suits at law or in equity the plaintiff may recover any part of the damages he claims, or any part of the relief he asks for. It would hardly be doubted that a town or school meeting warned to act upon a proposition to appropriate, for a specified purpose, a definite sum of money, could appropriate less than the sum named in the warning.

The principle applicable in such cases is suggested by the maxim "*omne majus in se minus continet*."

There is no error in the judgment of the Superior Court.

In this opinion the other Judges concurred.

VERMONT.
SUPREME COURT.

William H. ORMSBY

v.

Warren H. RHOADES.

An infant living with his uncle, who stands *in loco parentis* to him, cannot (where there is no express contract to the contrary, and no circumstances showing a different understanding or expectation of the parties), recover for his services, though worth more than his support, when the infant is in need of the support, and the uncle faithfully discharges the duties of his parental relation to him. (*Taft, J., dissents.*)

(Windham—Filed October 15, 1887.)

GENERAL ASSUMPSIT. Heard on a referee's report, September Term, 1886, Walker, J., presiding. Judgment that the plaintiff could recover only upon his claim, item No. 2, \$16.2 damages, and apportioning the costs; and that he could not recover for his services, found by the referee to be worth \$200, over and above what the defendant furnished him, and interest from April 4, 1881. *Affirmed.*

Exceptions by the plaintiff.

The referee found that the plaintiff's father was a brother of the defendant's wife; that the plaintiff was born in 1862, and both his parents deceased in 1870, at Troy, N. Y.; that in the fore part of October of that year the defendant and his wife found the boy, the plaintiff, at the Troy Orphan Asylum, where he had been taken a short time before by his Sunday-school teacher; and on October 17, 1870, the defendant and his wife took the boy to their home in Windham, where he continued to live with the defendant until April 24, 1881, when the plaintiff ran away. By some arrangement, it did not appear what, with the poor-master of the city of Troy, the plaintiff was surrendered by an official of said asylum into the defendant's custody when he was first taken to his home in 1870. While the plaintiff lived with the defendant, he had been made to believe that the latter was lawfully entitled to his earnings until he should become of age; and, laboring under that belief, he was induced to purchase his time of the defendant, during his minority, after he left him. Item No. 2, \$16.20, for which judgment was rendered below, was a charge for money paid to defendant under this purchase of his time. The referee found, in part:

"I do not find that the plaintiff was ever bound out or apprenticed to the defendant, or that the plaintiff was ever adopted by the said defendant, or by the said defendant and his wife, as his or their child. Neither am I able to find that there ever was any contract or agreement made or entered into by and between defendant and plaintiff, or between the defendant and any other person authorized to act for the plaintiff, in reference to plaintiff's term or manner of service, or the amount of compensation he was to receive, if

any. But I do find that the plaintiff was taken by the defendant into his family, was received and treated therein as a member thereof, and so continued to be recognized and treated by the defendant and his wife so long as he remained with them. The defendant clothed the plaintiff while he remained with him—not extravagantly, but quite comfortably, and as well as farmers' boys in our hill towns will average to be clothed. No charge or account of clothing furnished was ever made by the defendant to plaintiff. The boy was sent to church, was required to attend Sunday-school, and also attended the common school in the school district in which defendant resided. He was not kept constantly at school during each term, but was allowed and sometimes required to remain at home, and away from school, to assist about the work upon the farm. During the last few years plaintiff was with the defendant he was only allowed to attend school during the winter term, as his services at home upon the farm had become of some value to the defendant during the spring, summer, and fall months. I state this fact, inasmuch as it has a bearing upon the question of the value of the services of the plaintiff done and performed for the defendant during these years. Neither was he allowed to attend the winter term steadily, as he was required to remain at home occasionally and do work upon the farm. His opportunities for attending school, as allowed by the defendant, were just about the same as were afforded to farmers' boys living upon hill farms thirty to fifty years ago. Upon the trial some evidence was given tending to show abusive treatment of the plaintiff by the defendant. I find that the plaintiff was like the great majority of boys, and required correction. On two or three occasions the defendant inflicted corporal punishment upon him, but not to injure him in any way; and I find that both the defendant and his wife thought a great deal of the boy, and only punished him for his good. The plaintiff testified that he ran away because he was not well treated. I do not find that he was justified in leaving the defendant on any such ground as that assigned."

The referee also found, subject to the opinion of the court on the facts reported, that the plaintiff's services were worth \$200 more than that which the defendant furnished him; and that he was entitled to recover that amount with interest, if anything, for his work and labor for the defendant.

Messrs. A. E. Cudworth and Waterman & Martin, for plaintiff:

To sustain the claim that the defendant stood *in loco parentis*, the defendant must have been bound to support and educate the plaintiff during minority.

1 Bl. Com. 447; 2 Kent, Com. 193.

The fact that the defendant took the plaintiff, without authority, into his family, of his own motion, could not force this artificial family relation upon the infant plaintiff so as to permit the defendant's pocketing over \$200 earned by the plaintiff's toil.

This case does not come at all within the rule as laid down in *Fitch v. Peckham*, 16 Vt. 150; *Andrus v. Foster*, 17 Vt. 556; *Davis v.*

Goodenow, 27 Vt. 715; *Sprague v. Waldo*, 38 Vt. 189; *Lunay v. Vantyne*, 40 Vt. 501.

When one labors for another with his knowledge and approval, the law will imply that the relation of debtor and creditor exists, except in cases where the parties, at some time previous to the rendition of the services for which payment is demanded, have stood in such a relation to each other that rendering such services by the plaintiff did not make the defendant his debtor.

And neither relation by blood nor the family relation alone are sufficient to rebut the presumption that such services must be remunerated.

Briggs v. Estate of Briggs, 46 Vt. 571.

The law will not raise an implied promise against one incapable of making a valid promise.

Southworth v. Kimball, 58 Vt. 387.

The relation of the plaintiff to defendant must have come under one of these three conditions: He was a servant, or a boarder, or he was a visitor, neither bound to pay nor entitled to receive compensation.

Andrus v. Foster, 17 Vt. 556; *Guild v. Guild*, 15 Pick. 129.

"When the relation is that of a visitor, no expectation of pay for board or incidental services exists. If either of the other relations is established, an expectation of pay arises."

Sawyer v. Hebard's Estate, 58 Vt. 375.

Messrs. L. S. Walker and C. B. Eddy, for defendant:

The defendant stood *in loco parentis* to the plaintiff; and in such case the law implies no obligation to pay for plaintiff's services.

Andrus v. Foster, 17 Vt. 556; *Davis v. Goodenow*, 27 Vt. 715; *Lunay v. Vantyne*, 40 Vt. 501; *Fitch v. Peckham*, 16 Vt. 150.

When individuals stand to each other in a family relation, as distinguished from that of master and servant, the law implies no contract for wages.

Lantz v. Frey, 19 Penn. 366; *Mulhern v. McDavitt*, 16 Gray, 404.

The policy of the law is to encourage an extension of the circle and influence of the domestic fireside, and its presumptions are in favor of the existence of its relation, unless a different arrangement is proved to have been made.

Williams v. Hutchinson, 3 N. Y. 312; *Williams v. Williams*, 183 Mass. 304.

The arrangement between these parties was highly beneficial to the plaintiff. He was in no way defrauded or overreached. If it was a contract, it was for necessities, and therefore binding. "A contract for subsistence, clothing, and education is a contract for necessities, and, if reasonable and beneficial, will be supported by law."

Shaw, Ch. J., in *Stone v. Dennison*, 18 Pick. 6.

Rowell, J., delivered the opinion of the court:

The plaintiff's claim, shortly stated, is this: that, in order to entitle the defendant to be treated as having stood *in loco parentis* to him, he must have had the legal custody of his person, and have been bound to support, protect, and educate him during the time in question,—which he did not have and was not bound to do; that the

defendant took him from the asylum into his family of his own motion, without authority, and could not force a *quasi* family relation upon him, being an infant, so as to now shield himself from paying what his services were worth above what he received by way of support at his hands; that defendant can stand, therefore, only upon the ground of an agreement, express or implied; that no express agreement appears, and that, as plaintiff was incapable, by reason of infancy, of contracting, the law will not imply a promise against one incapable of making a valid one; that he was clearly not a visitor in defendant's family, but was either a boarder or a servant there; and that, whichever he was, he is entitled to recovery.

But it is not true that, in order to entitle the defendant to be treated as having stood *in loco parentis* to the plaintiff, he must at the time have had the legal custody of his person, and have been bound to support, protect, and educate him; and Blackstone and Kent, cited to that proposition, do not sustain it, and the cases are the other way. Thus, in the absence of any statutory provision imposing the obligation, a stepfather is not bound to maintain his stepchildren, and consequently is not entitled to their earnings or the control of their persons. *Tubb v. Harrison*, 4 T. R. 118; *Cooper v. Martin*, 4 East, 76; *Freto v. Brown*, 4 Mass. 675; *Bartley v. Richtmyer*, 4 N. Y. 38; 2 Kent, Com. 192. But yet he may stand in a partial relation to them; and, if he takes them into his house, and they become a part of his family, he will be deemed to stand in such relation, and to be entitled and responsible accordingly as long as that relation exists. *Stone v. Carr*, 3 Esp. 1; *Lord Ellenborough* in *Cooper v. Martin*, 4 East, 76, 82; 2 Kent, Com. 192. But when they cease to be members of his family, as they may at will, then whatever custody and control he had of them is gone, and his rights and liabilities on account of his former relation to them cease; and they cannot recover of him for services rendered while that relation existed, though minors at the time, and though their services be worth more than their support, unless there was an express agreement to that effect, or something to show that such was the understanding or expectation of the parties; for in such circumstances a promise to pay wages will not be implied. *Williams v. Hutchinson*, 3 N. Y. 312. The relation rebuts such an implication.

In *Mancell v. Thomson*, 2 C. & P. 303, an uncle who had brought up a niece, but of whom the case does not show he had legal custody, was held to stand *in loco parentis* to her; and, on showing the smallest degree of service, was allowed to recover damages for her seduction, the same as a father.

And in *Irvine v. Dearman*, 11 East, 23, the plaintiff, who had taken into his family and bred up for several years the daughter of a deceased friend, was allowed to recover damages for her seduction *ultra* the mere loss of service, on the ground that he stood *in loco parentis* to her.

So in *Haggerty v. McCanna*, 25 N. J. Eq. 48, a stepfather, having voluntarily assumed the care and support of his stepdaughter, was not allowed compensation for her support because he stood *in loco parentis* to her.

It is further contended that because the plaintiff was an infant, therefore the defendant could not stand in the relation of a parent to him, and thereby subject him to the legal consequences of that relation; because he could not have bound himself in the premises by an express contract with the defendant, and hence cannot be deemed to have assented by implication to that relation and its consequences. But this is not so; for an infant can bind himself by an express contract for necessities, and if by an express contract, then by an implied contract as well; and surely food and shelter, care and nurture, in the defendant's house, were necessities for the plaintiff in his circumstances. Thus, in *Stone v. Dennison*, 13 Pick. 1, an infant contracted specially to serve the defendant, till of age, for his board, clothes, and education; and it was held that he could not repudiate the contract and recover for his services because they were shown to be worth more than the stipulated compensation. The case was put upon the ground that the contract was for necessities.

In *Williams v. Hutchinson*, 8 N. Y. 312, the assent of an infant to an arrangement to waive the right to claim wages for his services was implied from the parental relation the defendant sustained to him when they were rendered.

We take it to be sound law that, whenever one stands in the relation of a parent to an infant who needs his care and support, and faithfully discharges the duties of that relation, there being no express contract to the contrary, nor any circumstances showing a different understanding or expectation of the parties, there can be no recovery for services on the one hand, nor for care and support on the other, though one happens to be worth more than the other.

This case comes clearly within this principle, and therefore the plaintiff cannot recover.

Judgment affirmed.

Taft, J., dissenting:

I do not agree with my brethren in the disposition of this case. The plaintiff, when eight years of age, was taken by the defendant and kept as a member of his family until he was nineteen years old, when he voluntarily left the defendant. The latter stood to the plaintiff *in loco parentis*. No contract was ever made by the parties. Will the law imply one? I think so. The care, support, and education furnished the plaintiff were certainly necessities, for which he might expressly contract, or for which he might be bound by an implied promise. But while the law implies a promise on the part of the infant to pay for all that the necessities furnished are worth, will it in this case imply one to pay \$200 in addition? I think not. An infant is not bound by any contract as to the price of necessities for which he may be liable. Kent, the learned commentator, says (Vol. 2, p. 240): "In all cases of contracts for necessities, the real consideration may be inquired into. The infant is not bound to pay for the articles furnished more than they were really worth to him as articles of necessity, and, consequently, he may not be bound to the extent of his contract; nor can he be precluded, by the form of the contract, from inquiring into the real value of the necessities furnished."

The contract is a personal one, voidable by

the infant or his representative only. 2 Kent, Com. 287. A party dealing with an infant is bound by the terms of the contract; and where the relation of parent and child in fact exists, a stranger cannot object that the one standing *in loco parentis* has not the legal custody of the infant. Such are the cases cited from 2 C. & P. 303, and 11 East, 23. And in *Keane v. Boycott*, 2 H. Bl. 511, the court refers to the correct principle when it says: "For this is the case of a stranger and a wrongdoer interfering between the master and servant, and now seeking to take advantage of the infant's privilege of avoiding his contracts,—a privilege which is personal to the infant, and which no one can exercise for him."

The case cited in the opinion of the court, of *Stone v. Dennison*, 13 Pick. 1, was a cause in which the contract was made, or assented to, by the guardian of the infant, and was therefore valid. *Haggerty v. McCanna*, 25 N. J. Eq. 48, was a case where the one standing in place of the parent attempted to recover compensation for the support of the infant. The plaintiff in that action could not repudiate the relation after having sustained it; he might not have been compelled to sustain it; but having done so, he could not avoid it; the infant alone could do that.

In the case of *Rez v. Wigston*, 8 B. & C. 484, it was held that an infant apprentice could not dissolve the relation of master and apprentice; but in England there are many statutes relating to apprenticeships, and I apprehend that that case was ruled under one of them; for in an early case at common law (*Gylbert v. Fletcher*, Cro. Car. 179), where an action was brought against an apprentice for departing from his service without license within the time of his apprenticeship, it was pleaded that at the time of making the indenture he was within age, whereupon it was demurred. After argument it was by "all the court resolved that, although an infant may voluntarily bind himself apprentice, and, if he continue apprentice for seven years, may have the benefit to use his trade, yet neither at the common law, nor by any words of 5 Eliz. chap. 4, shall the covenant or obligation of an infant for his apprenticeship bind him. But if he misbehave himself the master may correct him in his service, or complain to a justice of peace, to have him punished according to the statute, but no remedy lieth against an infant upon such covenant; and therefore it was adjudged for the defendant." At all events I think the latter case the better law. I see no more reason for holding that an infant may bind himself as to the price he shall pay for his bringing up, than I do in holding that he may bind himself as to the price of specific articles of necessity; which confessedly he cannot do. No injustice is done, by the rule I contend for, to the *quasi* parent; he is fully compensated for all that he expends for the infant, and if he wishes to make his contract a legal one, binding upon the infant, let him deal with the latter's guardian; and, if there is none, let him see that one is appointed, which can be done in all cases of infants.

How does the case at bar differ in principle from those of contracts by infants, to serve for a certain term, who quit before the term of service is performed? In such cases it has al-

ways been held that the infant may recover what, under all the circumstances, his services were worth, taking into consideration any injury the other party may have sustained by the avoiding the contract. Rob. Dig. 390, § 21. By this rule I think the plaintiff may recover the whole sum reported.

STATE of Vermont

v.

A. F. FREEMAN.

1. It is not necessary that the oath to the complaint of a private prosecutor for a breach of the peace be taken by the magistrate who issued the warrant; but it may be taken by a notary who is authorized to administer oaths.
2. When the complaint of a private prosecutor has been sworn to before the warrant was issued, but no certificate of the oath was appended thereto, the defect is one of form, and an amendment is allowable.

(Orange—Filed October 19, 1887.)

COMPLAINT by a private prosecutrix for a breach of the peace. Heard on a motion to quash, December Term, 1886, Orange County, Walker, J., presiding. Judgment that the motion be overruled. *Affirmed.*

The complaint was before a justice, and came to the county court on appeal. Motion to quash was made in the justice court, on the ground that it did not appear that the complaint was sworn to by the complainant. The motion was overruled, and the notary public was allowed to append the certificate of oath to the complaint, and the court found that it was sworn to before the warrant was issued. The other facts are stated in the opinion.

Messrs. D. C. Denison & Son, for the respondent:

A warrant upon the complaint of a private informer cannot lawfully issue without oath of the complainant, and this must appear by the magistrate's certificate.

State v. J. H., 1 Tyler, 444; 11 Vt. 339; Vt. Const. art. 11.

The magistrate ought to know that the oath has been taken, before the warrant is issued.

Muzzy v. Howard, 42 Vt. 23.

The complaint should show that it is presented by one having proper authority.

State v. Soragan, 40 Vt. 450.

The court should have jurisdiction of the process.

Congdon v. Vaughn, 56 Vt. 117; *Carleton v. Taylor*, 50 Vt. 230.

Here there is no process.

Morgan v. Hughes, 2 T. R. 225.

Mr. C. B. Stickney, for the State:

The defect was formal, and an amendment was properly allowed. Rev. Laws, § 1642. The case of *State v. J. H.*, 1 Tyler, 444, was decided before the passage of the statute of 1870, § 1642. The oath may be administered by a different officer than the examining magistrate.

Veasey, J., delivered the opinion of the court:

This was a complaint by a private prosecutrix for breach of the peace. The motion to quash was put on two grounds, viz.: first, that the prosecutrix did not make oath to the complaint; second, that no certificate of an oath was appended to the complaint before arrest of the respondent under the warrant.

As to the first point, it appears that an oath was taken, but it was by an officer authorized by statute to administer oaths (Rev. Laws, § 4555), other than the magistrate who issued the warrant. The Constitution, chap. 1. art. 11, forbids the issuing of any warrant without oath or affirmation first made. *State Treasurer v. Rice*, 11 Vt. 339. Must such oath be taken before the magistrate issuing the warrant, or may it be taken before another magistrate? The statutes are silent on the point. The substantial thing required in the Constitution is that the complaint be on oath. There is nothing in the form of the oath upon which the magistrate issuing the warrant is called upon to pass. Any form from which the idea can be collected is sufficient,—as, "taken and sworn before me."

1 Bish. Cr. Proc. § 231; *Commonwealth v. Bennett*, 7 Allen, 538; *Commonwealth v. Wallace*, 14 Gray, 382. The complaint must adequately charge an offense. Bish. Cr. Proc. § 230, and cases there cited. Therefore the magistrate must see the complaint in order to determine whether it furnishes sufficient foundation for a warrant. It stands like a *capias* in civil process issued upon affidavit. The right to the *capias* depends on compliance in the affidavit with the statutory requirements; therefore the magistrate must see it in order to pass on its sufficiency, as held in *Muzzy v. Howard*, 42 Vt. 23; but the oath to it may be before another officer authorized to administer oaths. So we think it may be as to a complaint.

The next objection is that there was no certificate of the oath to the complaint. It is urged in answer that this was a mere formal defect, and was amendable under Rev. Laws, § 1642. That section provides that formal defects may be amended under demurrers and motions to quash, before the jury is sworn.

The statutes neither require the oath to be appended or certified, nor do they prescribe a form of complaint. The oath had been taken in fact prior to the warrant.

In *State v. J. H.*, 1 Tyler, 444, it was held, under a motion to quash, that nothing short of the magistrate's certificate can be sufficient evidence that the oath was administered; and that case is relied upon by this respondent. The case contains no discussion by the court. The question was not raised before the magistrate who issued the warrant, but in the county court. We do not understand it was a decision that an amendment of the complaint could not have been allowed by the magistrate when the respondent was before him, or even by the county court when the motion to quash was made, so as to show an oath was taken, if such had been the fact. When the motion to quash in this case first came before the magistrate, he permitted an amendment of the complaint by allowing the notary who administered the oath to append his certificate of it, so that he then had the evidence which the case in Tyler holds

is essential. The amendment did not change the body of the complaint, or touch any allegation in it, or affect the amount or kind of proof required. It simply made the complaint show on its face what it was in fact. It was not the addition of a fact by the court upon proof of its existence, but the addition of the certificate of an oath by the officer who administered it,—like the amendment of an officer's return by the officer, or the copies of an appeal by the magistrate who tried the cases, to make the paper express what actually occurred. Under the English practice, amendments of informations were allowed after a plea in bar (*Rez v. Wilkes*, 4 Burr. 2527), and even after objection by plea in abatement (*Rez v. Seawood*, 2 Ld. Raym. 1472; 8 C. 3 Str. 739). It would be easy to sustain upon authority an amendment for substance, even under a motion to quash, but for the implication of our statute to the contrary. But, without touching that question here, in the absence of prescribed form by statute, or of specific statutory requirement that the oath to the complaint shall be certified thereon before issuing a warrant, we think the omission constitutes but a formal defect which is amendable under the statute cited. The case of *State v. Soragan*, 40 Vt. 450, was before this statute was enacted.

Judgment affirmed, and cause remanded.

Elijah DICKINSON

v.

Byron DICKINSON *et al.*

1. While an obligation for future support may not be a trusteeable debt, yet, where the obligor has failed to support, and arbitrators have awarded a specified sum against him because of such failure, such award is a debt, subject to attachment by trustee process; and when, in such case, the obligee has brought his petition to foreclose the mortgage executed to secure his support, the obligor can deduct the amount for which he had been adjudged trustee.
2. The obligor should have tendered money sufficient to pay both the award, less the amount for which he was held trustee, and also the expense of the obligee's support to the time of the tender.
3. Under a bond for future support, providing that if the obligee became dissatisfied with his treatment he had the privilege of residing in some other family,—*Held*, optional with him whether to reside with the obligor or in some other place.

(Chittenden—Filed October 28, 1887.)

PETITION to foreclose a mortgage, heard on the pleading and a special master's report, April Term, 1886, Chittenden County, Taft, Chancellor. Ordered that a decree of foreclosure pass for the petitioner; that there should be allowed him the sum of \$355.24, with interest from April 6, 1886; and that there should be deducted the amount of the two tenders, with interest thereon. *Reversed.*

1 Vt.

The master found that the arbitrators allowed the price of board, \$1.75 per week; that defendant Putnam ought to pay \$2 per week up to April 6, 1886; that said Byron went to live with one Haskins, his son-in-law, about five miles distant, when he left said Putnams; and that defendant Putnam, after the removal, offered to support the petitioner and his wife at some place at Underhill Center, nearer and more convenient of access for him, but that they claimed that they had the right, under the bond, to select their own place.

The other facts are sufficiently stated in the opinion.

Messrs. V. A. Bullard and Wilber & Wolcott, for the defendants:

The petitioner has no legal right to require his support at a place where it would cause needless expense or be exceedingly inconvenient to the mortgagor.

1 Hill. Mort. 172; *Wilder v. Whittemore*, 15 Mass. 262; 12 Allen, 586; *Holmes v. Fisher*, 18 N. H. 9; 20 Pick. 499; 1 Jones, Mort. § 891.

A suit of this kind cannot be maintained in the name of the mortgagee for the benefit of a third person who has furnished the support.

Bryant v. Erskine, 55 Me. 158; *Daniels v. Eisenlord*, 10 Mich. 454; 1 Jones, Mort. § 893.

The right of future support was not subject to assignment.

40 N. H. 35; 1 Jones, Mort. § 893.

The award was not exempt from attachment by trustee.

White v. Capron, 52 Vt. 634; 27 Vt. 561; 9 Gray, 211; 42 Vt. 120; *Holmes v. Clark*, 46 Vt. 22.

Messrs. J. J. Monahan and M. H. Alexander, for the petitioner:

The petitioner had the right, under the bond, to choose the place where he would be supported.

McClure v. Briggs, 58 Vt. 82.

The award was not subject to the trustee process.

Briggs v. Beach, 18 Vt. 115; *Stanly v. Robbins*, 86 Vt. 422; *Hastie v. Kelley*, 57 Vt. 298.

It was a joint debt due to the petitioner and his wife.

Fairchild v. Lampeon, 87 Vt. 407; *Bartlett v. Woodward*, 46 Vt. 100; *Towne v. Leach*, 32 Vt. 747.

Royce, Ch. J., delivered the opinion of the court:

It is found by the report of the master that in 1876 the petitioner conveyed his farm, with the personal property thereon, to the defendant Byron Dickinson, and that Byron executed the mortgage described in the petition, conditioned for the performance of a bond given by him to the petitioner for the support of the petitioner and his wife during the remainder of their lives, and the payment to them of a sum not to exceed \$20 a year during their lives. Byron performed the conditions of the bond for about eight years, when he became involved; and on the 31st of October, 1883, he and his wife conveyed the property to the defendant Putnam, who assumed the obligation, for the support of the petitioner and his wife, resting upon Byron by virtue of said bond. Putnam took immediate possession of the premises, and the petitioner and his wife remained with him, and

were supported and cared for by him until the 17th of October, 1884, when they, having become dissatisfied with their treatment, left, and went to live with one Haskins, and sent back word to Putnam that they should not return.

The bond given by Byron required him to furnish suitable and appropriate rooms for the use of the petitioner and his wife as long as it should be their pleasure to occupy the same, and in case they should become dissatisfied with the treatment of the said Byron or his family, they were to have the privilege of going to reside with some other family; and the said Byron was at all times and places to furnish the support provided for them in the bond, thus leaving it optional with the petitioner and his wife to reside with Byron on the premises conveyed, or in some other place. *McClure v. Briggs*, 58 Vt. 82.

On the 27th of February, 1885, Haskins having received no compensation for the support and care of the petitioner and his wife since their removal to his place, the petitioner claimed there had been a breach of the bond on the part of Putnam, and they then submitted all said matters to the arbitrament and award of two arbitrators by them chosen. The arbitrators awarded the petitioner \$203.87, for the support and maintenance of himself and his wife during the time they had lived at Haskins', and the annuity due.

One of the matters submitted was the construction to be put upon said bond, and that was conclusively settled by the award. After said award was made and published, one Terrill brought a suit upon a claim he had against Haskins, and summoned the petitioner as trustee; and upon disclosure and examination he was held as trustee, and judgment was rendered against him on the 17th of March, 1885. On the 18th of March Terrill brought suit upon said judgment against the petitioner, and summoned the defendant Putnam as trustee.

Upon the return-day of said writ, the 7th of May, 1885, the petitioner was defaulted, and Putnam, upon his disclosure reciting an indebtedness upon said award, was held as trustee, and judgment was rendered against him for \$87.84.

A suit was brought on the 29th of May, 1885, upon the award, in the name of the petitioner, but for the benefit of one Reynolds, to whom the claim had been assigned; and at the time of the hearing before the master that suit was pending in the county court. This suit is also being prosecuted for the benefit of said Reynolds.

Putnam paid the judgment rendered against him as the trustee of the petitioner, and the question is presented whether he is entitled to the benefit of that payment in reduction of the amount due upon the award. The petitioner claims that the award being for the support and maintenance of the petitioner and his wife, it was not subject to the trustee process; and in support of that claim cites, first, the case of *Briggs v. Beach*, 18 Vt. 115. In that case the trustee had executed his bond conditioned for the support of the defendant during life, and the court held that it was not a debt which came within the trustee process; that the cred-

itor had no greater right than the obligee, and could enforce performance of the bond in no other way than the award, and, if the right could be attached, they would be compelled to substitute the creditor in her place and allow him to enjoy her right personally.

The second case is that of *Stanley v. Robbins*, 86 Vt. 422, and all that is said upon the subject is that, an obligation for support being of a personal character, the property would not be subject to attachment by trustee process, as was decided in *Briggs v. Beach*, 18 Vt. 115.

The third case is *Hastie v. Kelley*, 57 Vt. 293, which simply held that the avails of exempt property could not be reached by trustee process, although the debt assumed the form of a life annuity.

All the cases that have come under my observation, in which it has been held that such a contract did not come within a trustee process, have been where the trustee has been sought to be charged on account of his obligation for future support; and in such cases it might well be held that the trustee could not be adjudged chargeable, because the money or thing due from him to the defendant depended upon a contingency. Rev. Laws, § 1074. The duty to support is contingent upon the life of the party to be supported, and so the value of the support to be rendered is incapable of estimation.

It will be noticed that the award made had no reference to future support; that was secured by the bond and mortgage, and no suggestion is made but what that security was ample. The award was to compensate the petitioner for past support which Putnam had neglected to furnish. It stands for consideration as it would if the petitioner had settled the matter with Putnam and taken his note or other obligation, upon the same consideration, for the amount due. Rev. Laws, § 1071, provides that any money or other thing due to the defendant, if it is due absolutely and without contingency, may be attached by the trustee process. And when the award was published, there became a debt due to petitioner that might be attached by the trustee process. The defendant Putnam having been adjudged the trustee of the petitioner, and having paid the judgment rendered against him, is entitled to the benefit of that payment, and the sum so paid should be deducted from the award.

On the 1st day of June, 1885, the defendant Putnam tendered to said Reynolds the sum of \$119.24, being the amount then due upon said award after deducting the amount of this judgment, and said tender has been kept good; and on the 24th day of August, 1885, he made him a further tender of \$55.50. No tender was made, at the time the tender of \$119.24 was made, to cover the expense of the petitioner's support from the 27th of February until that time; so it was insufficient in amount, and Reynolds was under no obligation to receive it. So the tender made on the 24th of August, under the construction we here put upon the bond, was insufficient in amount, and Reynolds was justified in disregarding it.

The decree of the Court of Chancery is reversed, and cause remanded, with mandate to enter a decree that there is due on said mortgage the

amount of said award, with interest on the same after it became payable, after deducting the amount of the judgment paid by the defendant Putnam as the trustee of the petitioner, and the further sum of \$136.69, being for the board and care of the petitioner from the 27th of February, 1885, to the 6th of April, 1886, and the amount then due. The costs are to be settled by the Chancellor.

Frank J. GREEN

v.

Hattie V. ADAMS, Geo. W. Folsom, Mary and Levi W. Seaver.

1. When a husband has committed and confessed a crime for which, if he should be punished by confinement in the State prison according to law, his wife would have a good cause of divorce therefor, a transfer by him of his personal property to a trustee, for the purpose of defrauding his wife of alimony, in case she should obtain a divorce, is void under the statute against fraudulent conveyances.—Rev. Laws, § 4155.

2. S had committed the crime of arson and confessed it, and, expecting to be confined in the State prison and that his wife would obtain a divorce, he transferred, with the intent of defrauding her of her right to alimony, his personal property to G in trust for his wife so long as she remained such, but no longer, and, in case she procured a divorce, for his mother and brother. S was imprisoned, and a divorce was granted to his wife therefor; all the funds were decreed by the court to her as alimony, and notice thereof given to the trustee. Thereupon the defendant F attached the funds by trustee process, bringing his action on a judgment obtained against S for burning his property. On a bill of interpleader brought by the trustee,—Held:

(a) That the transfer was void under the statute against fraudulent conveyances, and that the personal property vested in and belonged to the wife by virtue of the decree assigning it to her as alimony.

(b) That F's claim, being founded in tort, is not within the statute, as that relates only to rights and duties arising out of contracts.

3. The rights of the wife in respect to the property were not affected by the conveyance; and she would hold the money in the hands of the orator, even if F's claim had been within the statute; for the decree of alimony and the notification perfected her right to it before the service of the trustee writ.

(Washington—Filed October 17, 1887.)

BILL of interpleader. Heard on the pleadings and a special master's report, March Term, 1887, Washington County, before Veal Vt.

zey, Chancellor. The whole fund in controversy, except the note signed by Levi W. Seaver, was decreed to the defendant Hattie V. Adams, and the said Levi W. Seaver note was decreed to the defendant Folsom. Modified in part and reversed in part.

The case is stated in the opinion.

Mr. J. A. Wing, for the defendant Folsom: The wife's lien for alimony is on the husband's real estate and stock in corporations, but not on his personal estate, and he can dispose of this as he pleases, without her consent. In the case of *Foster v. Foster*, 56 Vt. 540, no question was made as to personalty. The husband can give away his personal property.

Bigelow, Fr. 96; *Holmes v. Holmes*, 8 Paige, 868.

He can convey it away, and the wife has no remedy.

Ford v. Ford, 4 Ala. 142; *Lightfoot v. Colgin*, 5 Munf. (Va.) 81; *Cameron v. Cameron*, 10 Smedes & M. 894; *Hays v. Henry*, 1 Md. Ch. 337.

He can give away till his wife, his children, and himself are penniless.

Pringle v. Pringle, 59 Pa. 281; 1 Bl Com. 449; 2 Kent, Com. 440.

No suit was pending for a divorce and her husband had not then done anything which was a cause of divorce; that depended on a contingency.

A clause in a will giving property to a widow, but, in case she marries, to another, is legal.

McCloskey v. Gleason, 56 Vt. 264.

The trust was valid as to the wife, but void as to the creditors, of which Folsom was one.

Jones v. Spear, 21 Vt. 426; *Cross v. Sickles*, 15 Vt. 252; *Church v. Chapin*, 35 Vt. 228; *Dewey v. Long*, 25 Vt. 564; *Woodward v. Wyman*, 53 Vt. 645; *Prout v. Vaughn*, 52 Vt. 451.

It is clear that the trust was void as to him, if he comes within the statute.

See cases *supra*.

A claimant in a bastardy suit is a creditor within the statute.

Damon v. Bryant, 2 Pick. 411.

So is one who has been assaulted a creditor in respect to his damages.

Slater v. Sherman, 5 Bush (Ky.), 206.

A conveyance pending an action for tort is void.

Ford v. Johnston, 7 Hun, 563; *Wilcox v. Fitch*, 20 Johns. 472.

The defendant Folsom can avoid the trust.

Miller v. Dayton, 47 Iowa, 312.

One having a claim for a tort is a creditor.

Weir v. Day, 57 Iowa, 84; *Logan v. Seatten*, 59 Md. 72.

By the common law, the husband owns the personal property absolutely. The wife has only a lien for dower in the realty.

Parks v. Cushman, 9 Vt. 320; Rev. Laws, §§ 2215, 2228.

This has not been indirectly changed by the divorce law.

Rev. Laws, §§ 2378, 2379.

The court can enjoin the husband in a divorce case from disposing of his property; but when this bill was brought, the property had been conveyed more than one year, and was wholly beyond his control. The injunction could not affect it. Under the statute no lien was created by the injunction.

Messrs. Heath & Willard, for the defendant **Hattie V. Adams**:

The conveyance to the orator was void as against the wife, because made in fraud of her rights. It was within the statute against fraudulent conveyances.

Rev. Laws, § 1155; *Foster v. Foster*, 56 Vt. 540; *Livermore v. Bantelle*, 11 Gray, 217; *Burrows v. Purple*, 107 Mass. 428; *Stuart v. Stuart*, 128 Mass. 370; *Brooks v. Caughran*, 8 Head, 464; *Niz v. Nir*, 10 Heisk. 546.

The court, in decreeing the alimony, passed the title of the property to the wife. The statute does not require such an injunction as this to be recorded. The injunction, by its own proper force, affected all the funds in the hands of the orator.

Walker, J., delivered the opinion of the court:

This is a bill of interpleader by which the orator asks leave to pay the funds in his hands, under a conveyance to him by Josiah W. Seaver for certain purposes under a so-called trust, to such one of the defendant claimants as the court shall decree it of right belongs.

It appears from the pleadings and the master's report that on the 26th day of October, 1879, Josiah W. Seaver, of Waitsfield, who then was the lawful husband of the defendant Hattie V. Adams (then called by the name of Seaver), having confessed that he was guilty of the crime of arson in burning several buildings in that vicinity, among which were the barns of the defendant George W. Folsom, and expecting to be confined in the State's prison in punishment therefor, sent for the orator, and with his consent transferred and delivered to him substantially all his property, which consisted of the following notes: Two notes signed by William and F. G. Farr, one for \$430, and one for \$70, also two notes signed by I. W. Seaver, one for \$200, and one for \$10, with the accrued interest on the same. These notes were delivered to the orator upon condition that he collect and pay from the avails thereof certain small bills mentioned, and procure for Josiah counsel in the arson cases, and that the balance of the fund should be held by the orator for the support and maintenance of his wife, Hattie B. Seaver, so long as she remained his wife, but no longer. This so-called trust was further conditioned that if his wife Hattie should die or obtain a bill of divorce from him, the funds then remaining in the hands of the orator should no longer be used for her benefit and support, but should be applied and appropriated to the use and benefit of his mother, Mary Seaver, during her life; and if any sum remained at her death, it was to be appropriated to the use of his brother Levi Seaver and his heirs.

The orator caused a memorandum of this conveyance and trust to be made in writing on the 27th of October. Hattie, the wife of Josiah, knew that this property was put into the hands of the orator, but it was not found that she knew or assented to the terms and conditions under which the property was passed over to him or that she accepted of its provisions.

On the 27th of October the said Josiah W.

Seaver was arrested upon the charge of arson, of which he had previously confessed he was guilty, and committed to jail in Montpelier. The Washington County Court being then in session, an information was immediately filed against him for the crime of arson, to which he pleaded guilty, and was thereupon sentenced by the court to be confined in the State's prison for the term of twenty-five years, and was confined in prison upon said sentence.

The orator collected \$525.80 on the notes thus passed over to him by Josiah, and paid debts to the amount of \$56.17, which left in his hands \$469.63. He thereafter paid Hattie one year's interest on this balance, \$28.15, and for taxes, etc., \$11.81. The balance with the accumulations, less taxes, is still in the hands of the orator. The two notes against Levi W. Seaver have not been collected, as they are not collectible. The orator allowed, by direction of Josiah, \$60 to Levi on said notes for the support of his mother in 1879 and 1880 under a previous contract.

In February, 1881, Hattie brought her petition for a divorce from Josiah, returnable to the March Term of Washington County Court, setting up as a cause his confinement in State's prison; on which an injunction was granted forbidding Josiah disposing of his property pending the divorce proceedings, which was duly served. At said March Term of court, and on the 12th day of April, the said Hattie was by said court granted a bill of divorce from said Josiah, by reason of his confinement in prison, and allowed to resume her maiden name of Adams. On the granting of this divorce, the court decreed to her as alimony all the funds in the hands of the orator under the so-called trust, in whatever form they might be. This term of court was adjourned *sine die*, April 14. On the 15th day of April the defendant George W. Folsom sued out a writ against Josiah W. Seaver, returnable at the next September Term of the court, on a judgment obtained by him at said March Term against Josiah, in an action of trespass *quare clavum fregit* for burning his property; and therein summoned the orator and Levi W. Seaver as trustees of Josiah. This writ was served on them as such trustees, April 18, and duly entered in court, where the cause is now pending. The orator was notified of Hattie's divorce, and also that all the funds remaining in his hands, of the property passed over to him by Josiah, were decreed to her as alimony, by her attorney, by a letter sent to and received by him before the service of the trustee writ upon him. Levi was not notified of this decree of alimony before the service of the trustee writ upon him.

The defendants Levi W. Seaver, the brother of Josiah, and Mary Seaver, his mother, answered the orator's bill, substantially admitting the allegation thereof, but made no claim to the property in the hands of the orator otherwise than they pray that the fund may be held for the support of Mary pursuant to the condition of the so-called trust. Mary has deceased pending this proceeding, and no claim is made in this court in behalf of her or her estate. No appearance or argument has been made in this court in behalf of Levi, and he makes no claim to the funds in his own behalf in his answer.

The issue presented in this court is wholly between the defendant Hattie V. Adams, and the defendant George W. Folsom. The defendant Hattie claims to hold the fund on the ground that the conveyance for transfer of the property by Josiah to the orator was fraudulent and void as against her, and that the decree of the county court granting this property to her as alimony passed the title of the same to her, and that her title thereto was perfected by her notification to the orator of her decree of alimony before the service upon him of the defendant Folsom's trustee writ.

The defendant Folsom claims to hold the fund on his trustee writ on the ground that his conveyance of the property to the orator was fraudulent and void against him as a creditor of Seaver; and claims that the conveyance was not fraudulent and void as to Hattie, because it was personal property, and the husband had the right to dispose of his personal property whether the wife understood the terms of the conveyance or not, even if done with the intent to defraud his wife of any right or duty she had against him, or to deprive her of the use of it.

1. So the principal question presented by the case is whether the defendant Hattie V. Adams is within the protection of Rev. Laws, § 4155, which makes void fraudulent conveyances of property as to the injured party, so that the conveyance alleged to be fraudulent was void as against her. If she is within the protection of this statute, and the conveyance was fraudulent, the property, as to her, though in the hands of the orator under a so-called trust arrangement, was still the property of her husband, and subject to any lawful order of court as his property; and the title and ownership thereof was legally passed to and vested in her by the order of court decreeing it to her as alimony.

Rev. Laws, § 4155, provides that "fraudulent and deceitful conveyances of houses, lands, tenements, or hereditaments, or of goods and chattels; all bonds, bills, notes, contracts, and agreements; all suits, judgments, and executions made or had, to avoid a right, debt, or duty of another person, shall, as against the party only whose right, debt, or duty is attempted to be avoided, his heirs, executors, administrators, and assigns, be null and void."

No distinction is made in this statute between realty and personalty. It includes all kinds of property and choses in action. All conveyances of property made or had to avoid a right, debt, or duty of another person are made void as against the party whose right, debt, or duty is attempted to be avoided. It is not designed to protect creditors alone, in the strict sense of the term; it embraces all persons who have a right or debt against the conveyancer, or to whom he owes a duty which he attempts to avoid.

The master finds that "the placing of the property in controversy in the orator's hands, by the said Josiah W. Seaver, was done in contemplation that his wife might get a bill of divorce from him, as he had confessed to the burning of a large amount of property of which he was sure to be convicted and sent to the State's prison; and he did this to place the property so she would not get it, if she ob-

tained a divorce, as he then well knew what her rights would be in reference to a divorce." This is an express finding that the notes were delivered to the orator for the purpose of avoiding the payment of alimony which might be decreed to his wife Hattie, on the granting to her of a divorce from him, which he expected and well understood she ultimately would have a cause for by reason of the punishment consequent upon his crime. It was done with the intent of defrauding his wife of her right to alimony out of his property.

It was held in *Foster v. Foster*, 58 Vt. 540, that a claim for alimony is incident to and consequent upon divorce, and that a wife having a cause for divorce, though not in strict language a creditor of her husband, stood to him in the relation of a creditor having an inchoate right of payment of whatever alimony might thereafter be decreed to her, and that therefore she came within the purview of the statute making void fraudulent conveyances of property as to the party injured.

In the case at bar the cause of divorce did not exist at the time of the delivery of the notes to the orator, but the husband had committed and confessed a crime upon the punishment for which a cause for divorce was consequent. Upon the due execution of the law the cause would in all probability arise. Nothing but death could thwart the punishment sure to follow. The wife stood to her husband practically in the condition of a wife having a cause of divorce. He understood that a right and claim for alimony would follow his criminal act, and fraudulently attempted to avoid it by the conveyance of all his property to the orator, cutting off all his wife's right to it in case she obtained a divorce. The conveyance was made expressly to defeat her right to alimony, and was to take effect against her on her obtaining a divorce. The conveyance did not become absolute as against her, and operate to defraud her of her right to alimony, until after the cause of divorce actually existed; so that the conveyance must be treated the same as a fraudulent conveyance made after the cause of divorce had accrued. The cause of divorce followed the husband's punishment, and a right of alimony accrued to the wife as was expected. She asserted her right under the law and obtained a divorce, whereupon the conveyance of the property to the orator became absolute against her and a fraud upon her, as it was the consummation of his fraudulent attempt to defraud her, of her right to alimony out of his estate. She was as much the victim of his fraud as if the cause of divorce had existed at the time of the conveyance, and we think it clear that the statute, § 4155, is broad enough to protect her. It protects every person whose right, debt, or duty is attempted to be avoided. The language is very comprehensive; and no principle of public policy or construction will exclude from its protection the wife whose right to support and alimony out of her husband's property is fraudulently attempted to be avoided.

It was held in *Beach v. Boynton*, 26 Vt. 725, that although the words "right and duty" are limited to such rights and duties as are of the nature of debts existing *ex contractu*, yet even

with that limitation they are far more extensive in their signification than "debt" in its strict sense.

It is true no right existed on the part of the wife, or any duty on the part of the husband, which could form the basis of an action at the time of the conveyance; but this was not indispensable. It is not necessary that the right be perfected and due at the time. It is sufficient if there be some inchoate right arising from some contract which may ripen into a debt. It may be contingent to some extent, like the right of a surety against his principal to indemnification before he has made any payment upon the principal's debt, which has been held to be within the evil intended to be remedied by the statute; and the surety has been allowed to stand as one having a debt against his principal from the date of suretyship, though not having paid anything upon the principal's debt at the time of the conveyance. So in this case the wife's right to alimony was contingent upon the punishment of the husband, her inchoate right of alimony out of his estate existing all the while by virtue of the marriage contract. This contingency was removed, and she became a *quasi* creditor with a right of action before the conveyance became absolute as against her; and it was void as against her.

To a certain extent the wife, in reference to her claim for support and for alimony, stands in about the same attitude to her husband that a creditor stands towards his debtor, and the statute seems to have been designed for the protection of the wife's rights arising from the marriage contract, as well as for the protection of the creditor.

It is settled, as was said in the argument, that the law imposes no restraint upon the husband in the free and unlimited exercise of his right to alienate his personal property at will, and his real estate, also, except his wife's homestead right therein, even though, in the exercise of this right, he strips himself of all means of supporting and maintaining his wife, provided he does so *bona fide* and with no design of defrauding her of her just claim upon him and his estate; the intent in all such cases being the true test of the validity of the transaction. If it be done with a fraudulent intent as to the wife, the transaction is invalid, and she may assail the same under the statute. The intended fraud works the invalidity. *Ricketts v. Ricketts*, 4 Gill, 103; *Feigley v. Feigley*, 7 Md. 537; *Smith v. Fellows*, 2 Atk. 62; 2 Roper, Hus. & W. 14.

2. The defendant George W. Folsom contends that his claim against Josiah W. Seaver in tort (trespass *quare clavum fregit*) for burning his buildings, is within the statute against fraudulent conveyances, and that the conveyance in question was made with intent to defeat his claim for damages. Whether the conveyance was made with that intent or not is largely a question of fact to be found by the master. The master does not so find; nor does he find any facts showing such an intent. He finds that there was no evidence tending to show that Seaver put his property into the hands of the orator to prevent the same being attached by the persons whose buildings he had burned, and that the property was not in

such shape that any of it could have been attached by them on writs brought to recover their damages. This finding negatives the fraudulent intent.

It is, moreover, well settled that Folsom's claim, being founded in tort, is not within the statute. It was held in *Brooks v. Claves*, 10 Vt. 37, *Williams, Ch. J.*, that the word "right," as used in the statute, is synonymous with "debt or duty," and does not include a mere right to attach property. In *Beach v. Boynton*, *supra*, *Redfield, Ch. J.*, it was held that the words "right and duty" are limited to such rights and duties as are in the nature of debts—such as exist *ex contractu*,"—and that it was the purpose of the statute to exclude from its protection rights of the nature of torts, or not to include them. Under a similar statute, the Supreme Court of Connecticut held that a voluntary conveyance made with intent to defeat a claim founded on a tort was not within the statute of that State against fraudulent conveyances, as it related only to claims arising out of contracts. *Fox v. Hills*, 1 Conn. 294; *Fowler v. Frisbie*, 3 Conn. 320.

So, upon the facts reported, as well as the law, the defendant George W. Folsom is not within the protection of the statute. The conveyance is not void as to him, and he cannot assail it. His rights with respect to the property included in the conveyance were affected by it. He cannot treat it as ineffectual, and avail himself of the remedies provided by law for collecting his claim out of it, as the property of the fraudulent grantor, because the property cannot be treated, as to him, as the property of such grantor. Therefore he cannot hold the funds in the hands of the orator, on his trustee writ, as the funds of Josiah W. Seaver, nor the two uncollected notes against L. W. Seaver. Neither is the custodian of J. W. Seaver's property nor his debtor so far as relates to defendant Folsom.

3. As the conveyance was void as to the defendant Hattie V. Adams, her rights in respect to the property conveyed and its avails were not affected by the conveyance. For the enforcement of her claim for alimony, the payment of which was attempted to be avoided, the property conveyed was still her husband's property, subject to the order and process of court. The county court, in its decree of alimony, properly treated the property conveyed, and its avails, as though such conveyance had not been made. The decree of alimony to the defendant Hattie V. Adams, by the county court, included all the funds and property remaining in the hands of the orator, in whatever form the same might be. This decree avoided the whole conveyance and passed the title of the fund remaining in the hands of the orator, and the two uncollected notes against L. W. Seaver, to said Hattie, and she is entitled to hold the same against the defendant George W. Folsom and the other defendant. She would also hold the money in the hands of the orator, even if Folsom's claim was within the statute; for the decree, and the notification thereof in the order, established and perfected the right to it before the service of the trustee writ.

The result is that the decree of the Court of Chancery is modified in part and reversed in

part, and the cause remanded to the Court of Chancery, with mandate that a decree be made by said court that the defendant Hattie is entitled to all the funds remaining in the hands of the orator arising from the collection of notes transferred to him, and the accumulations thereof, less such disbursements and costs as may be allowed the orator by the court, and also to the uncollected L. W. Seaver notes; that the orator deliver to the defendant Hattie the two uncollected notes against L. W. Seaver, and pay to her the amount of funds in his hands at the time of the decree of alimony, arising from the collections made, and all accumulations thereof, including collections since made, if any, after deducting taxes paid thereon, and such costs as may be allowed the orator by the court of chancery in this proceeding. If the orator and the defendant Hattie do not agree as to the amount thus to be paid over, the cause to be referred to a master to ascertain and report the amount, and decree to be made according to the amount allowed thereon by the court. As the question of costs was reversed in the court of chancery, no order is made in this court in respect to costs in that court. In this court the orator is not to recover or pay costs, but the defendant Hattie is to recover her costs of the defendant Folsom, to be taxed and allowed.

Moses D. ROWELL

v.

SCHOOL DISTRICT No. 19 in Tunbridge,
Orange County.

1. A school committee can be legally elected only at the annual meeting on the last Tuesday of March.
2. A failure to elect a committee at the annual meeting does not create a vacancy, but leaves the district legally officered as to a committee.
3. There is an implied promise on the part of a school district to pay a de facto committee for boarding a teacher, and for labor and material furnished it, when, although not legally elected, he acted in good faith as committee, and the district stood by in silence and availed itself of the benefit; and this is so, although the district had voted to have the teacher "board around."

(Orange—Filed October 20, 1887.)

ASSUMPSIT. Trial by court, June Term, 1886, Orange County, Rowell, J., presiding. Judgment for the defendant. *Reversed.*

It appeared that the defendant held an annual March meeting in 1883; that the meeting was adjourned one week, without electing any officers; that on April 5, 1883, the selectmen of Tunbridge appointed officers for the district, to hold their offices until others were elected, and this was done on the ground that there was a vacancy; that the same person was appointed clerk who had been elected clerk at the annual meeting in March, 1882; that said clerk warned a school meeting for the 1st day of May, 1883, 1 Vr.

at which time the plaintiff was elected a prudential committee of said district, and acted as such until March, 1884, when a new election was had. The plaintiff's account was: \$3 for repairing schoolhouse; \$12 for boarding teacher in summer of 1883; \$36 for boarding teacher in winter of 1883-4; \$4, making fines.

The other facts are sufficiently stated in the opinion.

Messrs. Lamb & Tarbell and C. H. Heath, for defendant:

There was no legal election.

Rev. Laws, §§ 508, 519; *Mason v. Brookfield School Dist. No. 14*, 20 Vt. 487.

The plaintiff had no authority to bind the district in matters pertaining to himself.

Houston v. Russell, 52 Vt. 110; *McGreggor v. Balch*, 14 Vt. 428; *Courser v. Powers*, 34 Vt. 517.

There was no vacancy.

Willard v. Pike, 1 Vt. (L. ed.) 337, 4 New Eng. Rep. 603.

The plaintiff was a mere volunteer, and could not create a debt against the district.

Messrs. S. M. Pingree and J. D. Denison, for plaintiff:

The plaintiff was at least a *de facto* committee; and his acts were valid as to third persons and the public.

Goodwin v. Perkins, 89 Vt. 598; 19 N. H. 115; *Allen v. State*, 21 Ga. 217.

Venay, J., delivered the opinion of the court:

The ruling of the county court that the plaintiff was not legally elected prudential committee, and was only committee *de facto* and not *de jure*, was in accordance with the decision in *Willard v. Pike*, 1 Vt. (L. ed.) 337, 4 New Eng. Rep. 603; nevertheless, we think he was entitled to recover.

The case is a suit in his favor as an individual for labor and material furnished to the district. The failure to elect a prudential committee at the annual meeting created no vacancy, but left the district legally officered, as to such committee, by the committee of the previous year. Yet the district took such action as gave the plaintiff the form of right to proceed in its behalf, as he did proceed, and had the benefit of his labor and material rendered in apparent good faith and without objection. In other words, it and its legally existing officers entitled to interfere stood by in silence while regular service was being rendered for the district by one having the color of right; and such service as the district would have been bound to pay for, to the plaintiff, had he been a *de jure* officer. *Brown v. School District*, 55 Vt. 43.

A promise will sometimes be implied from the silence or presumed assent of the party. *Chitty, Cont. p. 22; Lamb v. Bunce*, 4 Maule & S. 275. If one accepts or knowingly avails himself of the benefit of services done for him without his authority or request, he shall be held to pay a reasonable compensation for them. *Abbott v. Hermon*, 7 Me. 118.

Although the bill of exceptions states that the services for which the plaintiff sought to recover were rendered as such committee, yet we do not understand by that, that he sought to justify his acts as done in his official capacity. He claims to recover for personal services and

material which he in form was appointed to render and furnish. The defense is wholly a defect in the appointment. No suggestion is made but that the service and material were of a kind that would entitle the plaintiff to recover if his election had been legal. None is made but that, if he had procured this service to be rendered by others, his acts as a *de facto* officer would have bound the district. The only point urged is the one above stated. As an answer to that he may well say: "You gave me the form of right and duty, and I proceeded in good faith to render the service, to your benefit, of which you knowingly and without protest availed yourself."

The tax cases in the reports bear no analogy to this. The enforcement of a tax is a proceeding *in invitum*, and the municipality and its officers can stand only on strict compliance with statutory requirements. The collector does not proceed in his own right, but justifies purely as an official, and must show he is an officer *de jure*.

We think the case in its facts and circumstances is clearly within that class where the rule of an implied promise to pay has been implied in behalf of the claimant.

The plaintiff's right is unaffected by the vote to have the teacher "board around." Such vote was not the making of a legal provision for board. *Brown v. School District, supra*.

Judge Ross would hold that the election of the plaintiff was legal but for the decision in *Willard v. Pike, supra*.

Judgment reversed, and judgment for the plaintiff.

Sarah M. CAMP, Admx.,

v.

H. W. CAMP.

1. Fence-viewers have no official authority to establish a disputed boundary line; and their establishment of one is merely an award on an oral submission or a parol contract. Hence, in an action of trespass on the freehold for building a fence on the plaintiff's land, evidence was not admissible in favor of the defendant, as bearing on the question of location of the division line, to show that the fence-viewers established a line, and that the defendant then built his share of the fence at the plaintiff's request, or to prove a license, as the exceptions do not show that the defendant claimed one; but it was admissible as bearing on the question of exemplary damages.
2. When it does not appear for what purpose excluded evidence was offered, if it had any legal tendency to prove or disprove any material issue or question to be determined by the jury, as shown by the exceptions, it must be held to have been improperly excluded.

(Lamoille—Filed October 21, 1887.)

TRESPASS on the freehold. Plea, general issue. April Term, 1887, Lamoille Coun-

ty, Taft, J., presiding. Verdict and judgment for the plaintiff. *Reversed.*

The case appears in the opinion.

Mr. McFarlin, for the defendant:

The evidence was admissible to show a submission to the fence-viewers acting as a board of arbitrators.

White v. Everest, 1 Vt. 181.

It was clearly admissible as bearing on the question of exemplary damages.

Devine v. Rand, 38 Vt. 621; *Pierce v. Hoffman*, 24 Vt. 525; 1 Greenl. Ev. § 58; *Pratt v. Pond*, 42 Conn. 318; *Johnson v. Smith*, 64 Me. 553; *Sedg. Dam.* 380; *Currier v. Swan*, 68 Me. 323; *Paine v. Farr*, 118 Mass. 74; *Earl v. Tupper*, 45 Vt. 275; *Burnham v. Jenness*, 54 Vt. 272.

Mr. P. K. Gleed, for the plaintiff:

There was no error in excluding the evidence. Any action of the fence-viewers in locating the line was void.

Shaw v. Gilfillan, 22 Vt. 565; *Smith v. Bullock*, 16 Vt. 592.

If the offer was to prove a license, then it was properly excluded, as a license must be specially pleaded.

Briggs v. Mason, 31 Vt. 433; 1 Chitty, Pl. 505; *Allen v. Parkhurst*, 10 Vt. 557.

The charge as to exemplary damages was correct.

Rob. Dig. p. 223.

Walker, J., delivered the opinion of the court:

This was an action of trespass on the freehold to recover damages for cutting and carrying away grass, and building a fence on the plaintiff's land. Plea, the general issue.

The main question in controversy was the location of the division line between the lands of the parties, who were adjoining owners. The plaintiff had verdict, and the defendant excepted.

The defendant relies only upon his exception to the exclusion of the testimony offered by him, tending to show that the fence-viewers of the town in which the land was located, when called out to divide the division fence between the parties, on the suggestion of the plaintiff and the assent of the defendant, established the boundary line between their lands; and that the defendant, at the request of the plaintiff, after the line was thus established and the fence divided, went on and built his share of the fence.

As fence-viewers have no official authority to establish disputed boundary lines, their action in establishing the division line, as set forth in the offer of the defendant, was merely an award on an oral submission or a parol contract between the parties. It has long been settled in this State that a parol agreement in regard to the division line of adjoining owners or proprietors of real estate, unless followed by the acquiescence of fifteen years, is not conclusive between the parties. *Campbell v. Bate-man*, 2 Aik. 177; *White v. Everest*, 1 Vt. 181; *Smith v. Bullock*, 16 Vt. 592.

As a contract by oral submission and award stands on the same ground as any other oral contract, an award or an oral submission as to the division line between adjoining proprietors is not conclusive between the parties, unless

followed by an acquiescence of fifteen years. *Smith v. Bullock, supra*. Such a contract is regarded as within the Statute of Frauds. Judge Redfield, in the case last cited, says the decisions are to that effect in Massachusetts, Maine, and Connecticut, and that the English reports recognize the same doctrine, although a contrary rule has obtained in some States.

The defendant's offer was not accompanied with an offer to show that the parties had acquiesced in the boundary line established by the fence-viewers, for fifteen years. The testimony was therefore inadmissible as bearing upon the question of the location of the division line; nor was it admissible as tending to show license, for the exceptions do not show that the defendant, by his plea or otherwise, claimed to have cut the grass and built the fence under a license from the plaintiff.

But as it does not appear from the bill of exceptions for what purpose the excluded testimony was offered, if it had any legal tendency to prove or disprove any material issue or question to be determined by the jury, as shown by the bill of exceptions, we must hold that it was improperly excluded. *Greene v. Donaldson*, 16 Vt. 162.

It appears that there was evidence in the case tending to show that the defendant, in doing the acts charged, acted maliciously and with a wanton spirit; and the jury were told that they had a right to award exemplary damages in enhancement of the ordinary damages, on account of the bad spirit and wantonness of the defendant manifested by the acts for which they found him liable, etc. The jury included exemplary damages in their verdict.

The defendant contends that the testimony excluded was material and admissible as bearing on the question of exemplary damages, as tending to show the motive under which the defendant did the act charged in the declaration.

We think the contention is sound, and that the testimony was admissible as affecting the right of the plaintiff to exemplary damages and the extent of his recovery in that respect. When exemplary damages are claimed, all the circumstances and facts connected with the transaction, tending to exhibit or explain the motive of the defendant, are admissible in evidence. The plaintiff may show that the act was done with express malice; on the other hand, the defendant is entitled to the benefit of any facts and circumstances tending to show that he acted in good faith under an honest belief that he had a right to do the thing complained of. So, in this case, if the defendant in good faith acted under the award of the fence-viewers, made under the circumstances which the testimony offered tended to show, relying upon the line established by them as the division line between the lands; and built the alleged fence, honestly believing that he was building it on the boundary line as his share thereof; and cut the grass, believing it was on his land and that the award was binding,—he was clearly entitled to the benefit of such facts in evidence upon the question of exemplary damages, and to all such facts and circumstances as tended to show that he did the acts complained of under an honest belief of his right to do so. He could not show that he did the acts com-

plained of in good faith, under the award, relying upon it as conclusive between them, without being permitted to show the submission of the question of the boundary line to the fence-viewers, and their action under the same, and such other facts and circumstances as the testimony excluded tended to show.

Judgment reversed, and cause remanded.

George DODGE, Admr.,

v.

Carlos N. BENEDICT.

The plaintiff's intestate was under an **obligation to support his mother during her life, at a particular place**, which was always open and suitable for her support. Soon after the son's decease she went to live with her son-in-law, the defendant, who boarded and cared for her in sickness for several months, without any contract or arrangement with anyone. **Held**, that the intestate was **not obligated to furnish support at another place, and that his estate was not liable therefor.**

(Washington—Filed October 19, 1887.)

ASSUMPSIT brought by the plaintiff, administrator of the estate of Chauncey Gourley, to recover for property bid off by the defendant at an auction sale of the property of the estate of said Chauncey. Heard on a referee's report, September Term, 1886, Washington County, Powers, J., presiding. Judgment for the plaintiff to recover the sum of \$249.41. *Affirmed.*

The defendant presented a claim in set-off for the expenses incurred in the last sickness of his mother-in-law, Mrs. Lattis Gourley. It appeared that Gurdon Gourley and his wife, Lattis, conveyed one half of their farm to their son Chauncey, on January 2, 1862, conditioned for their support, "upon the same farm, for the term of their and each of their natural lives;" that at the death of the grantors the other half of the farm was to be the property of said Chauncey; that said Gurdon deceased in 1874; that said Chauncey deceased in January, 1888, and said Lattis in the next August. After the death of her husband the said Lattis went back and forth from the farm to the defendant's house, calling both places her home; but during the last few years of her life she was the most at Benedict's.

The other facts are sufficiently stated in the opinion.

Mr. E. W. Bisbee, for the defendant:

The deed, when accepted, became the mutual act of the parties, and a valid contract between them.

Newell v. Hill, 2 Met. 180; *Maine v. Cumston*, 98 Mass. 317; 48 N. H. 475; 27 Me. 106.

The defendant is entitled to recover for his charges for support.

Savoy v. Hebard, 58 Vt. 375; *Doane v. Doane*, 46 Vt. 485; *Briggs v. Briggs*, 46 Vt. 571; *Thayer v. Richards*, 19 Pick. 398; *Fiske v. Fiske*, 20 Pick. 499, 508.

Assumpsit is the proper remedy for a breach of a stipulation in a deed poll.

Johnson v. Muzzy, 45 Vt. 419; *Newell v. Hill*, 2 Met. 180; *Goodwin v. Gilbert*, 9 Mass. 510; *Pike v. Brown*, 7 Cush. 133; *Hinsdale v. Humphrey*, 15 Conn. 431.

Messrs. Heath & Willard, for the plaintiff:

The offset should be disallowed: (1) because no debt was created between Lattis and the defendant; (2) because there was no liability to support, except at the farm; (3) because the rights of the parties cannot be enforced by a plea in offset; (4) because there is no privity between the parties to this suit.

There is no debt.

Davis v. Goodenow, 27 Vt. 715.

There was no liability to support except on the farm.

Jenkins v. Stetson, 9 Allen, 128.

At law a party has no remedy for a breach of the condition of a conditional deed, except ejectment.

1 Greenl. Cr. 466, 504; *Beach v. Walker*, 6 Conn. 196; *Waterman, Set-Off*; Rev. Laws, § 915.

Ross, J., delivered the opinion of the court:

The only question in this court is whether the defendant should be allowed in set-off his claim for taking care of Lattis Gourley during her last sickness. The plaintiff's intestate, by the terms of the deed from Gurdon Gourley, was bound to support her on the farm where he deceased. After the decease of Gurdon she did not live continuously upon the farm. In the fall of 1882 she was taken sick in Moretown. While she was there sick the intestate deceased. Very soon after his decease Lattis was able to have been moved to the farm, was moved to the defendant's, near the farm, remained there until her decease, and was cared for by the defendant. The result of the findings of the referee is that there was no contract between the plaintiff and defendant with reference to the care and support of Lattis during this period. She had the right to be supported during this period at the expense of the estate represented by the plaintiff, upon the farm. When she was taken to the defendant's

home, she could have been taken to the farm, but at her request was taken to the defendant's home, and there supported, without any contract or agreement, until her decease. The defendant was her son-in-law. After the decease of her son it was natural that she should desire to reside with her daughter, the defendant's wife. But such support by the defendant would without contract give him no legal claim against her, or her estate, or the farm of the intestate. The intestate's obligation was not for her support at any other place than on the farm. We need not consider whether he or his estate would be holden for her support if taken sick while on a proper visit away from the farm, and rendered unable to be removed to the farm. The facts found by the referee do not present such a case for consideration. The only question presented for decision is whether, where the contract is for support at a particular place, and that place is continuously open to receive and support, and the person is able to be carried there and supported, the support at some other place can be charged upon the person bound to support at the particular place, without any contract therefor. We do not think that it can. The contract, under such circumstances, does not provide for the support of Lattis at any other place. To hold that it did would be to disregard it, and make a new contract for the parties. It is the duty of the court only to enforce the contract as made. The defendant has no contract rights in regard to the support of Lattis. He can only at most be substituted to the rights of Lattis. By the contract evidenced by the deed, the intestate was bound to support her only on the farm,—certainly, so long as she was able to be carried to the farm for support. When she was voluntarily and purposely absent from the farm, without any contract or arrangement with the intestate in regard to her support, and without the default of the intestate, she could not charge the intestate for her support; neither, under such circumstances, could the defendant furnish her support, and legally charge it to the intestate. The contract mentioned by the deed does not obligate the intestate to furnish support at another place, under such circumstances.

The judgment is affirmed.

MASSACHUSETTS.

SUPREME JUDICIAL COURT.

MT. HERMON BOYS' SCHOOL

v.

INHABITANTS OF GILL.

1. A corporation for the education of boys, whose purpose was to provide a place where young men whose early education has been neglected could be instructed, their physical welfare cared for, and a practical knowledge of work, especially in agriculture, given, by requiring their manual labor on a farm owned by the corporation, having suitable buildings and personal property thereon, appropriate to, and carried on for, such uses; where the pupils were furnished board and instruction for the purpose of their physical training and practical study of agriculture in connection with manual labor, at a small charge and less than the cost of their education,—is entitled to exemption of its real and personal property from taxation, as used and appropriated to educational and charitable purposes.
2. Where the farm and the personal property thereon were mainly worked and used for development by the scholars, and its products were mostly consumed by them, sales of the farm products, including animals bred and raised there and sold at a profit, as incidental to its management, and not for subsequent revenue, do not subject the farm or any of the farming stock to taxation.

(Franklin—Filed October 20, 1887.)

ON plaintiff's exceptions. *Sustained.*

Action by plaintiff to recover for taxes illegally assessed by defendants and paid by plaintiff.

The case was tried in the superior court before Brigham, J., without a jury.

The facts material to the issue are stated by the court.

Messrs. Conant & Conant, for plaintiff:

The taxes described in the plaintiff's declaration were assessed by defendant's assessors, and paid by the plaintiff, after demand and written protest that said taxes had been illegally assessed; and an action of contract is the proper remedy.

Pub. Stat. chap. 12, § 84; *Dow v. First Parish in Sudbury*, 5 Met. 73.

The real estate and personal property of the plaintiff, assessed by the defendants, are within the exemption from taxation provided by Pub. Stat. chap. 11, § 5, cl. 3.

The plaintiff is duly incorporated under Pub. Stat. chap. 115, for the "education of boys." It is a "literary institution." The plaintiff is also a "scientific" institution, as well as literary. The plaintiff is also, to some extent, a "benevolent and charitable" institution. A devise or a bequest for such a purpose would be held to be a good charity.

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Boxford Second Relig. Soc. v. Harriman, 125 Mass. 321; *American Academy of A. & S. v. Harvard College*, 12 Gray, 582; *Hadley v. Hopkins' Academy*, 14 Pick. 240.

The property assessed is occupied by the plaintiff for the purpose of the incorporation, viz., "the education of boys." This purpose is broad and comprehensive enough to include literary, scientific, mental, moral, and physical education. Agriculture is a branch of learning that may be lawfully taught in the public schools in every town in the Commonwealth.

Pub. Stat. chap. 44, § 1. See also *Id.* §§ 8, 9, 15.

The exemption from taxation conferred by the statutes is not limited to such real estate only as may appear to the court necessary for the purposes for which it was incorporated, but applies to all real estate of the corporation, occupied by it, and intended for, and in fact appropriated to, those purposes by its officers.

Massachusetts Gen. Hospital v. Somerville, 101 Mass. 819, 822. See *Wesleyan Academy v. Wilbraham*, 99 Mass. 599; *Pierce v. Cambridge*, 2 Cush. 618.

The word "occupied" has been construed by this court. *Chapel of Good Shepherd v. Boston*, 120 Mass. 212; *Lynn Workmens Aid Asso. v. Lynn*, 136 Mass. 285.

There is no portion of such estate used for other than literary, educational, benevolent, charitable, scientific, or religious purposes.

Northwestern University v. People, 99 U. S. 823 (25 L. ed. 387); *Monticello Seminary v. People*, 106 Ill. 398; *S. C. 46 Am. Rep. 702*.

Mr. John A. Aiken, for defendant:

If any portion of the plaintiff's real estate or personal property was liable to taxation, these actions cannot be maintained. The proper remedy is an application for abatement.

Pub. Stat. chap. 11, § 69; *Browne v. Boston*, 2 Gray, 494, 496; *Chapel of Good Shepherd v. Boston*, 120 Mass. 212.

The two tobacco barns—a part of the property for which the plaintiff claims exemption—are not property appropriate for a literary, educational, scientific, or religious institution. The defendant seeks to hold subject to taxation only the farm and farming stock.

The real estate of every inhabitant of Gill was security for the payment of the debt, and might be taken upon an execution on a judgment against the town on account of this debt.

Hill v. Boston, 122 Mass. 844, 849.

Until this debt is paid, the real estate of the plaintiff is a part of the security holden for the town's liability; and it should bear its proportion of the money raised by taxation on account of that debt.

The plaintiff claims exemption from taxation by Pub. Stat. chap. 11, § 5, cl. 3. It is not entitled to avail itself of that exemption, because its property has not been occupied for the purposes for which it was incorporated, and because a portion of its estate has been used for other than literary, educational, benevolent, scientific, or religious purposes.

It is immaterial whether the products disposed of from 1884 to 1885 were sold, bartered, or exchanged. At law the nature and effect of the transaction are the same.

Commonwealth v. Clark, 14 Gray, 367, 373.

Neither can it make any difference that the

other parties to the transfer were, in some of the instances, a girls' school of similar objects and systems, and clergymen, and religious persons.

A statute which exempts property from taxation is to be strictly construed. Taxation is the rule; exemption the exception. The burden of proof is upon every party who claims exemption to show that his case comes clearly within the exception. If any doubt arises as to the exemption, it must operate most strongly against the party claiming the exception.

Redemptorist Fathers v. Boston, 129 Mass. 178.

The plaintiff has been a seller of farm produce for gain. That the sales have been small is no defense; the question is not one of degree. The statute never intended such proceedings.

The plaintiff well urges that many of the products of its farm are of a perishable nature, like butter, milk, eggs, and apples, and some of them of a nature unavailable for school purposes, as the hides of animals, and that the only way for the school to utilize such products is to sell them or trade them off. The answer to this position is that, if the plaintiff chooses, in the management of its school, to have an annex, like a farm, which obliges it to enter the market as a seller of goods, the plaintiff must bear the same burdens that other sellers bear, *i. e.*, pay taxes. The plaintiff is not obliged to maintain its farm. The case depends upon our statutes and decisions. Adjudications in other States furnish no aid. See *Wesleyan Academy v. Wilbraham*, 99 Mass. 599; *Chapel of Good Shepherd v. Boston*, 120 Mass. 212; *Lynn Workingmen's Aid Assn. v. Lynn*, 136 Mass. 283; *Pierce v. Cambridge*, 2 Cush. 611; *Lovell South Cong. Meeting-House v. Lovell*, 1 Met. 538.

It is not material whether the plaintiff made a profit, or not, in its dealings.

Lynn Workingmens Aid Assn. v. Lynn, *supra*.

Knowlton, J., delivered the opinion of the court:

The defendants very properly conceded, at the argument, that the plaintiff was one of the institutions to which certain exemptions from taxation were granted by Pub. Stat. chap. 11, § 5, cl. 8. The first question under this clause is whether the plaintiff's real estate which was taxed was occupied for the purpose for which the plaintiff was incorporated; and, inasmuch as the incorporation was under the general law, the second question is, under the last part of said clause, whether any portion of the taxed property, real or personal, was "used or appropriated," at the time of taxation, "for other than literary, educational, benevolent, charitable, or religious purposes."

The purpose of the plaintiff's incorporation was the "education of boys." Education is a broad and comprehensive term. It has been defined as "the process of developing and training the powers and capabilities of human beings."

To educate, according to one of Webster's definitions, is "to prepare and fit for any calling or business, or for activity and usefulness in life." Education may be particularly directed to either the mental, moral, or physical powers and faculties; but in its broadest and best sense

it relates to them all. The plaintiff's trustees did not exceed their authority under their certificate of incorporation when they established an institution one of whose purposes was, according to the facts found, "to provide a place where young men whose early education has been neglected could be instructed, their physical welfare cared for, and a practical knowledge of work, especially in agriculture, given, by requiring of each member of the school a certain amount—usually two hours per day—of manual labor on said farm." It appears further in the facts that "the aim of the industrial arrangements is not so much to secure pecuniary benefit as to provide for physical culture, teach how to do various kinds of farm work, form habits of industry, and inculcate right views of manual labor, and especially of agriculture."

The plaintiff's farm consists of about 400 acres of land, upon which, besides the buildings containing the chapel, schoolrooms, library, museum, cottages for lodging, general dormitory for 200 pupils, and dining-hall, there are two farmhouses, barns, and other buildings adapted to farm purposes. The farm was used for tillage, pasture, and other agricultural purposes, and "oxen, horses, and swine were bred, reared, kept, and used on it."

"No person under the age of sixteen years, or not having health, mental ability, and moral character, could be admitted into the school."

The farm was mainly carried on by the labor of the scholars of the school, and the products of the farm were for the most part consumed in said school. The animals kept on the farm were tended by the plaintiff's scholars. During the year following May 1, 1884, products and livestock of the farm were sold for cash or exchanged in barter, at current market rates, amounting in value to \$1,047.57. These appear to have been articles not desired for consumption. Four hundred dollars of the amount was received for two cows of imported stock and their two calves. Pork and hogs were exchanged in part for beef; and there were other products incidental to the management of the farm,—some of them perishable,—which apparently were not needed for use in the school. The use of the farm and of the personal property upon it resulted beneficially to the plaintiff in three different ways: First, it furnished for the scholars the field, object, and materials necessary for their physical training and practical study of agriculture, in connection with manual labor and the general development referred to in the above-quoted statement of the purposes and aims of the school. Secondly, it provided food for the pupils and teachers who were in attendance, and contributed directly to the economical support of the scholars, which was an important object of the institution. Thirdly, so far as the products of the farm were sold, the plaintiff presumably obtained profit, and to that extent replenished its treasury. The use of the property to accomplish either of the first two results would be for the purpose for which the corporation was formed, within the meaning of the statute we are considering, and would leave the whole exempt from taxation; the use of it to accomplish the last would not. To an institution of learning attempting to furnish practical education in ag-

riculture, and to give boys physical development by manual labor, a farm is as necessary as are chemicals and chemical apparatus to a teacher of chemistry. And a farm cannot be managed without the personal property properly appertaining to it. So, too, in connection with a boarding school situated as this was, the corporation's use of the farm to raise provisions for its scholars is to be distinguished from the use of it to increase the funds in its treasury and thereby enable it to do its charitable work. This distinction is well marked in *Wesleyan Academy v. Wilbraham*, 99 Mass. 589, and *Chapel of Good Shepherd v. Boston*, 120 Mass. 212. See also *Monticello Seminary v. People*, 106 Ill. 398.

The purpose referred to in the statute contemplates the direct and immediate result of the use of the property, and not the consequential benefit to be derived from the improvement of it. Where one of the objects of an institution of learning is charitable, and boys are required to pay only a part of the cost of their education—as in this case, only \$100 per year for board and tuition—the corporation may own its property and use it directly in the education of its pupils, as well when the property is land upon which provisions are raised for their sustenance, as when it is real estate occupied by the houses in which they dwell. But if it seeks to promote its educational and charitable objects by obtaining profit from its property and filling its treasury for future use, that purpose is not within the exempting clause. The practical difficulty in cases of this kind is to ascertain the purpose for which the real estate is occupied; when that is determined, the result is reached.

In this case the plaintiff's purpose in the use of its farm must be ascertained from its conduct,—its acts and the declarations accompanying them. Its general purposes in establishing the institution under the authority of its certificate of incorporation are very fully set forth in the facts reported. One was to teach the boys, among other things, agriculture. Another was to furnish them board and instruction at a small charge. Getting money and supplying the treasury was not one of the purposes for which the institution was founded. It was merely a means by which these purposes were to be accomplished.

Was this farm used to practically teach the boys agriculture, and give them physical training, and furnish them manual labor as a part of their education? Was it used to furnish supplies directly to this boarding school, and so lessen the cost of education there? Was it, on the other hand, used to produce revenue, and earn income which might afterward be expended for this school? It seems to us that the farm and the property upon it were used in the legitimate management of the school, to directly accomplish its purposes, and not to obtain money for subsequent use in accomplishing them. The fact that products were sold is a circumstance important only so far as it characterizes the use. We think the sales were merely incidental to a use for the purposes of the institution. If certain valuable chemicals are produced in a school by practical instruction in chemistry, and are subsequently sold instead of being wasted, that

does not change the character of the use of the apparatus and the original ingredients employed. And if a farm is set apart and cultivated to supply food for a family or community, it does not cease to be used for that purpose because in the economical management of it there are certain products which cannot be utilized otherwise than by sale.

The same considerations apply to the last question under the statute, whether any portion of the property was "used or appropriated for other than literary, educational, benevolent, charitable, or religious purposes." So long as the personal property was held by the plaintiff it was not used otherwise than incidentally to the use of the farm, and so was not liable to taxation. The subsequent sale of it had no retroactive effect to subject it to assessment. Unless restrained by special provisions of law, any institution may sell its property which is exempt from taxation, and properly dispose of the proceeds.

The sale of farm products is ordinarily evidence that the farm is used for profit, and in most cases it would deprive a party of the exemption here claimed; but, under the peculiar facts of this case, we deem it unimportant, and hold that the ruling that the action could not be maintained was erroneous.

Exceptions sustained.

COMMONWEALTH of Massachusetts

v.

Maurice WALL.

1. Where the board of aldermen had **revoked defendant's license for the sale of intoxicating liquors, he cannot, on a subsequent complaint against him for unlawfully keeping intoxicating liquors for sale, successfully defend on the ground that he did not have a reasonable opportunity to be heard before the board upon the revocation.**
2. When the board of aldermen had jurisdiction over the subject-matter and over the person of defendant, the exercise of the discretion of the board in **refusing to grant a continuance cannot be reviewed by this court in another proceeding to which the board is not a party.**

(Worcester—Filed October 21, 1887.)

ON defendant's exceptions. *Overruled.*

Complaint charging defendant with unlawfully keeping intoxicating liquors, with intent to sell the same, on July 9, 1887. On the trial in the superior court, before Pitman, J., and a jury, the evidence for the Commonwealth tended to show that the defendant on that day kept intoxicating liquors at his grocery store with intent to sell the same.

It was admitted by the government that the defendant had received from the board of aldermen of Worcester a license of the fourth class for the sale of intoxicating liquors at his grocery store, for the term of one year from May 1, 1887. It was admitted by the defend-

ant that the board of aldermen, on June 6, 1887, passed an order revoking his said license upon proof satisfactory to them that he had violated the conditions thereof. The defendant, for the purpose of showing said order of revocation invalid and not destructive of his rights under said license, on the ground that no reasonable opportunity was afforded the defendant to be heard, offered to show that on Saturday, June 4, 1887, he was cited to appear before said board of aldermen on the following Monday evening, June 6, at eight o'clock, to attend a hearing upon the revocation of his license; that on said Monday evening he was confined to his bed by reason of sickness, and was unable to attend said hearing; that he was represented by counsel, who presented to the board of aldermen the certificate of his physician, of his physical inability to be present, and requested a continuance of said hearing; that thereupon the city marshal stated to the board, but not under oath, that the defendant was in his saloon attending to business that afternoon, which statement defendant now offered to prove was incorrect, and it was then voted to proceed with the hearing; the aldermen refused his request for continuance, upon which counsel left. The board, after a hearing, revoked the license of defendant.

The court ruled that upon the foregoing facts, if proved, the revocation was valid; and under such ruling the jury returned a verdict of guilty.

To this ruling the defendant duly excepted.

Mr. John R. Thayer, for defendant:

The defendant relied upon his license. The government claimed the license had been revoked, and this was the issue.

The defendant had a right to show that the revocation was invalid, and to introduce evidence to prove that the conditions to be complied with by the board of mayor and aldermen before they revoke the license had not been complied with.

Pub. Stat. chap. 100, § 16, provides that the mayor and aldermen may revoke a license which they have granted, "after notice to the licensee, and a reasonable opportunity for him to be heard by them."

1. The defendant claimed, upon his trial, that he had never had such an opportunity, and offered evidence in support of his claim and to prove the fact. The court refused to permit the evidence to be introduced, and assumed the authority to decide the question as one of law.

2. Whether reasonable opportunity to be heard had been given the defendant before the revocation of the license was a fact to be determined by the jury upon the evidence, and not a question of law to be decided by the court.

In *Commonwealth v. Moylan*, 119 Mass. 109, the government introduced parol evidence to show that the defendant had an opportunity to be heard.

The board of mayor and aldermen could not exercise their judgment or discretion as to what was a reasonable opportunity to be heard by them. This was a question of fact to be determined by evidence when the legality of the revocation of the license was called in question.

The evidence offered was sufficient, if believed, to prove that he had no reasonable opportunity to be heard. It was not reasonable

to proceed to convict him of a crime when he was sick in bed and unable to get to the place of hearing.

Mr. Andrew J. Waterman, Atty-Gen. for the Commonwealth:

The ruling of the court was correct.

Pub. Stat. chap. 100, § 16, provides that "the mayor and aldermen of the city, or the selectmen of the town, by which a license has been issued, after notice to the licensee, and reasonable opportunity for him to be heard by them, or by a committee of their number, may declare his license forfeited, upon proof satisfactory to them that he has violated or permitted to be violated any condition thereof. The pendency of proceedings before a court of justice shall not suspend or interfere with the power herein given to decree a forfeiture."

The bill of exceptions in this case shows that the defendant admitted that the board of aldermen of Worcester revoked his license upon proof satisfactory to them that he had violated some one or more of the conditions thereof.

But he contends that he had no reasonable opportunity to be heard upon the matter. The evidence is that he was duly summoned, and appeared by counsel, who offered, as an excuse for the nonappearance of the defendant personally, his illness, and presented a certificate of a physician, of the physical inability of the defendant. The board was then informed by the city marshal that the defendant was in his saloon attending to business that afternoon.

This left the matter of the inability of the defendant to appear personally in doubt.

Upon a refusal of the board to grant a continuance, the defendant's counsel left, and the hearing proceeded, at which "proof satisfactory" of the defendant's violation of condition of his license was found, and his license was revoked.

It was a matter of discretion upon the part of the board of aldermen whether, under all the circumstances in the case, of which they, and they alone, could and would have particular knowledge, the defendant had such "a reasonable opportunity" to be heard as was intended by the statute. And the presiding judge in the superior court properly ruled, as a matter of law, that the revocation was valid.

Field, J., delivered the opinion of the court:

It is admitted by the defendant that the record of the board of aldermen showed that his license had been by it declared to be forfeited, upon proof satisfactory to the board that he had violated the conditions of the license; and that this was done after notice to him and an opportunity to be heard. Pub. Stat. chap. 100, § 16. *Commonwealth v. Moylan*, 119 Mass. 109; *Commonwealth v. Harkness*, 128 Mass. 76. He contends, however, that the facts which he offered to prove show that he did not have a reasonable opportunity to be heard. His alleged grievance is that on account of his illness he was entitled to a continuance of the hearing, and that this was refused. The defendant was represented by counsel, who left after the request for a continuance had been refused. It thus appears that the board of aldermen had jurisdiction over the subject-matter, and over the person of the defendant, so far as was required in order to enable it to determine the ques-

tion before the board. The motion for a continuance was addressed to the discretion of the board. We need not decide whether the manner in which this discretion was exercised can be reviewed by this court; for, if this can be done, it can only be by some proceeding to which the board of aldermen is a party.

Exceptions overruled.

COMMONWEALTH of Massachusetts

v.

John BUCKLEY *et al.*

1. In an indictment charging defendant with threatening to accuse a person of a crime, the name of the person threatened is **necessary to the identity of the offense charged in the indictment, and must be proved as set forth.**
2. In Massachusetts a **middle name or initial is part of the name, and a variance in regard to it, in an indictment, is fatal.**
3. It **cannot be said, as matter of law, that A and E, when used as a middle initial in a name, are the same.**

(Plymouth—October 20, 1887.)

ON defendant's exceptions. *Sustained.*

The indictment charged that the defendants at Brockton, on May 14, 1887, "knowingly, willfully, and maliciously did verbally threaten to accuse one Frank E. White, of Brockton aforesaid, of having committed the crime of burning a building not his own, to wit, the store of John D. White, by words then and there knowingly, willfully, and maliciously spoken of and to the said Frank E. White, substantially as follows:

"'You' (meaning the said Frank E. White) are the man that set the fire; and unless you give us \$100 we will make it hot for you. We will make a jailbird of you,'—with intent then and there to extort money, to wit, the sum of \$100, from him, the said Frank E. White, against the peace," etc.

At the trial in the Superior Court for Plymouth County, before Thompson J., it was proved, but the attention of the court was not called to the fact until after the commencement of the charge, that the name of the person referred to and designated in said indictment as Frank E. White was Frank A. White, and not Frank E. White; and there was no evidence tending to show that said Frank A. White had ever been known or called Frank E. White until so designated in the indictment; and thereupon the defendants asked the court to rule that there was a variance between the allegations in said indictment and the proof, and that by reason of said variance the jury should return a verdict of not guilty.

The court refused to so rule, and ruled that, if the jury were satisfied that Frank A. White is the person called Frank E. White in the indictment, there was no variance as claimed by defendants. The jury returned a verdict of guilty, and the defendants alleged exceptions.

Messrs. J. M. & T. C. Day, for defendants:

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The indictment should have been quashed, as it does not allege that defendants threatened to accuse Frank E. White of a crime or offense. It is only the willful and malicious burning of a building that is made a crime.

Pub. Stat. chap. 203, § 4.

The indictment does not allege, excepting argumentatively, that defendants threatened to charge Frank E. White with having willfully and maliciously burned the building or store of John D. White, and is therefore bad.

Commonwealth v. Rannels, 10 Mass. 520; *Commonwealth v. Call*, 21 Pick. 515, 521; *Turns v. Commonwealth*, 6 Met. 224-234.

The crime or offense that the defendant threatened to accuse another of has been set forth in terms fully and technically descriptive.

See Pub. Stat. chap. 202, § 29; *Commonwealth v. Goodwin*, 122 Mass. 19.

The government was bound to prove the allegations in the indictment that John D. White was the owner of the building, of the burning of which the indictment alleges the defendants threatened to accuse the said Frank E. White.

Commonwealth v. Wade, 17 Pick. 895.

The rulings given by the court in place of the one asked were applicable only to prosecutions of offenses in relation to or affecting real or personal estate, and were erroneous.

Pub. Stat. chap. 214, § 14.

The government was bound to prove that the name of the party alleged to have been threatened was Frank E. White.

Commonwealth v. Pope, 12 Cush. 272; *Commonwealth v. Mehan*, 11 Gray, 321, and cases cited.

Mr. Andrew J. Waterman, Atty-Gen., for the Commonwealth:

The rulings of the court were correct.

The motion to quash the indictment was properly overruled; it was substantially in the language of the statute, and sufficient.

Commonwealth v. Murphy, 12 Allen, 450; *Commonwealth v. Carpenter*, 108 Mass. 15; *Commonwealth v. Moulton*, 108 Mass. 307; *Commonwealth v. Dorris*, 108 Mass. 488; *Commonwealth v. Andrews*, 132 Mass. 263; *Commonwealth v. Goodwin*, 122 Mass. 19; *Commonwealth v. Bacon*, 135 Mass. 521; *Commonwealth v. Philpot*, 130 Mass. 59.

The ruling of the court upon the question of variance is in accordance with many precedents.

State v. Williams, 50 Iowa, 98; *Rez v. Neirman*, 1 Ld. Raym. 582; *Bish. Cr. Proc.* § 683; *Edmundson v. State*, 17 Ala. 179; *Miller v. People*, 39 Ill. 457; *Choen v. State*, 52 Ind. 347; *People v. Cook*, 14 Barb. 259; *State v. Manning*, 14 Tex. 402; *Dodd v. State*, 2 Tex. App. 58.

The court properly refused to rule as requested upon the point of the ownership of the property, and rightly ruled that if White was in possession of the store there would be no variance.

Commonwealth v. Dale, 2 Mass. (L. ed.) 390, 4 New Eng. Rep. 200, 144 Mass. 363; Pub. Stat. chap. 214, § 14; *Commonwealth v. Goldstein*, 114 Mass. 277.

Holmes, J., delivered the opinion of the court:

The name of the person threatened is ne-

cessary to the identity of the offence charged in the indictment, and therefore must be proved as set forth. *Commonwealth v. Mahan*, 11 Gray, 321.

It is settled in this Commonwealth that a middle name or initial is part of the name, and a variance in regard to it is fatal. *Commonwealth v. Perkins*, 1 Pick. 388; *Commonwealth v. Hall*, 3 Pick. 262; *Commonwealth v. Shearman*, 11 Cush. 546.

The ruling that there was no variance if Frank A. White was the person called Frank E. White in the indictment probably went upon the ground that the E. might be rejected as surplusage, as is held in some States. It cannot be said, as matter of law, that A and E are the same. There was no evidence that the party was ever called Frank E. White.

Exceptions sustained.

Emory A. SQUIRES

v.

Inhabitants of AMHERST.

1. A receipt acknowledging the payment of money "in full of all demands for damage sustained on the highway" is **not only a receipt, but an agreement** that the money is received in full payment of all demands for damages sustained by reason of the defect in the highway referred to.
2. Such agreement **cannot be varied or controlled** by evidence of an oral agreement made contemporaneously with it and **inconsistent** with its terms.
3. An oral agreement, offered to be proved, made contemporaneously with the written agreement,—that the receipt covered only the claim for damages to plaintiff's property, and did not include the claim for damages to his person, and that there was a distinct agreement that plaintiff should be paid something more if it appeared that he had been injured in his person,—is **inconsistent with the writing; and a mistake or misunderstanding, on the part of plaintiff, of the legal import of the written agreement, is not a ground for avoiding it at common law.**

(Hampshire—Filed October 21, 1887.)

ON plaintiff's exceptions. *Overruled.*

Action of tort, under Pub. Stat. chap. 52, to recover for personal injuries sustained on a highway.

The plaintiff testified to receiving personal injuries, and damage to a wagon, horse, and harness, on the evening of December 31, 1885, by running off the end of a culvert by reason of the lack of a railing on a way in defendant town, which it was bound to keep in repair; that he fell into water a foot deep; that the wagon fell on to his chest and kept him in the water for some time; that he went home several miles, being carried a part of the way, feeling a little lame; that the next morning he went to get the horse, wagon, and harness which he had left at or near the place of in-

jury over night, still feeling a little lame, but able to walk comfortably; that the next morning after the injury, while getting his property, he went to see one Stone, who was a selectman of Amherst, about the accident; they went together to the place where the accident occurred; that Stone said to plaintiff: "You want to get your wagon repaired, I suppose, and are you hurt? Plaintiff replied that he felt rather lame and sore. Stone said perhaps it was only a cold, and asked plaintiff how much he would take to settle. Plaintiff said he would take \$50 and make it all even. Stone said he should never pay that, as long as plaintiff was not injured himself, and it would not take \$50 to make the repairs. The plaintiff replied that if he was not injured he wanted nothing, except for the repairs. Stone said he guessed it was a cold only. Plaintiff said if he was not injured he would be willing to take that, as he wanted only what was right of the town. Stone said, if the plaintiff was injured, he was ready to do what was right. This talk was in the yard of one Cooley.

Plaintiff was to be paid, according to the talk, \$10, and, if he was injured, was to be paid what was right. Stone said he would pay more if plaintiff was injured, wrote the receipt annexed, and read it, and plaintiff signed it. Plaintiff could not say that he read it just as it was written, and could not say that he did not; but it had in it all demands for damages, but nothing about personal injuries, and he did not understand that it covered them.

Plaintiff said he signed it, as long as Stone agreed to pay him more if he was injured. He also testified that he could read it himself. He testified also that Stone estimated what the repairs would cost, and that it would be less than \$10,—that plaintiff would have something left for his trouble, of the \$10,—and took out \$10 from his pocket, and handed it to plaintiff, who took it.

The cost of said repairs was in fact about \$3. The presiding judge asked the plaintiff's counsel if he claimed that there was any fraud in procuring this writing, who replied that he did not, but did claim there was a mistake about the writing; that the minds of the parties did not meet on the proposition that there was a settlement of any claim for personal injuries, or any other than for the property damage; and that there was a distinct understanding and agreement that plaintiff was to be paid more if he was injured in his person, at the time the writing was signed, and that it did not express the understanding of plaintiff.

The plaintiff offered to show by the above testimony and other evidence of the same kind, and by his testimony, that he did not understand that he was settling for personal injuries; that the writing was procured by mistake; that he did not understand he was settling for personal injuries; and claimed the right to go to the jury on that question and on the whole case. But the court ruled that the writing could not be thus controlled, and, subject to plaintiff's exception, directed a verdict for defendant.

Plaintiff's counsel stated that he should ask for damages for personal injuries only. After about five days from the injury, plaintiff was taken quite sick, as he had testified in chief,

and suffered much in his back, head, and stomach, as a result of his being thrown down the bank as before herein described, and was disabled for a considerable time.

It was conceded that the town had ratified the act of said Stone as a settlement, at a town meeting, by accepting the selectman's report describing such settlement.

The receipt referred to above is as follows:

Amherst, January 1, 1886.

Received of F. L. Stone, for the town of Amherst, \$10 in full of all demands for damage sustained on the highway near the house of Alden Cooley, on the evening of Dec. 31, 1885.

Emory A. Squires.

Mr. William G. Bassett, for plaintiff:

The ruling of the court was an interpretation of the written instrument. The contention of plaintiff was that the paper was procured under such circumstances of mistake as to render it ineffectual, as evidence of accord and satisfaction, to bar plaintiff's right of action for personal injuries. There was evidence for the jury on this question. It was error not to submit it to them with instructions similar to those approved in *Curley v. Harris*, 11 Allen, 112.

The cases relied on, of *Goss v. Ellison*, 136 Mass. 508; *Leddy v. Barney*, 139 Mass. 394; *Osborn v. Martha's Vineyard R. R. Co.* 1 Mass. (L. ed.) 124, 1 New Eng. Rep. 452, 140 Mass. 549; *Weston v. Chamberlin*, 7 Cush. 404; *Stone v. Dickinson*, 5 Allen, 29; *Brown v. Cambridge*, 3 Allen, 474, where the question was not as to the validity of the release, but its effect, have no application to the facts presented in this case.

The paper was procured by an agreement that more should be paid if plaintiff was injured in person. In that event the payment it evidenced was not to be in full.

Lee v. Lancashire & Y. R. Co. L. R. 6 Ch. 527; 8 C. 19 W. R. 729; 25 L. T. N. S. 77; *Roberts v. Eastern Counties R. Co.* 1 Fost. & F. 460; *Rideal v. Great Western R. Co.* Id. 706.

The legal effect of the instrument was not to prevent a recovery for personal injuries. The words "in full of all demands for damage sustained" have not a broad enough meaning for that. The statute places "bodily injury" in antithesis to "damage in his property." The instrument only deals with the latter.

Pub. Stat. chap. 53, § 18. See Pub. Stat. chap. 167, § 94, title, *Negligence of Towns*.

At least a case of latent ambiguity was presented, to explain which parol testimony was admissible; and the testimony showed clearly that personal injuries were not settled for.

Sargent v. Adams, 8 Gray, 72; *Suett v. Sturtevant*, 102 Mass. 865; *Keller v. Webb*, 125 Mass. 88; 2 Add. Cont. p. 782; *Smith v. Jeffrey*, 15 Mees. & W. 561, 562.

Mr. D. W. Bond, for defendant:

The ruling of the court that the writing signed by the plaintiff could not be controlled as the plaintiff proposed, and directing a verdict for the defendant, was correct.

It was not claimed that the plaintiff was induced to sign the writing by any fraud practiced upon him.

The plaintiff claimed there was a mistake about the writing; that the minds of the parties did not meet upon the settlement as stated
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in the writing. The plaintiff offered to show that he did not understand he was settling for personal injuries.

The writing is "in full of all demands for damage sustained on the highway" on the evening of December 31, 1885. Such a writing has been held by our courts to constitute a contract and an accord and satisfaction, and not to be controlled by parol evidence.

Brown v. Cambridge, 3 Allen, 474; *Stone v. Dickinson*, 5 Allen, 29, 33; *Stone v. Dickinson*, 7 Allen, 26; *Curley v. Harris*, 11 Allen, 112; *Simons v. Almy*, 103 Mass. 83; *Goss v. Ellison*, 136 Mass. 508; *Leddy v. Barney*, 139 Mass. 394; *Osborn v. Martha's Vineyard R. R. Co.* 1 Mass. (L. ed.) 124, 1 New Eng. Rep. 452; 140 Mass. 549.

Field, J., delivered the opinion of the court:

In an action at law in this Commonwealth, the written paper put in evidence by the defendant is regarded not only as a receipt acknowledging the payment of money, but as an agreement that the money is received in full payment of all demands for damages sustained by reason of the defect in the highway complained of; and, so far as the written paper contains an agreement, it cannot be varied or controlled by evidence of an oral agreement made contemporaneous with it, and inconsistent with its terms. *Osborn v. Martha's Vineyard R. R. Co.* 1 Mass. (L. ed.) 124, 1 New Eng. Rep. 452, 140 Mass. 549; *Leddy v. Barney*, 139 Mass. 394; *Goss v. Ellison*, 136 Mass. 508; *Brown v. Cambridge*, 3 Allen, 474; *Curley v. Harris*, 11 Allen, 112.

It was not claimed by the plaintiff at the trial "that there was any fraud in procuring this writing" which at common law would avoid it, and the plaintiff has not attempted to rescind the agreement by restoring the money he has received. The claim is that there was a mistake in this, that the plaintiff understood that the receipt covered only the claim for damages to his property, and did not include the claim for damages to his person, and that there was a distinct agreement between the plaintiff and Stone that the plaintiff should be paid something more if it appeared that he had been injured in his person. The agreement contained in the receipt is unambiguous, and clearly covers all demands for damages, whether to person or property; the oral agreement, which plaintiff offered to prove, is plainly inconsistent with the writing; and a mistake or misunderstanding, on the part of the plaintiff, of the legal import of the written agreement, is not a ground for avoiding it at common law.

We need not decide whether the evidence offered would have been competent if the plaintiff had intended to avail himself of his equitable rights pursuant to Stat. 1883, chap. 223, § 14. It does not appear that the evidence was offered or the exceptions taken with reference to the rights conferred by this statute upon plaintiffs in actions at law.

Exceptions overruled.

William E. LANE

v.

Calvin HOLMAN.

1. Under Pub. Stat. chap. 162, § 18, re-
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- quiring that notice of the examination of a judgment debtor be served upon the debtor three days before the time fixed for the examination, with one day additional for every twenty-four hours' travel, service must be made as many hours as there are miles of travel, before the beginning of the third day from the day fixed for the examination.
2. The meaning of the statute is that time for travel shall be allowed at the rate of one hour for each mile.
 3. An arrest, under a certificate of arrest issued by a magistrate on the default of the debtor to appear for examination after insufficient service of notice, is illegal; and such certificate will not protect the creditor at whose request it was issued from an action for false imprisonment.
 4. The debtor does not waive the illegality of such arrest by recognizing before another magistrate and by submitting to an examination for the purpose of taking the poor debtors' oath, and by taking such oath.
 5. Where the debtor, after obtaining his discharge from arrest on giving recognizance, submitted himself to examination for the purpose of taking the poor debtor's oath, and incurred expenses in so doing,—*Held*, that such expenses, having been voluntarily incurred, were not proper elements of damage in an action brought by him for false imprisonment.

(Worcester—Filed October 21, 1887.)

ON report. *Judgment on verdict.*

Action of tort for false imprisonment. At the trial in the superior court, before Staples, J., and a jury, the following facts appeared: January 4, 1886, the defendant caused the plaintiff to be arrested, by James M. Drennan, a deputy sheriff, on an execution in favor of the defendant, against Lane, the plaintiff, issued out of the Second District Court of Eastern Worcester, to which execution was annexed the affidavit of Herbert Parker, and certificate (so called) of authorization of arrest of Christopher C. Stone, justice of said district court.

Prior to the issuing of said certificate (so called), application had been duly made to said magistrate, Stone, by the attorney of Holman, under Pub. Stat. chap. 162, § 18, for a certificate authorizing the arrest of Lane on said execution, and thereupon Stone had issued a notice in supposed accordance with the provisions of said chapter 162, requiring Lane to appear before him for examination at the time stated therein. The notice was issued November 18, 1885.

The notice was served on Lane at 10 o'clock in the forenoon on November 17, 1885, Lane then residing at Worcester, a place fifteen miles distant from the place of return named in said notice; and said service was made upon Lane at his place of business in said Worcester, the same being the same distance as aforesaid from the place of return named in the notice. On the return day of the notice Lane did not appear, and at 10 o'clock in the forenoon of said

day, to wit, November 20, 1885, was defaulted by the said magistrate, Stone.

Thereupon, after said default, the magistrate, Stone, issued the said certificate for the arrest of Lane, and annexed the same to the execution aforesaid.

It appeared that Drennan arrested the plaintiff at 3 o'clock P. M. on said January 4, held plaintiff in his custody under said arrest for about two hours, and then took him before Charles R. Johnson, a master in chancery, in said Worcester, before whom Lane entered into a recognizance with surety, in the form provided by law in the case of poor debtors arrested on execution. January 12, 1886, Lane gave notice of his desire to take the oath for the relief of poor debtors, and notice was made returnable January 15, 1886, when the creditor appeared, and the examination of the debtor commenced. The examination was continued several times, till March 8, 1886, when the said master administered the oath for the relief of poor debtors to Lane. Lane paid for the service of the notice to the creditor, January 15, \$2.28; he also paid the magistrate \$1 for the notice, and \$1 for the final certificate. Lane also paid counsel fees, for service of counsel in the matter of his taking the oath on and after January 12, 1886, the sum of \$30, and it was agreed that this was a reasonable price for services rendered after January 12, 1886.

It also appeared, upon the question of damages, that while under arrest Lane took counsel as to how he should recover his liberty, and paid therefor the sum of \$5 as counsel fee, and that he paid the master the sum of \$5 as a fee upon the recognizance. No question was raised as to the right of the plaintiff to recover the two last-named sums as part of the damages, if entitled to damages at all; but the defendant's counsel claimed, and asked the court to rule, that, as respects the former item, to wit: the notice to take the oath, the service thereof, the sum paid for final certificate, and for counsel fees for services on and after January 12, 1886, and as to all fees and expenses aforesaid, incurred on and after January 12, 1886, the same could not be recovered as part of the damages in this action. The court ruled as requested by the defendant, and directed the jury not to include in the assessment of damages the sums so paid by the plaintiff, covered by the request of the defendant. The court instructed the jury that the plaintiff might recover, in damages, for the loss of time while he was under arrest, and for the indignity suffered by him by reason of the false imprisonment, if any was shown in this case; and also allowed the jury to include the items of \$1 for the said recognizance, and said counsel fee of \$5, in the assessment of damages.

The defendant also asked the court to rule that the arrest and detention of the plaintiff was lawful, and that legal justification was shown therefor. The court declined so to rule, and did rule that the notice to the plaintiff issued by the magistrate under Pub. Stat. chap. 162, § 18, was insufficient, and that no sufficient service thereof was made upon the plaintiff, and that the plaintiff was not allowed thereby sufficient time for his appearance, and that upon the facts here appearing the arrest was unlawful.

The jury found for the plaintiff and assessed damages in the sum of \$15.97, and, at the request of the parties, the court reported the case for the determination of the Supreme Judicial Court.

Mr. George H. Mellen, for plaintiff:

1. The arrest and imprisonment of the plaintiff was illegal. The notice served upon him was insufficient.

Pub. Stat. chap. 162, § 18; *Stewart v. Griswold*, 134 Mass. 391.

Upon question of waiver, see *Carlton v. Akron Sewer Pipe Co.* 129 Mass. 40.

2. The jury should have been instructed to allow the plaintiff damages for loss of time and for expenses actually incurred until he fully regained his freedom from imprisonment.

Parsons v. Harper, 16 Gratt. (Va.) 64; *Bonesteel v. Bonesteel*, 30 Wis. 511; 2 Add. Torts, 786; *Pritchett v. Boevey*, 1 Cro. & M. 775; *Foxall v. Barnett*, 2 El. & B. 928.

Messrs. John W. Corcoran and Herbert Parker, for defendant:

The court erred in the ruling that no sufficient service of said notice was made upon the plaintiff. When an act is to be done a certain number of days before an event, the rule of law excludes the whole day of the event, and refuses to recognize fractions of a day, and gives the actor the benefit of the whole day on which the act is done.

Butler v. Fessenden, 12 Cush. 78; *Bemis v. Leonard*, 118 Mass. 502-507; *Stewart v. Griswold*, 134 Mass. 391, 392.

Service was therefore made upon the debtor, allowing not less than three days before the time fixed for the examination.

And the question then comes up on the construction and interpretation to be given to the words of the statute, "and at the rate of one day additional for every twenty-four miles of travel." In the language of the court in the above case of *Stewart v. Griswold*, *supra*, "the letter of the statute does not deal with fractions of twenty-four miles' travel."

In the contemplation of the statute, and by its expression, twenty-four miles is stated as the unit of travel allowance, and that which is stated and accepted as the unit is not susceptible of division.

It is contended that the court erred in the ruling that, upon the facts and pleadings as set forth in the report, the jury might find for the plaintiff. The plaintiff cannot now, in this collateral action, for the first time impeach the validity of a proceeding in which he was a party, and which had proceeded to final judgment, which judgment has not been reversed or set aside.

Headrick v. Whittemore, 105 Mass. 29.

No action lies for imprisoning the plaintiff on process which is voidable only, so long as it appears regular upon the record; but he should first apply to the court to have it set aside.

Reynolds v. Corps, 8 Cai. 267.

And especially is this true if the plaintiff has waived the error by availing himself of his imprisonment for the purpose of obtaining the benefit of an Insolvent Act. And the report sets forth that plaintiff did avail himself of the imprisonment and subsequent proceedings, for the purpose of obtaining such benefit.

Reynolds v. Church, 8 Cai. 274.

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The defendant may justify under process which is voidable only, while it continues without being set aside by the court.

Reynolds v. Corps, *supra*.

The arrest and imprisonment ceased when he was discharged from the custody of the officer; and, if the arrest was void in law, certainly after such release the arrest did not and could not continue: nor could any proceedings based upon any obligations entered into by virtue of such arrest have any legal effect as binding the plaintiff thereunder.

Allen v. Shed, 10 Cush. 375; *Warne v. Con-stant*, 4 Johns. 32.

At the utmost the plaintiff was entitled only to such expenses as he in good faith and of necessity incurred to secure his release from custody,—and all such charges the court instructed the jury to include in the assessment of damages.

Field, J., delivered the opinion of the court:

It is contended that the arrest was unlawful because, although the certificate of arrest was issued after notice to the debtor to appear and submit himself to an examination, pursuant to Pub. Stat. chap. 162, § 18, the service of the notice was insufficient. The statute requires that the notice be served "by delivering an attested copy of the notice to the debtor, or leaving the same at his last and usual place of abode, allowing not less than three days before the time fixed for examination, and at the rate of one day additional for every twenty-four miles' travel." The plaintiff resided at Worcester, and the notice was served upon him there, on November 17, 1885, at 10 o'clock in the forenoon. The time fixed for the examination was November 20, 1885, at 9 o'clock in the forenoon, and the place was the courtroom in Clinton, which was fifteen miles distant from the plaintiff's residence in Worcester, and the same distance from the place where he was served with the notice.

In construing statutes which provide for the service of process or of notice, when the process is required to be served, or the notice given, a certain number of days before the return day, the days have been reckoned by excluding the return day, and including the day in which the process is served or the notice given; and fractions of a day have not been regarded, because the statutes have made a day the unit of time. *Stewart v. Griswold*, 134 Mass. 391; *Butler v. Fessenden*, 12 Cush. 78; *Bemis v. Leonard*, 118 Mass. 502, 507. If, then, the statute had not required that additional time be given for travel, the service in this case would have been sufficient; but as the statute requires that time be allowed for travel, in addition to the three days, and as fractions of these three days are not regarded, it follows that the earliest time, on which a notice can be served, if time is allowed for travel, is on the fourth day before the day fixed for the examination. In estimating the time to be allowed for travel, it is plainly the intention of the statute that a day may be divided. Time is to be allowed "at the rate of one day additional for every twenty-four miles' travel;" that is, at the rate of one hour for each mile of travel. The plaintiff was therefore entitled to an allowance of fifteen

hours for travel in addition to the three days' notice, and therefore the service, to be sufficient, should have been made at least fifteen hours before the beginning of the third day from the day fixed for the examination. *Stewart v. Griswold, supra.*

The plaintiff did not appear in obedience to this notice, and was defaulted, and the magistrate thereupon annexed to the execution a certificate of arrest. There was no waiver by the plaintiff of the defect in the service; and the act of the magistrate in making and annexing the certificate to the execution was not authorized by law, and the arrest was illegal. While the process, if valid upon its face, may protect the officer, it does not protect the creditor at whose request the unlawful act is done; and the debtor, by recognizing before another magistrate, and by submitting himself to an examination for the purpose of taking the oath for the relief of poor debtors, and by taking the oath, does not waive the illegality of the arrest. *Carleton v. Akron Pipe Sewer Co.* 129 Mass. 40.

After the plaintiff had obtained his discharge by entering into a recognizance before Charles R. Johnson, a master in chancery, the imprisonment was at an end. He could have been discharged from imprisonment by other methods if he had chosen to employ them. After his discharge on giving his recognizance, he was under no legal obligation to appear before the magistrate and submit himself to an examination. He could have successfully defended a suit on the recognizance. See *Stewart v. Griswold, supra.* The expenses incurred after he was discharged were voluntarily incurred, and were rightly excluded as elements of damage resulting from the arrest and imprisonment. By the terms of the report, judgment is to be entered on the verdict.

Charles WHITNEY, Admr.,
v.
James CLARY.

1. Where it is stated in defendant's presence that he had given a promissory note, and another person present is requested to and does there witness it, and before witnessing it reads it over, his testimony that the note is in the same condition as when he witnessed it, and to the circumstance, is sufficient to prove the making of the note.
2. A note, when made and delivered, is *prima facie* evidence of consideration.
3. The surrender of a note given by defendant's son, though it could not be enforced at law, is sufficient consideration for a new note given by defendant.

(Worcester—Filed October 20, 1887.)

ON defendant's exceptions. *Overruled.*

This was an action upon the following promissory note:

658

\$378.

Sterling, March 16, 1888.

For value received I promise to pay to the order of John H. Davis three hundred and seventy-eight dollars, on demand, with interest.

His
Witness, Susan P. Goodell. James X Clary.
mark.

Indorsement Mar. 16, 1888. Rec'd \$7.00.

Answer: (1) a general denial; (2) special denial of genuineness of signature; (3) want of consideration. At the trial the plaintiff proved his appointment as administrator of estate of John H. Davis, and testified that he found said note among the papers of the intestate.

Susan P. Goodell testified:

"Kept house for John H. Davis at Sterling from 1881 to 1885."

Q. Is that your signature? (Producing note.)

A. Yes. James Clary came to farm at Sterling where Davis lived. Davis and Clary were in dining-room adjoining kitchen. I was in kitchen, and door was ajar between the rooms. Davis wrote the note. I heard him read it to Clary, then he steps to the door and wanted me to put my name on note to witness it. I went in there; remember I took the pen out of Clary's hand and wrote with same pen. I did not see Clary do anything with pen.

Q. Did he say anything?

A. Mr. Davis says: "This is Mr. Clary, William's father, who is taking up William's note, giving him; and I want you to witness it."

Q. And you signed it?

A. Yes; I read the note before I witnessed it. It was in same condition then as now.

On cross-examination this witness testified: "Mr. Davis told me it was a renewal of William Clary's note. Davis said he wanted a renewal because William had died. I do not remember that James Clary said anything. After I signed the note I immediately left the room; was in the room only a short time. Do not know of any money being paid that day. I knew the amount of the note at the time, and have forgotten."

Q. You cannot testify to anything upon that note other than your handwriting?

A. No; the rest of note, except my name, is in Davis's handwriting.

Plaintiff then offered note in evidence; defendant objected; the court allowed the note to be given in evidence, and defendant excepted.

The plaintiff then rested.

James Clary, the defendant, testified: "All the dealing I ever had with Davis was when I bought a cow and gave my note for \$50. Never signed a note for renewal of William's note. Saw Davis when I paid balance for cow; did not see Mrs. Goodell; saw no one in room; did not stay long. Never got any money from Davis. Never saw the witness to note, Susan P. Goodell, at Davis's house, and never knew of her witnessing any note or other instrument signed by me. My son's name was William Henry Clary; he died ten years ago last April. William borrowed \$400 from Davis and gave his note and used the money in building a house upon real estate owned by him. Do not know if Davis held this note when he died. Do not know what became of

it. Did not receive it from Davis since my son died. Never had any talk with Davis about this note before or since William died; the only transaction I ever had with him was when I bought cow and gave note for it. Did not go there any time when Davis wrote a note and read it to me. Nothing was said to me about taking up William's note."

Q. You were the administrator of William Clary's estate?

A. Yes.

Q. The date of administration was April 18, 1876? (Producing letter of administration.)

A. Yes.

Defendant then put in evidence letter of administration on William H. Clary's estate. It appeared that defendant Clary was the only heir of his son William, who at the time of his decease owned the real estate upon which he had used the money loaned him by Davis. This was all the material evidence offered to prove consideration of said note. The defendant then asked the court to rule that the plaintiff had not offered any evidence which would warrant the jury in finding that there was any consideration for said note, or that would warrant a verdict for the plaintiff. The court declined to so rule, and submitted the case to the jury with instructions as to the *prima facie* proof supplied by the note itself, if its execution was proved, as to the burden of proof, and as to the right of the jury to determine upon the whole case the evidential value of this *prima facie* proof; which instructions were not excepted to. The jury returned a verdict for the plaintiff for the amount of said note and interest; and the defendant, being aggrieved by the said rulings and refusals to rule, excepted thereto.

Messrs. John W. Corcoran and Thomas F. Gallagher, for defendant:

The burden was on plaintiff to prove that the defendant signed the note in the presence of the attesting witness.

Holden v. Jenkins, 125 Mass. 447.

It nowhere appears from the testimony of the witness Goodell, that defendant signed the note in her presence, or even that his signature was upon it when she signed her name thereto as an attesting witness.

There was no consideration for the note. The plaintiff claimed that the note sought to be recovered was given by defendant in payment or satisfaction of a prior note given by defendant's deceased son, William Clary, to plaintiff's intestate, John H. Davis. It was therefore incumbent upon the plaintiff, in order to establish a legal consideration for defendant's note, to prove that William Clary's note was given up by Davis, and delivered to the defendant.

Moreover there was evidence, undisputed, tending to show that William Clary's note was outlawed at the time the note in suit was alleged to have been made, and also that the said note of William Clary was never delivered to or received by the defendant.

The case finds that the note declared on was without a legal consideration, and a *nudum pactum*.

Hill v. Buckminster, 5 Pick. 391; *Williams v. Nichols*, 10 Gray, 88.

Unless the evidence is sufficient to warrant

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a jury in finding a valid consideration for the instrument, the action cannot be maintained.

Warren v. Durfee, 126 Mass. 340.

Messrs. A. Norcross, H. C. Hartwell, and C. F. Baker, for plaintiff:

I. The execution of the note was sufficiently proved, and the note was properly received in evidence.

The evidence showed that the note was read to the defendant; that in the presence of the defendant the attesting witness was requested by the payee to put her name on the note, to witness it; that Davis, the payee, said: "This is Mr. Clary, William's father, who is taking up William's note, giving him, and I want you to witness it;" that she took the pen from defendant's hand and witnessed the signature; and that the note was in the same condition then as when produced at the trial. This, in defendant's presence and without objection from him, was an admission that it was his note and that he had signed it. It was sufficient to bring the note within the rule given to constitute an attested note, viz.: "The witness must put his name to it openly, and under circumstances which reasonably indicate that his signature is with the knowledge of the promisor and is a part of the same transaction with the making of the note."

Drury v. Vannear, 1 Cush. 276; *Swazey v. Allen*, 115 Mass. 594; 1 Greenl. Ev. § 569 a.

The silence of the defendant under such circumstances would amount to an adoption of the signature, if he had not himself written it.

II. The signature having been proved, the note itself is *prima facie* proof of consideration. It further appeared in evidence that defendant was the administrator and only heir of the estate of his son William, who had borrowed the sum of \$400 from plaintiff's intestate, and given his note for same; and that the defendant inherited from his son the real estate upon which the money loaned him by Davis was used; and that, when the note in suit was given, Davis stated to the attesting witness, in defendant's presence, that the defendant was giving his own note to take up William's, and that he (Davis) wanted a renewal because William had died. This was sufficient to warrant the jury in finding that the note in suit was given to take up a note held by plaintiff's intestate against defendant's son, and it is immaterial whether, at the time it was given, the note against his son was barred by the Statute of Limitations or could be enforced against his estate.

Wilton v. Eaton, 127 Mass. 174; *Newhall v. Paige*, 10 Gray, 386; *Kerr v. Lucas*, 1 Allen, 279; *Coggins v. Murphy*, 121 Mass. 166; *Wheaton v. Wilmarth*, 18 Met. 422; Story, Prom. Notes, § 185.

But it did not appear that at the time defendant gave his note the claim against his son's estate was barred. There was no evidence of any probate proceedings except the appointment of defendant as administrator.

Unless due notice of his appointment was given, claims would not be barred against the estate.

Pub. Stat. chap. 132, § 3; *Forward v. Forward*, 6 Allen, 494-498.

Or new assets may have come into the administrator's hands.

Pub. Stat. chap. 186, § 11.

Or the claim might have been prosecuted by application to the supreme court under provision of Pub. Stat. chap. 186, § 10.

Morton, Ch. J., delivered the opinion of the court:

The testimony of the witness Goodell, if believed, was sufficient to justify the jury in finding that the note in suit was duly signed by the defendant, and that it was attested by the witness with the knowledge of the defendant, and was a part of the same transaction with the making of the note. *Swazey v. Allen*, 115 Mass. 594, and cases cited. The defendant contradicted this witness, but it was for the jury to decide which was entitled to credit.

The signature of the defendant and the delivery of the note having been proved, the note itself is *prima facie* evidence of consideration. But in this case there was evidence which would justify the jury in finding that the note in suit was given to take up and cancel an old note signed by the defendant's son and held by the plaintiff's intestate. The surrender of this note, even if it could not be enforced at law, was a sufficient consideration for the new note. *Wilton v. Eaton*, 127 Mass. 174.

The case before us is much stronger in favor of the plaintiff than was the case of *Wilton v. Eaton*, *supra*. In the case at bar the defendant was the administrator and only heir of his son. He filed no bond as administrator, and nothing appears to show that his son's note, at the time of its surrender, could not be enforced against his estate.

Exceptions overruled.

Joseph STEELE *et al.*

v.

H. E. NASH *et al.*

Where it was agreed between two creditors of a common debtor that whatever one of them should realize to apply on his debt, after all costs and fees arising from and by reason of his suits and executions should have been deducted, he would share with the other, —Held, that costs and fees in actions brought to avoid the judgments in said suits, and to recover the proceeds of the sales on said executions in the hands of the officer, are costs and fees within the meaning of the agreement, to be deducted from the amount realized on said debt before the proceeds should be divided between such creditors.

(Hampden—October 21, 1887.)

APPEAL by defendants from a decree granting the relief prayed for in a bill of complaint. *Reversed.*

The bill alleges that plaintiffs were creditors of one Bobsin, and had attached his goods; that defendants, his creditors, had also attached his goods by a prior attachment, and recovered judgment against him; that, plaintiffs being about to institute insolvency proceedings against Bobsin, defendants agreed with plaintiffs that if they

would desist from taking such insolvency proceedings, defendants would pay plaintiffs \$300, or one half the amount which should accrue on the execution issued on said judgment, above the costs and fees upon said executions; that, in consideration of said agreement, plaintiffs did not institute such insolvent proceedings, and thereby became entitled to one half the sum collected on such execution, which defendants refused to pay.

Defendants answered, *inter alia*, that they and the deputy sheriff who collected the execution had been sued by the assignee in insolvency of said Bobsin, to recover the goods attached by defendants and sold on said execution; and defendants, in settlement of the suit, paid to said assignee a sum equal to the amount collected by them upon such execution, which sum was divided by the assignee among creditors, including plaintiffs.

Mr. William H. Brooks, for defendants:

The bill of complaint is defective because:

1. It does not aver that at the time of the alleged agreement the plaintiffs were creditors of John Bobsin, the allegation being that "they are, and on the 14th day of September last past were, creditors." The "September last past" was more than a year subsequent to said agreement. 2. It contains no averment that the plaintiffs at the time of said agreement possessed a claim upon which insolvency proceedings could have been instituted against said Bobsin, or that they could have instituted such proceedings. The agreement and note were without consideration and void.

Palfrey v. Portland, S. & P. R. R. Co. 4 Allen, 56.

These objections may be taken by answer.

Heard, Eq. Pl. p. 103.

The plaintiffs, at the time of the making of said agreement and note, had no claim upon which such insolvency proceedings could have been begun.

Palfrey v. Portland, S. & P. R. R. Co. supra.

The deputy sheriff held the money as a servant of the law, and, while he so held it, it was not the property of these defendants, and it cannot be successfully contended that, in the language of the agreement, "the money realized upon such sales passed into the hands and possession" of these defendants. There was not even a demand for the money made by the defendants upon the officer.

Wilder v. Bailey, 3 Mass. 289; *Pollard v. Ross*, 5 Mass. 819; *Turner v. Fendall*, 5 U. S. 1 Cranch, 117 (2 L. ed. 53).

The officer had the right to retain the money until the conflicting claims should be determined or adjusted.

Bayley v. French, 2 Pick. 586; *Rogers v. Sumner*, 16 Pick. 387; *Bartlett v. Eveleth*, 4 Met. 149.

The plaintiffs aided and abetted the defendants in their efforts to obtain a preference over the other creditors and to prevent an equal distribution of the debtor's assets. This agreement contravenes the policy of the insolvent laws and is void.

Dexter v. Snow, 12 Cush. 594; *Downs v. Lewis*, 11 Cush. 76.

This agreement placed the plaintiffs under wrong influences, which injuriously affected the rights and interests of other creditors.

Story, Eq. §§ 333, 349, 378, 379; *Fuller v. Dame*, 18 Pick. 481.

Verre. William Slattery and Gideon Wells, for plaintiffs:

The plaintiffs' agreement was a sufficient consideration for the contract. It was an advantage to defendants in enabling them to perfect their attachment. It was analogous to an agreement to pay a third party's debt, in consideration of forbearance to sue.

Wheeler v. Slocumb, 16 Pick. 52; *Boyd v. Freize*, 5 Gray, 553; *Robinson v. Gould*, 11 Cush. 55. See also *Vinal v. Richardson*, 18 Allen, 521; *Worcester Mechanics, Sav. Bank v. Hill*, 113 Mass. 25.

The contract was not invalid, either as violating the provisions of the insolvent law or as against public policy. There is no provision of the insolvency laws forbidding such a contract. The insolvent was not a party to it. There can be no fraud against the insolvent law, as such, to which the debtor is not a party.

The agreement was not void as against public policy.

It is not the duty of an insolvent to institute such proceedings.

Wilson v. City Bank, 84 U. S. 17 Wall. 473 (21 L. ed. 723); *Tenth Nat. Bank of N. Y. City v. Warren*, 96 U. S. 539 (24 L. ed. 640); *Little v. Alexander*, 88 U. S. 21 Wall. 500 (22 L. ed. 625); *Rogers v. Palmer*, 102 U. S. 263 (26 L. ed. 164).

W. Allen, J., delivered the opinion of the court:

It is obvious, from the facts stated in the master's report, that the parties supposed the attachment of Nash & Co. might be avoided under insolvent proceedings. It does not appear whether they feared a statute dissolution of the attachment by an assignment under proceedings commenced within four months after the attachment, or that it might be avoided by an assignee as in fraud of creditors or of the insolvent law. The contract was made to protect the attachment from insolvent proceedings. It was in view of the liability of the attachment to be dissolved by an assignment before the execution was levied, or avoided by a subsequent suit by an assignee, that the parties agreed that if, after the sale of the property upon the execution, and after the money realized upon such sales should have passed into the hands or possession of Nash & Co., they should refuse to pay to the plaintiffs one half of the amount "which they, said Nash & Co.," shall have realized upon said executions, after all the costs and fees arising from and by reason of said suits and said executions shall have been deducted, then said McIntosh may indorse said note to said Steele & Emery, and not otherwise.

The parties were creditors seeking payment of their debts, and the fair construction of the agreement is that whatever Nash & Co. should realize to apply on their debt they would share with the plaintiffs. After the sale of the property on execution, and while the proceeds were in the hands of the officer, a bill in equity was brought against Nash & Co. and the officer, by the assignee in insolvency, to avoid the judgments of Nash & Co., and to recover the proceeds of the sales; and the officer was enjoined

against paying them over to Nash & Co. That suit was compromised by the payment of a part of the proceeds to the assignee, and the balance was paid over by the officer to the attorney of Nash & Co., in payment of costs and fees in the equity suit and in other cases growing out of the suits and executions upon which the property was sold, so that Nash & Co. never received anything which they could apply on their debts against the insolvent. We think that the costs and fees in actions brought to avoid the judgments and to recover the proceeds of the sales on execution in the hands of the officer were "costs and fees arising from and by reason of said suits and said executions," within the meaning of the contract; and that neither the money received by the officer on the sales while it remained in his hands as officer, nor the money paid by the officer in compromise of the suit of the assignee, nor the money paid by the officer to the attorney of Nash & Co. for costs and fees incurred in the suit by the assignee, and in similar suits brought to recover the proceeds of the sales from the officer, was money realized upon such sales, in the hands and possession of Nash & Co., within the meaning of the contract.

This decision renders it unnecessary to consider the question whether there was any legal consideration for the note, and we express no opinion upon it. In the opinion of a majority of the court the entry must be—

Bill dismissed.

COMMONWEALTH

v.

Chester A. HINDS.

1. A warrant to search for and seize intoxicating liquors, issued under Pub. Stat. chap. 100, § 80, in the form prescribed by that statute, can be executed in the night time.
2. The authority to execute a warrant in the night time, and to issue a warrant in which the authority to execute it is not limited to the daytime, must be found in the statute which authorizes the warrant. Such authority will be inferred, unless the statute expressly or impliedly limits it to the daytime.
3. The general rule is that process, civil or criminal, can be as well served in the night time as in the daytime; and a direction in a warrant to serve it, without limitation as to the hour of the day, is a direction to serve it in the night-time as much as in the daytime.

(Franklin—Filed October 21, 1887.)

ON defendant's exceptions. *Overruled.*

Indictment for an assault upon one Jillson, a constable of Orange.

At the trial in the Superior Court before Brigham, Ch. J., there was evidence that Jillson, a constable of Orange, with a search-warrant issued under Pub. Stat. chap. 100, entered the building described in the warrant, occupied by the defendant as a dwelling-house and a saloon, and there, at about 9 o'clock in

the evening of January 18, 1887, made search for intoxicating liquors alleged in the warrant to be kept for sale in violation of law; that in a closet in said building Jillson found a bottle partially filled with rum, which he seized and put into his pocket; that the defendant, while Jillson was continuing his search in the building, laid his hand upon said Jillson's person, snatched from Jillson's pocket and grasped this bottle, containing rum, and after a struggle carried away the same.

This is all the evidence material to this report. Upon this evidence the defendant asked the court to rule: 1. That the evidence will not warrant a verdict of guilty. 2. The search of the premises occupied by the defendant, in the night time, was unauthorized by the warrant; and Jillson became a trespasser in so doing; and the defendant could rightfully retake from him his property, if in so doing he used no greater force than was reasonably necessary. 3. The warrant in this case did not authorize Jillson to search the premises of the defendant in the night time; and Jillson, in so doing, was a trespasser; and the defendant could rightfully retake his property, if in so doing he used no more force than was reasonably necessary.

The court refused so to rule, the defendant excepted, and thereupon defendant submitted to a verdict of guilty.

Mr. John A. Aiken, for defendant:

The granting and execution of search warrants have always been deemed extreme acts of authority, and extraordinary precautions have been thought necessary to prevent their abuse. *Lord Coke* regarded them as contrary to law. See 2 P. C. 149. The Province Laws provided in explicit terms that, in matters of excise and imposts on intoxicating liquors, search warrants should be executed in the daytime only.

1 Prov. Laws, pp. 33, 119, 278, 393.

The Constitution of the United States, declares the right of the people to be secure, in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.

U. S. Rev. Stat. § 3066.

Our own Bill of Rights contains a provision similar to that in the United States Constitution.

See Rev. Stat. chap. 142, §§ 1, 2, 4.

The provisions relative to a search in the night-time were suggested in 1835, by the Commissioners on the Revision of the Statutes (see note to Rev. Stat. chap. 142, § 4, re-enacted in Gen. Stat. chap. 170. See Pub. Stat. chap. 212).

The list of things for which search warrants may issue authorizing a search in the night-time has been extended; it does not, however, include intoxicating liquors, and the authority to search in the night time can be granted only to search for the things named in that chapter (§ 4); and such authority must be granted by two trial justices, or a police, district, or municipal court (see Pub. Stat. chap. 201, § 60).

The warrant in the case at bar is issued under Pub. Stat. chap. 100, and follows the form suggested in § 46 of that chapter. This form of warrant was among the forms, authorized by Act 1855, chap. 397; to be used in prosecutions under chap. 215 of the Acts of that year, and it is a form which appears in subsequent legislation.

Gen. Stat. chap. 86, § 63; Acts 1869, chap. 415, § 66; Acts 1879, chap. 162, § 17.

The warrant in the case at bar did not authorize a search in the night time.

1. In its terms it contains no authority to search in the night-time. The directions in the warrant, to "forthwith" enter and search, means to enter and search as soon as it is legal to do so,—that is, in the daytime.

2. Assuming that a compliance with the requirements of Pub. Stat. chap. 212, § 4, relative to searches in the night-time, would authorize a search for intoxicating liquors, there was in this case no compliance with those requirements.

3. The express authority for a warrant to search in the night-time, contained in Pub. Stat. chap. 207, 212,—limited as it is by definite restrictions and to definite things, none of which is intoxicating liquor; and the absence of such authority in Pub. Stat. chap. 100,—implies that in the latter chapter no such authority exists. *Expressio unius exclusio alterius*. This maxim is applicable in the interpretation of statutes.

Broom, Leg. Max. 651, 664.

The silence of chapter 100 as to searches in the night-time shows that the right under that chapter remains as at common law and by the established practice of this State, which, as the learned Commissioners say, always required a search warrant to be executed in the daytime.

If the Legislature had intended that search warrants for intoxicating liquors might be served in the night time, the authority would have been granted in explicit terms. If the absence of such authority was an unintentional omission, it is an oversight to be corrected by the body that made it, and not by this court.

Commonwealth v. Certain Lottery Tickets, 5 Cush. 370, 373.

Mr. Edgar J. Sherman, Atty. Gen., for the Commonwealth:

The presiding judge properly refused to rule as requested by the defendant. The warrant was in the language of the statute, following the form provided by Pub. Stat. chap. 100, § 46. By it the officer was required "forthwith" to enter the premises described in the same. There is no constitutional or statutory restriction as to the time when this entry and search is to be made. In many instances it must be at a time most expedient in the judgment of the officer, who, however, must act in strict accordance with his precept. There is a presumption that the officer will execute his precept at a proper time and in a proper manner.

Mass. Const. art. 14; 1 Bish. Cr. Proc. §§ 243, 207; *State v. Brennan's Liquors*, 25 Conn. 278; *Wright v. Keith*, 24 Me. 163; *State v. Smith*, 1 N. H. 346; *Bell v. Clapp*, 10 Johns. 268.

This case is not affected by the provisions of chap. 212, § 4. In that section provisions for a search in the night time are made where "there is satisfactory evidence that any property stolen, embezzled, or obtained by false tokens or pretenses, or that any other things for which a search warrant may be issued by the provisions of this chapter, are concealed," etc. In § 2 these "other things" are enumerated, and intoxicating liquors are not of the number.

There being no constitutional objection to

the service of a search warrant in the night-time; nor a provision of the statute, authorizing a search for intoxicating liquors, that such search shall be at a particular time; while, on the contrary, a form for such warrant is provided, which was used and acted under by the officer in the case,—he was therefore justified in making the search at the time specified in the bill of exceptions, and the presiding judge properly refused to give the second and third rulings requested by the defendant. The acts of the defendant constituted an assault upon the officer.

W. Allen, J., delivered the opinion of the court:

The only question presented by these exceptions is whether a warrant to search for and seize intoxicating liquors, issued under Pub. Stat. chap. 100, § 30, in the form prescribed by that statute, can be executed in the night-time. The argument for the defendant is that there is no express authority in the statute to execute the warrant in the night-time, and that by the common law and by the statute, when no express provision is otherwise made, a search warrant can be executed only in the daytime.

The only search warrant known to the common law was to search for stolen goods. The usual direction of it was to search in the daytime. Whether, at common law, a warrant which directed a search not limited to the daytime would be valid, and whether such a warrant could be executed in the night time, it is not necessary to consider. See *Dane*, Abr. chap. 217, A. 2; *Davis*, Justice, 30, 51, 148; 2 *Hale*, P. C. 113; *Bump*, Justice, *Search Warrant*; *Barton*, Justice, 481; 3 *Williams*, Justice, 861. The warrant in question was not a common-law search warrant, and its validity and effect must be determined by the statute.

The Revised Statutes first made provisions in regard to the form of search warrants. Before that there was no statute relating to the common-law search warrant, but there were statutes authorizing warrants to search for counterfeit money (Stat. 1823, chap. 40); for gunpowder, in certain cases (Stat. 1828, chap. 62); and to enter a gaming house (Stat. 1884, chap. 172). Rev. Stat. chap. 142, made general provision in regard to search warrants: § 1 authorized warrants to search for property stolen, embezzled, or obtained by false pretenses; § 2 authorized search warrants in four other specified cases; § 3 provides for the form of the warrant,—among other things that it should command a search in the daytime; § 4 provided for the manner in which a warrant might be issued authorizing a search in the night-time. The Commissioners, in their note, give as the reason for recommending this section, that “by the common law and the established practice in this State a search warrant was always required to be executed in the daytime, and this requirement has, in many cases, rendered it almost useless as an instrument for the detection of offenders.” This is the origin of the provisions which have ever since been in force, and which appear in Gen. Stat. chap. 170, §§ 1-4, and in Pub. Stat. chap. 212, §§ 1-4. Pub. Stat. chap. 212, § 1, provides that a warrant may issue to search for

property stolen, embezzled, or obtained by false pretenses; § 2 authorizes search warrants in seven different cases; § 3 provides that “all search-warrants shall be directed to the sheriff of the county, or to his deputy, or to a constable, commanding such officer to search in the daytime the house or place,” etc.; § 4 provides that, if there is satisfactory evidence that anything “for which a search warrant may be issued by the provisions of this chapter,” is concealed, etc., in a particular house or place, a warrant may be issued by two trial justices, or by a police, district, or municipal court, to authorize a public officer to search such house or place in the night-time.

The Revised Statutes, and various statutes enacted since, authorize the issuing of search warrants, or of warrants in the nature of search warrants, in cases which were not included in the chapter on search warrants. Whether, in a case of that kind, the general rule that warrants can be served in the night time, or the rule applied by the General Statutes to search warrants, that they shall authorize a search only in the daytime, shall apply, must depend upon the terms and construction of each statute. It is a question as to the intention of the Legislature in each case. It will be observed that § 4 of the chapter on search warrants is limited to warrants issued under that chapter, and cannot apply to a warrant issued under any other statute. The authority to execute a warrant in the night-time, and to issue a warrant in which the authority to execute it is not limited to the daytime, must be found in the statute which authorizes the warrant. Such authority will be inferred, unless the statute expressly or impliedly limits it to the daytime. We think such authority is found in the statute under which the warrant in the case at bar was issued. Pub. Stat. chap. 100, § 30. It does not, like Pub. Stat. chap. 58, § 4, provide that the warrant shall be directed and executed as provided in Pub. Stat. chap. 212, § 3; nor, like Pub. Stat. chap. 207, § 57, that no search shall be made after sunset, unless specifically authorized; nor, like Pub. Stat. chap. 207, § 60, require that a warrant shall be issued to search at any hour of the day or night; but it contains full and explicit provisions, even prescribing a form of the warrant, excluding the inference that it is governed by Pub. Stat. chap. 212, § 3, and that the execution of the warrant under it is limited to the daytime. Its provisions differ in every particular from those of Pub. Stat. chap. 212, § 3. The direction of the warrant, instead of to the sheriff or his deputy or constable, is to be to the sheriff, deputy sheriff, city marshal, chief of police, deputy chief of police, deputy marshal, police officer, or constable. There are particular provisions, not contained in § 3, as to the description, in the warrant, of the place to be searched, and special provisions as to authorizing the search of dwelling-houses; the warrant is to command the officer to search the premises and to keep the property found until final action, and to return his warrant to the court; instead of to search in the daytime, and to bring the property and the person in whose possession it is found, before the court; and the warrant itself, in the form prescribed by the statute, is “forthwith to enter the ——— herein described, and make diligent and careful search,”

instead of to search in the daytime. The general rule is that process, civil or criminal, can be as well served in the night time as in the daytime; and a direction, in a warrant, to serve it without limitation as to the hour of the day, is a direction to serve it in the night-time as much as in the daytime. The intention of the Legislature to authorize the execution of the warrant in the night time is shown by providing for and by prescribing a direction in the warrant which includes that, instead of the direction to search in the daytime, which it required in the ordinary search warrant. Since Stat. 1852, chap. 322, these provisions have been the subject of careful scrutiny, and have been enacted no less than five times. Stat. 1855, chap. 215, 397; Gen. Stat. chap. 86; Stat. 1869, chap. 415; Stat. 1876, chap. 162; Pub. Stat. chap. 212. The repetitions emphasize the intention manifested in the statute. The intention that there should be authority to execute the warrant in the night time might also be shown by the purpose and the particular provisions of the statute, and by its history and the history of other statutes authorizing searches and seizures. But the considerations already presented are sufficient, and render further discussion unnecessary.

Exceptions overruled.

John MILLER

v.

Timothy SHAY.

1. **An account-book kept by plaintiff, showing the number of loads of sand delivered, being the record of his daily business, made for the purpose of establishing a charge against another, is competent evidence, although the book was rough and imperfect, and although the account was kept only by marks, the plaintiff being unable to write.**
2. **Such book is one of original entries, although the marks were transferred from marks made on the cart by the servants of the plaintiff who delivered the same.**
3. **Where goods are delivered by a servant, and his entries or marks are transferred to the account-book, the servant is a competent and necessary witness to support the charges and to prove the delivery.**
4. **The plaintiff had the right to use his account-book as a memorandum to refresh and aid his memory.**
5. **The fact that the book went to the jury could not prejudice the defendant. A new trial will not be granted because of the admission of incompetent testimony which is entirely immaterial.**

(Worcester—Filed October 20, 1887.)

ON defendant's exceptions. *Overruled.*

Action for 252 loads of sand delivered at 40 cents a load.

Plaintiff proved an agreement to furnish sand at that price.

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Plaintiff testified:

"I furnished sand at different times; kept an account of what I delivered by putting down straight marks in a small account-book (which was produced by the witness), one mark for every load; thus showing as many marks as I delivered loads. I employed Joseph Pratt and Edward McCann and my son to draw and deliver loads of sand, under my contract, to the defendant. Whenever Pratt or McCann worked I set it down. Each of them marked on the side of his cart with chalk or pencil, and reported at noon, the number of loads of sand that day delivered by him, and I put down in the book what each reported every day; that is, the number of loads delivered. As each one reported day by day I marked the number in this book. I took the number of loads off the cart as he showed me. When I drew, myself, I put the number of loads on the same book. Pratt, McCann, and myself drew 214 loads. This account does not include 85 loads drawn by my son. After taking the loads off the cart, I would rub them out. I cannot write, and I read but little; these are original entries."

Joseph Pratt testified that he drew some of the sand in question for Miller, sometimes a day and sometimes part of a day; that he always gave in the account every day to Miller; that he kept it by a chalk-mark on his wagon for every load he drew. Against the objection and exception of the defendant the witness was allowed to testify that every day he drew sand he counted the marks for the sand drawn that day, and reported to Miller the number; that he reported to Miller correctly the number of loads drawn in each day. The witness further testified that this continued all the time he drew sand there,—some three months; that he reported to Miller the number of loads every day or evening, and reported correctly.

In cross-examination the witness testified that he put the loads down in chalk on the side of the cart, and would rub out each night when he had reported.

Edward McCann testified that he drew some of the sand under Miller's direction; that when he drew a load of sand he always marked it down on the side board of the cart and at night reported to Miller how many he had drawn,—reported correctly each day,—and after report Miller rubbed out the marks. Miller saw the marks.

In cross-examination he testified that he used the same cart as Pratt, and Miller rubbed off the marks.

The plaintiff offered in evidence the book. The book showed no debit or credit side and did not mention the name of the defendant; on different pages beginning with the second page appeared a series of straight marks which aggregated in all 214. It was not claimed that the book itself exhibited any marks or appearance of fraud or falsehood.

Against the objection of the defendant, the court held that the book was competent evidence in connection with the evidence adduced by the plaintiff, if believed, and as part of the *res gesta*; and admitted the same. The defendant excepted thereto.

The verdict was for the plaintiff.

Mr. W. A. Gile, for defendant:

The evidence of Joseph Pratt, objected to,

was incompetent. If the chalk-marks on the cart were competent as original entries, then the book of marks taken from them was incompetent, as not being original entries. The fact that Pratt reported what he had done to the plaintiff does not make his report competent, nor does it help the character of the book. The book was a copy of the marks on the cart, or it was the result of the report of a third party, and in either case secondary evidence. The question of the admissibility of the book as evidence is a question of law.

Cognell v. Dolliver, 2 Mass. 217.

If the book was the result of the report or conversation with Pratt, it was simply a declaration of the plaintiff and his hired man in the plaintiff's own favor, and is incompetent.

Bentley v. Ward, 116 Mass. 383.

There are numerous cases where a memorandum has been made upon a slate, or chalk-marks upon a cart, as in *Smith v. Sanford*, 12 Pick. 139; but in all of these cases the account transferred was to a regular account-book, which carried the necessary presumption that it was a book of the daily transactions of the party offering them.

Greenl. Ev. § 117.

The book offered here was no such book. It only had so many straight marks in it, and there is no presumption that it was the record of the daily transaction of the plaintiff.

See *Prince v. Smith*, 4 Mass. 454.

What presumption does this book of straight marks, with no name, no charge, no date, no amounts, no articles charged, no loads, no sand, nothing but straight marks, afford the court that they were daily business transactions? There is no case in the Commonwealth where the verbal report of a plaintiff's witness to himself has been allowed to be put in evidence to strengthen his case.

But the court ruled further, and held that the book was evidence as proof of the "*res gestæ*." What the jury could have supposed the "*res gestæ*" was, of which this book of straight marks was "a part," is a matter of such uncertainty that a verdict rendered under such a dead-language instruction from the learned court should not survive a reasonable review of the grounds upon which the verdict was directed.

If the evidence, introduced by the plaintiff, of the report of his man was incompetent, then the book would also be incompetent, and should have been excluded from the jury, even though it might have been competent as a memorandum to refresh the recollection of the plaintiff.

Mcara. Thomas G. Kent and Geo. T. Dewey, for plaintiff:

The marks were made in the book by the plaintiff, who was unable to write, for the purpose of making charges against the defendant; as clearly appears from the testimony reported. The book, verified by oath, contained the daily records of the loads of sand delivered by the plaintiff or his servants,—a record made at or near the time of delivery. The exceptions state that it was not claimed that the book exhibited any appearance of fraud, and the case comes within the rule of *Pratt v. White*, 132 Mass.

477.

2 MASS.

The book, supported by the other evidence produced, was competent, although the account or record was made only by marks (*Mathes v. Robinson*, 8 Met. 289; *Kendall v. Field*, 14 Me. 30), and although copied or transferred from other marks on the cart (*Faxon v. Hollis*, 13 Mass. 427; *Smith v. Sanford*, 12 Pick. 139). As the account or record of what was delivered by the plaintiff's servant, it was equally admissible, whether made directly from the reports of the servants (*Harwood v. Mulry*, 8 Gray, 250; *Littlefield v. Rice*, 10 Met. 287), or copied or transcribed daily from memoranda made by servants,—that is, the marks on the cart (*Morris v. Briggs*, 3 Cush. 342; *Kent v. Garvin*, 1 Gray, 148; *Barker v. Haskell*, 9 Cush. 218). The evidence of Pratt, excepted to, was not only competent, but necessary.

Morton, Ch. J., delivered the opinion of the court:

The small account-book kept by the plaintiff, showing the number of loads of sand delivered, was properly admitted in evidence. It was a rough and imperfect book of accounts, but it was honestly kept, and was the record of the daily business of the party, made for the purpose of establishing a charge against another. *Pratt v. White*, 132 Mass. 477. Such a book, supported by the oath of the plaintiff, is competent, though the account was kept only by marks, the plaintiff being unable to write. These entries are intelligible, and no more liable to fabrication than other entries. It is a book of original entries, though the marks were transferred from marks made on the cart by the servants of the plaintiff who delivered the sand. *Smith v. Sanford*, 12 Pick. 139; *Kent v. Garvin*, 1 Gray, 148; *Harwood v. Mulry*, 8 Gray, 250.

In the case where goods are delivered by a servant, and his entries or marks are transferred to the plaintiff's account-book, it has been held that the servant must be a witness to support the charges and to prove the delivery. *Kent v. Garvin*, *supra*. In the case before us, therefore, the testimony of Joseph Pratt was competent and necessary.

If there was doubt whether the plaintiff's book ought to have gone to the jury, there is another ground upon which the defendant's exceptions should be overruled. In a transaction like that involved in this case, it is not to be expected that any memory, unaided, could retain accurately the number of loads of sand delivered. The plaintiff had clearly the right to use his account-book as a memorandum to refresh and aid his memory. The fact that the book went to the jury could not prejudice the defendant. The only possible use the jury could make of it would be to count the marks and see if the plaintiff had stated their number correctly. The exceptions show that the plaintiff's count was correct, and it is of no consequence to the defendant whether the jury took this number from the plaintiff's testimony or from a count of the marks. A new trial would not be granted because of the admission of incompetent testimony which is entirely immaterial.

Exceptions overruled.

A. Jones EATON

v.

Albert TUSON.

Where a **chattel mortgage** refers to a former mortgage for a description of the property, and the former mortgage is made **expressly subject** to a certain incumbrance, to wit, an unrecorded mortgage, the latter mortgage **only conveys** to the mortgagee the mortgagor's right of redemption from the former mortgage, and is subject thereto.

(Worcester—Filed October 21, 1887.)

ON plaintiff's exceptions. *Overruled.*

Action for conversion of personal property. One Carroll made a mortgage to plaintiff of personal property, stating it to be "described in a mortgage given to defendant to secure a note;" and covenanted that the property was free from incumbrance except the former mortgage. The former mortgage was unrecorded. Carroll made two other mortgages to plaintiff, referring, for a description thereof, to the first mortgage given to him. The question was whether, on foreclosure of plaintiff's mortgage, he took his title under his several mortgages subject to the prior mortgage of defendant.

The facts appear in the opinion.

Mr. James H. Bancroft, for plaintiff:

When goods have been tortiously obtained, the fact is sufficient evidence of conversion.

Thurston v. Blanchard, 22 Pick. 20.

These goods were tortiously obtained by the defendant.

McPartland v. Read, 11 Allen, 231.

An unrecorded mortgage of personal property is not valid against third persons with notice.

Denny v. Lincoln, 13 Met. 202; *Travis v. Bishop*, Id. 304; *Wright v. Tellow*, 99 Mass. 397; *Howard v. Chase*, 104 Mass. 251.

Where a grantor in a deed containing covenants of seisin, title against incumbrances, and of general warranty, having used terms purporting to convey the estate therein mentioned, by metes and bounds, added these words, "meaning and intending by this deed to convey all my right, title, and interest in and to" the premises so described, the whole estate is conveyed.

Hubbard v. Apthorp, 3 Cush. 419.

These mortgages to the plaintiff were not made subject to the Tuson mortgage; the mention of that mortgage was only a matter of description. The first two mortgages contain this clause, "except so far as said mortgage may be an incumbrance thereon;" and the third mortgage expressly, warrants against all persons.

In the case of *Howard v. Chase*, *supra*, the mortgages to the plaintiff contained the provision that the property is "subject to a mortgage to Silas E. Chase for about \$10,000." There was no qualification to this provision; and upon an inspection of the papers now on file in that case it will appear that the entire covenant contained in the plaintiff's several mortgages reads as follows: "And we, the said Thomas Leavitt, Albert Leavitt, and Elijah C. Howard,

do avouch ourselves to be the lawful owners of said goods and chattels, and have good right to sell and dispose of the same in manner aforesaid."

Messrs. Blackmer & Vaughan, for defendant:

The several mortgages under which the plaintiff claims title are, by their express terms, if reasonably construed, conveyances to the plaintiff, not of the property mentioned, but merely of the right which the mortgagor had to redeem it from the Tuson mortgage. This being so, the plaintiff takes no greater rights than the mortgagor had, and therefore cannot deny the validity of the Tuson mortgage.

Howard v. Chase, 104 Mass. 249; *Tuite v. Stevens*, 98 Mass. 305; *Pecker v. Silsby*, 123 Mass. 108.

There was no evidence in this case of either a tortious taking, or an actual conversion, by the defendant, of the goods claimed by the plaintiff.

Cooley, Torts, 452.

The taking of the goods by the officer serving the replevin writ was not a tortious taking.

Willard v. Kimball, 10 Allen, 211; *Wells, Replevin*, 264; *Foster v. Pettibone*, 20 Barb. 350.

The fact that the defendant had taken possession of the property under his mortgages, and filed certificates of foreclosure, cannot affect the rights of the parties in this case, because the statutory limitation had not expired at the date of the service of the defendant's writ of replevin.

Field, J., delivered the opinion of the court:

The question in this case is whether the plaintiff's title was subject to the unrecorded mortgage of the defendant. The first two mortgages given to the plaintiff we think clearly purport to convey to the plaintiff the property subject to the mortgage to the defendant, or, in other words, only convey the mortgagor's right of redeeming the property from the mortgage to the defendant. The third mortgage to the plaintiff is of "all the personal property mortgaged to grantee by mortgage dated October 18, 1883, and recorded with Worcester city mortgages of personal property, to which reference is had for a description." The mortgage dated October 13, 1883, is made expressly subject to the incumbrances mentioned in the prior mortgage of October 12, 1883, and the mortgage to the defendant is an incumbrance, expressly mentioned in this mortgage of October 12, 1883. The mortgage of October 17, 1883, therefore, only conveyed to the plaintiff the mortgagor's right of redemption from the mortgage to the defendant. The case is governed by *Howard v. Chase*, 104 Mass. 249; *Tuite v. Stevens*, 98 Mass. 305; and *Pecker v. Silsby*, 123 Mass. 108.

Exceptions overruled.

Jacob H. FAIRBANKS

v.

Margaret P. SNOW.

1. When duress consists only of threats, and does not go to the height of such bodily compulsion as turns the

ostensible party into a mere machine, the contract is only voidable.

2. In an action upon a promissory note made by defendant and her husband, when defendant alleges that her signature was obtained by duress and threats on the part of her husband, and there was evidence tending to show that defendant had ratified the note, a ruling requested—that, if defendant signed the note under duress, it was immaterial whether the plaintiff knew, when he received the note, that it was so signed—was properly refused.
3. The ground upon which a contract is voidable for duress is the same as in case of fraud, and is that—whether it springs from a fear or a belief—the party has been subjected to an improper motive for action.
4. Threats by a stranger, made without knowledge or privity of the party, are not good ground for avoiding a contract induced by them.

(Worcester—Filed October 20, 1887.)

ON defendant's exceptions. *Overruled.*

Action on promissory note. Defendant claimed that she signed the note in suit under duress. The alleged duress consisted of threats made by her husband, and a fear that her refusal to sign the note would result in the death of her husband.

Messrs. A. Norcross, H. C. Hartwell, and C. F. Baker, for defendant:

It may be doubtful whether a threat of suicide on the part of the husband would constitute duress.

See *Remington v. Wright*, 43 N. J. L. 451; *Rogers v. Adams*, 66 Ala. 600.

Threats made by a husband to his wife in a private interview are admissible in evidence.

French v. French, 14 Gray, 186.

When the language of a husband or wife in a private interview is such in itself as to constitute cruelty or duress, it is not inadmissible on the ground that it was part of a private conversation. The defendant's request for a ruling that, if she signed the note under duress, it was immaterial whether the plaintiff knew it was so signed, should have been given.

A contract, to be binding, must be the result of the free assent of the parties.

Loomis v. Ruck, 56 N. Y. 462. See *Fowler v. Buttery*, 78 N. Y. 68; *Barry v. Equitable L. Assur. Co.* 59 N. Y. 587.

That there were other considerations than such duress, which in part influenced defendant to sign the note, is immaterial.

Taylor v. Jaques, 106 Mass. 291; *Osborn v. Robbins*, 36 N. Y. 371; *Hackett v. King*, 6 Allen, 58; *Phelps v. Zuschlag*, 34 Tex. 371.

The duress need not occur at the time of signing note, if plaintiff was still under restraint.

Taylor v. Jaques, *supra*; *Morse v. Royal*, 12 Ves. Jr. 355-378.

The subsequent actions of the defendant relative to arrangements for paying the note are not a ratification or confirmation of the note, as it does not appear that what she did was

with such intent or with a knowledge of the invalidity of the note.

Rau v. Von Zedlitz, 132 Mass. 164; *Montgomery v. Pickering*, 116 Mass. 227; *Kempson v. Ashbee*, L. R. 10 Ch. App. Cas. 15; *Morse v. Royal*, *supra*.

Messrs. W. S. B. Hopkins and Stillman Haynes, for plaintiff:

Mere abusive language and threats are all that have ever been held admissible from the privacy of marital conversations.

French v. French, 14 Gray, 186; *Dexter v. Booth*, 2 Allen, 559; *Bliss v. Franklin*, 13 Allen, 244; *Drew v. Tarbell*, 117 Mass. 90; *Raynes v. Bennett*, 114 Mass. 424.

The request of the defendant that the court rule that it was immaterial whether the plaintiff knew of the alleged duress when he took the note was rightly refused. In the case of notes the defense of duress is like other defenses of fraud, and cannot be set up against an innocent holder for value.

Clark v. Pease, 41 N. H. 414; *Woodhull v. Holmes*, 10 Johns. 231; *Powers v. Ball*, 27 Vt. 662; *Duncan v. Scott*, 1 Campb. N. P. 100.

Actual notice, or that which is inferred from the dishonor of paper, opens the defense as against an otherwise innocent purchaser for value.

Osborn v. Robbins, 36 N. Y. 365; *Vinton v. King*, 4 Allen, 562.

In case of a mortgage it has been held that the duress must have been at the instigation of the grantee.

Bazemore v. Freeman, 58 Ga. 276; *Green v. Scrannage*, 19 Iowa, 461; *Talley v. Robinson*, 22 Gratt. 888.

The findings of fact are fatal to the defense in this, that they establish ratification.

Holmes, J., delivered the opinion of the court:

This is an action upon a promissory note made by the defendant and her husband to the order of the plaintiff. The defendant alleges that her signature was obtained by duress and threats on the part of her husband. The judge below found for the plaintiff, it would rather seem, on the ground that, whether there was duress or not, the defendant had satisfied the note; which there seems to have been evidence tending to show that she did. See *Morse v. Wheeler*, 4 Allen, 570; *Rau v. Von Zedlitz*, 132 Mass. 164.

But as this may not be quite clear, we proceed to consider the only exception taken by the defendant,—the judge's refusal to rule that, if the defendant signed the note under duress, it was immaterial whether the plaintiff knew, when he received the note, that it was so signed. The exception is to this refusal.

No doubt, if the defendant's hand had been forcibly taken and compelled to hold the pen and write her name, the signature would not have been her act; and, if the signature had not been her act, for whatever reason, no contract would have been made, whether the plaintiff knew the fact or not. There still is sometimes shown an inclination to put all cases of duress upon this ground. *Barry v. Equitable L. Assur. Co.* 59 N. Y. 587, 591.

But duress, like fraud, only becomes material as such on the footing that a contract or con-

veyance has been made which the party wishes to avoid. It is well settled that when, as usual, the so-called duress consists only of threats, and does not go to the height of such bodily compulsion as turns the ostensible party into a mere machine, the contract is only voidable. *Foss v. Hildreth*, 10 Allen, 78, 80; *Vinton v. King*, 4 Allen, 561, 565; *Lewis v. Bannister*, 16 Gray, 500; *Fisher v. Shattuck*, 17 Pick. 252; *Worcester v. Eaton*, 13 Mass. 371, 375; *Duncan v. Scott*, 1 Campb. 100; *Whelpdale's Case*, 5 Coke, 119 a; 1 Bl. Com. 130; *Clark v. Pease*, 41 N. H. 414.

This rule necessarily excludes from the common law the often-recurring notion, just referred to, and much debated by the civilians, that an act done under compulsion is not an act in a legal sense. *Tamen coactus voluit*, D. 4, 2, 25, § 5. See 1 Windscheid, Pandecten, § 80.

Again, the ground upon which a contract is voidable for duress is the same as in the case of fraud, and is that—whether it springs from a fear or a belief—the party has been subjected to an improper motive for action. See *Rodliff v. Dallinger*, 141 Mass. 1, 6; *Stiff v. Keith*, 143 Mass. 224.

But if duress and fraud are so far alike, there seems to be no sufficient reason why the limits of their operation should be different. A party to a contract has no concern with the motives of the other party for making it, if he neither knows them nor is responsible for their existence. It is plain that the unknown fraud of a stranger would not prevent the plaintiff from holding the defendant. *Masters v. Miller*, 4 T. R. 320, 333; *Masters v. Jefferson*, 8 C. B. 100; *Sturge v. Starr*, 2 Myl. & K. 195; *Pulford v. Richards*, 17 Beav. 87, 95.

The authorities with regard to duress, however, are not quite so clear. It is said in *Thoroughgood's Case*, 2 Coke, 9, that "if a stranger menace A to make a deed to B, A shall avoid the deed which he made by such threats, as well as if B himself had threatened him, as it is adjudged, 45 Edw. III., 6 a." Shep. Touch. 61, is to like effect. See also *Fowler v. Buttery*, 78 N. Y. 68. But in *Y. B. 43 Edw. III.*, 6, pl. 15, which we suppose to be the case referred to, it was alleged that the imprisonment was by the procurement of the plaintiff. And we know of no distinct adjudication, of binding authority, that threats by a stranger, made without knowledge or privity of the party, are good ground for avoiding a contract induced by them. In *Keilway*, 154 a, pl. 3, "the defendant in debt pleaded that he made the obligation to the plaintiff by duress of imprisonment (on the part) of a stranger, and the opinion of Rede and others was that this is not a plea without making the obligee party to this duress." In *Taylor v. Jaques*, 106 Mass. 291, 294, it was said that the defendant had to prove that he signed the note "under a reasonable and well-grounded belief, derived from the conduct and declarations of the plaintiffs, that if he did not sign it he would be arrested." See also *Green v. Scrannage*, 19 Iowa, 461, 466; *Talley v. Robinson*, 22 Gratt. 888; *Bazemore v. Freeman*, 58 Ga. 276.

Loomis v. Ruck, 56 N. Y. 462, was decided on the ground that, if the non-negotiable note in suit was in the first instance a contract between the plaintiff and the defendant, it was ob-

tained through the agency of the defendant's husband in such a way as to make the plaintiff answerable for his conduct. Moreover, the older writers likened duress to infancy, and took a distinction between feoffments, etc., by the party's own hand, and acts done by letter of attorney; regarding the latter as wholly void. 2 Co. Inst. 482, Finch, Law, 102. It has been held in New York and some other States, as well as in England, that a power of attorney given by an infant is void. *Ponda v. Van Horne*, 15 Wend. 681; *Knox v. Flack*, 22 Pa. 337; *Saunderson v. Marr*, 1 H. Bl. 75. And if this analogy were followed, the contracts in all the New York cases which we have cited would be void by the law of that State, for want of a personal delivery by the defendant to the plaintiff. There may be still other explanations of the decisions.

In the present case it does not appear who delivered the note, and does not clearly appear that the defendant did not deliver it herself. If any question of authority were open, it would have to be noticed that in Massachusetts the distinction as to power of attorney has been so limited, if not wholly done away with, with regard to infants, that it would be doubtful at least if it could have any application to the case at bar. *Whitney v. Dutch*, 14 Mass. 457, 463; *Welch v. Welch*, 103 Mass. 562; *Moley v. Brine*, 120 Mass. 324.

However the law may stand elsewhere, we are of opinion that the ruling requested was wrong upon principle and authority.

Exceptions overruled.

Joseph A. FORTIN

v.

Inhabitants of EASTHAMPTON.

The fact that a defect from an accumulation of ice, which caused a personal injury, had existed for nine days, in a frequented sidewalk, which during that time was patrolled by a policeman and several times passed by a selectman, affords evidence of notice to the town of the defect, and of negligence in not remedying it.

(Hampshire—Filed October 21, 1887.)

ON defendant's exceptions. *Overruled.*
Tort, under Pub. Stat. chap. 52, § 18, to recover damages for injuries sustained by falling on an ice accumulation on a sidewalk in defendant town. An opinion, on exceptions taken at a former trial of the case, is reported in 1 Mass. (L. ed.) 125, 3 New Eng. Rep. 37, 142 Mass. 486.

The case was tried in the Superior Court before Knowlton, J., and a jury, and a verdict rendered for plaintiff.

The questions presented are stated in the opinion.

Mr. William G. Bassett, for defendant:
The jury ought not to have been permitted to find for plaintiff. A burden imposed upon plaintiff by the present statute, to prove that the damage or injury might have been prevented by reasonable care and diligence on the part of defendant, was not met.

Pub. Stat. chap. 52, § 18; *Rooney v. Randolph*, 128 Mass. 580; *Hayes v. Cambridge*, 136 Mass. 402; *Post v. Boston*, 141 Mass. 189; *Hanscom v. Boston*, Id. 242.

If the evidence had tended equally to sustain either of the inconsistent propositions, that it was the fault of defendant that ice was on the walk at all, and the defendant's fault that all the ice that could be removed was gotten off, neither of them could be said to be established by legitimate proof.

Smith v. First Nat. Bank, 99 Mass. 605, 612; *Crafts v. Boston*, 109 Mass. 519.

While insisting that the cause of the injury was the result of an attempt, not made by defendant—and when made not appearing—to clear off ice at all, or about the place of the alleged defect, which ice was there from natural causes, and not because of defendant's neglect or fault, could plaintiff have recovered under the former statute?

Gen. Stat. chap. 44, § 22; *Nason v. Boston*, 14 Allen, 506; *Billings v. Worcester*, 103 Mass. 329.

"The liability of the city must rest upon some ground of fault or neglect on the part of its officers who are charged with the care of the streets."

Nason v. Boston, *supra*.

Under the present statute, the cause of the fall being the "hole," defendant could be held liable, if at all, only because the hole could have been removed by getting off the ice around the hole, which caused it to exist, together with proof that reasonable effort and diligence on defendant's part would have enabled defendant to remove it; yet without such proof, but, on the contrary, while affirmatively showing that such a result could not have been reached, plaintiff is allowed to recover because it was not reached. It was the duty of the court to prevent this.

Todd v. Old Colony & F. R. R. Co. 8 Allen, 18; 8 C. 7 Allen, 207.

Messrs. D. W. Bond and J. B. O'Donnell, for plaintiff:

There was evidence that the town had reasonable notice of the defect, or might have had notice thereof by the exercise of reasonable care and diligence.

A change in the law, by the Act of 1877, now Pub. Stat. chap. 52, § 18, with reference to the notice by a town, has been considered in several recent cases.

Hayes v. Cambridge, 136 Mass. 402; *Post v. Boston*, 141 Mass. 189; *Olson v. Worcester*, 142 Mass. 536; *Blake v. Lowell*, 143 Mass. 296.

Under previous statutes it was held that notice to a town of a defect in the highway may be inferred from the central position of the place where it exists, and any other circumstances which tend to show its notoriety, and from its continuance for such a length of time as to lead to the presumption that the proper officers of the town did in fact know, or with proper diligence and care might have known, the fact.

Reed v. Northfield, 18 Pick. 94, 98; *Howe v. Lowell*, 101 Mass. 99; *Donaldson v. Boston*, 16 Gray, 508, 511; *Foster v. Boston*, 127 Mass. 290; *Whitehead v. Lowell*, 124 Mass. 281; *Harriman v. Boston*, 114 Mass. 241.

3 Mass.

W. Allen, J., delivered the opinion of the court:

The case assumes that a defect in the sidewalk caused the injury to the plaintiff. The only questions raised are, whether there was any evidence that the defendant had notice of the defect; and whether there was any evidence that the defect might have been remedied or the injury prevented by reasonable care and diligence on the part of the defendant, so as to render the defendant liable under Pub. Stat. chap. 52, § 18.

The defect was the existence and condition of ice on the sidewalk. There was evidence from which the jury might have found that the ice was in substantially the same condition at the time of the injury that it was in when formed, immediately after a particular storm of snow and rain which occurred at some time before the injury. The plaintiff, and several witnesses called by him, testified that the storm was on the Sunday before he was injured, which was on a Wednesday. But there was other evidence, from recorded observations, which might have satisfied the jury that, as was argued to them by the plaintiff's counsel, these witnesses were mistaken, and that the storm occurred nearly a week before the time testified to by them. The defendant contends that there was no evidence that the injury to the plaintiff was caused by the general rough and uneven condition of the ice, or by any defect except the particular one described by the plaintiff as a hole in the ice; and that there was no evidence that that particular defect had existed for any considerable length of time. But we think that the jury would have been authorized to find that the attempt to clear the sidewalk, which left it in the condition testified to by the plaintiff was made before the ice was fully formed, and more than a week before the injury to the plaintiff.

The jury may have found that the defect which caused the injury had existed for nine days in a frequented sidewalk, which during that time was patrolled by a policeman and several times passed by a selectman. Clearly, these facts afford evidence of notice of the defect and of negligence in not remedying it.

Exceptions overruled.

COMMONWEALTH

v.

John MALONEY.

1. On appeal from a sentence of a trial magistrate, such irregularities only as deprived him of jurisdiction can avail the defendant. If he had jurisdiction of the person, to sentence, the appellate court has the same jurisdiction. By appealing from the sentence, the defendant voluntarily appeared and submitted to it.
2. Mere consent does not confer jurisdiction of the person. To make voluntary appearance and submission more than a mere consent, the magistrate must have power to compel the presence

of defendant. Without that power, consent confers no jurisdiction of the person.

3. Where, the defendant having pleaded guilty, the cause was ordered continued *nisi*, on payment of the costs, to be again called up for sentence upon notice to the defendant, this amounted to a discharge; and the magistrate has no authority, upon subsequent notice, to impose any sentence, under the arrangement. An indefinite continuance by and before a court of limited jurisdiction, having no regular or stated terms of court, as are had in higher courts of general jurisdiction, gives the magistrate no power again to compel attendance; and any sentence thereafter is without authority, and void for want of jurisdiction over the person of the defendant.

(Worcester—Filed October 21, 1887.)

COMPLAINT for keeping a liquor nuisance. *Proceedings quashed.*

The complaint was made to, and trial had before, Chauncey W. Carter, a trial justice for this county. The record contains the following:

By virtue of the within warrant, the respondent is brought into court this 19th day of June, A. D. 1886, and the within complaint is read to him, and, being asked whether he is guilty or not guilty of the offense within charged upon him, says that he is not guilty. Continued June 19, 1886, at 2 o'clock P. M. Continued to June 26, 1886, at 2 o'clock P. M., at which time the defendant retracted his plea of not guilty and pleaded guilty of the offense charged against him. It is therefore ordered by said court that the cause stand continued for sentence to August 7, 1886, at 2 o'clock P. M., at which time the cause was continued *nisi* upon payment of costs by defendant; to be again called up for sentence upon notice to defendant. October 6, 1886, upon notice to defendant, the case was called up for sentence, and continued to October 16, 1886, at which time the defendant was ordered to pay a fine of \$100, and imprisonment in the house of correction for the term of twelve months. From which sentence the said John Maloney appeals to the superior court.

In the superior court, on the appeal, upon motion for sentence by the district attorney, the defendant moved for a dismissal of the complaint, for the following reasons: (1) because he says this court has no jurisdiction, in that the record of the case discloses the fact that it was disposed of contrary to Stat. 1885, chap. 85; (2) because the trial justice, before whom the case was disposed of, had no power to continue *nisi*; (3) because the trial justice had already accepted the costs in the case, as appears from the record; (4) because, in accepting the costs as aforesaid, the trial justice has already imposed a sentence, which has been fully satisfied; (5) because judgment cannot twice be entered on one and the same complaint; (6) because the trial justice has no power to continue a criminal case for more than ten days.

The court overruled the motion, and ruled that no legal obstacle existed to the award of sentence in this case.

The questions of law presented by said motion being so important as to require the decision of the Supreme Judicial Court, at the request of the defendant the case was reported for the determination of the Supreme Judicial Court.

Messrs. John W. Corcoran and Thomas F. Gallagher, for defendant:

That the magistrate had original and final jurisdiction of the defendant and the offense, is conceded. That the case was ripe for sentence June 26, 1886, upon the defendant's plea of guilty, is likewise admitted. The order of the court made that day, "that the case stand continued for sentence to August 7, 1886," was without legal authority and void.

Pub. Stat. chap. 212, § 26.

The court therefore had lost jurisdiction of the defendant, and could not impose sentence.

Ibid.

The magistrate exhausted his jurisdiction by imposing a sentence, to wit, the payment of costs; and it was not in his power to further punish the defendant.

Commonwealth v. Foster, 122 Mass. 323.

After the adjournment of his court for the day, the magistrate could not revise or modify said sentence, and it must stand, together with the record thereof, as rendered and made up.

Commonwealth v. Foster, *supra*; *Ex parte Lange*, 85 U. S. 18 Wall. 163, 174 (21 L. ed. 872); *Rex v. Fletcher*, Russ. & R. 58; *Commonwealth v. Mayloy*, 57 Pa. 291; *Brown v. Rice*, 57 Me. 55.

The sentence, having been rendered by a court which had jurisdiction of the party and of the offense, was not absolutely void.

Commonwealth v. Loud, 3 Met. 328; *Kite v. Commonwealth*, 11 Met. 581; *Commonwealth v. Foster*, 122 Mass. 323.

Said sentence, having been satisfied, and not having been avoided, must therefore stand as the final sentence of the magistrate.

Commonwealth v. Foster, *supra*.

The magistrate under these circumstances had no authority to continue this case *nisi*, and his order therefor was a nullity.

Pub. Stat. chap. 212, § 26.

Upon the face of the record the court surrendered and lost all jurisdiction over the person of the defendant by its orders of June 19 and August 7, and the proceedings thereafter were *coram non judice*.

Id.

The second sentence, passed upon defendant October 16, 1886, was illegal, and the defendant should have been discharged, upon his appeal therefrom, by the superior court.

Commonwealth v. O'Neil, 6 Gray, 345; Pub. Stat. chap. 155, § 58.

Mr. Andrew J. Waterman, Atty-Gen., for the Commonwealth:

The motion to dismiss was rightfully overruled.

If there were any errors in the proceedings below, which do not appear from the bill of exceptions, the defendant, by his appeal from the judgment of the trial justice, vacated the same, and rendered immaterial all errors and irregularities in any of the proceedings there. Although the continuance in the lower court was for a period of more than ten days, it was after he had pleaded guilty to the charge in the

complaints; and in the postponement of the imposing of the sentence the rights of the defendant could not be prejudiced.

Commonwealth v. Harvey, 111 Mass. 420; *Commonwealth v. Holmes*, 119 Mass. 199; *Commonwealth v. Fredericks*, 119 Mass. 205; *Commonwealth v. Mahoney*, 115 Mass. 151; *Commonwealth v. Cathane*, 108 Mass. 431; *Commonwealth v. Sheehan*, Id. 432; *Commonwealth v. McCormack*, 7 Allen, 532; *Commonwealth v. Tinkham*, 14 Gray, 12; *Commonwealth v. O'Neil*, 6 Gray, 345.

W. Allen, J., delivered the opinion of the court:

The defendant cannot on appeal take advantage of irregularities in the proceedings before the trial justice, unless they were such as to show that the magistrate had no jurisdiction to impose a sentence. If the trial justice had jurisdiction of the person of the defendant, to sentence him upon the complaint, the appellate court had the same jurisdiction upon the appeal. *Commonwealth v. Holmes*, 119 Mass. 195, and cases cited; *Commonwealth v. Dunbar*, 15 Gray, 209; *Commonwealth v. Dillane*, 11 Gray, 67.

The record sufficiently shows that the defendant voluntarily appeared before the magistrate, and submitted to his sentence by appealing from it. Mere consent would not give jurisdiction over the person of the defendant. To make the voluntary appearance and submission show more than mere consent, it is at least necessary that the magistrate should have had power to compel the presence of the defendant. If the defendant could not have been arrested and held for sentence by any legal warrant or authority, the magistrate had no jurisdiction of his person, and could acquire none by consent.

If a magistrate has authority to order a party into custody or to issue process to arrest him, the party can waive defects in process or service,—perhaps can submit to the authority without process; but where there is no authority to arrest and hold a person, or to issue process for his arrest, he cannot, by consent, create such authority and give jurisdiction to hold and sentence him. The question in the case is whether the magistrate could lawfully have had the defendant arrested and brought before him for sentence, either under the original warrant or on a *capias*. If he could not, and could not acquire jurisdiction of the person of the defendant by process, he could not by consent.

The record is very imperfect, but it shows that the defendant was arrested on the warrant, and brought before the trial justice on the 19th day of June, and pleaded not guilty; that the case was continued to June 26, when the defendant retracted his plea and pleaded guilty, and the case was continued to August 7, when the defendant was discharged. The record does not state whether, before his discharge, he was under recognizance or was held in custody, and it is immaterial; whether he was committed to jail or to the custody of his sureties, he was all the time held under the original warrant, or the warrant of commitment, until his discharge on the 7th of August. *Commonwealth v. Morihan*, 4 Allen, 585. And that discharge, whether he had been committed or held under recognizance, extinguished the authority to hold

him under, any then existing process. This must necessarily have been the effect unless his going at large was an escape on account of which he could have been retaken. But a going at large under order of court cannot be an escape, even though the order be irregular and unauthorized. The order amounted to a discharge of the defendant without a judgment, and to nothing more. The record is in words that "the cause was continued *nisi* upon payment of costs by defendant; to be again called up for sentence upon notice to the defendant." This was not in terms a final judgment, nor an absolute final disposition of the case; but the question is whether the defendant remained a party to it, and, if not, whether he could subsequently be made a party. The case was not "continued" within any meaning of that word known to the law. A continuance is an adjournment to a time certain; a continuance *nisi* is to a time certain unless something should occur to cause action upon the case before that time. The record is that the case is continued until it shall be called up on notice. This purports to be an indefinite adjournment of the court, and contingent final disposition of the case. Pub. Stat. chap. 155, § 71, provides that trial justices may adjourn their courts in all cases, civil or criminal, on trial before them, to any time or place as occasion may require, except as provided in chap. 212, § 26 (which relates to continuances in criminal cases). This requires an adjournment to a time certain. At common law, justices of the peace could detain in custody for a reasonable time prisoners brought before them for trial or examination. If they exceeded that, the custody was illegal and they were liable in trespass. *Davis v. Capper*, 10 Barn. & C. 28; *Cave v. Mountain*, 1 M. & G. 257; *Davis*, Justice, 57.

It may be that prior to Stat. 1821, chap. 98, there was authority in justices to admit prisoners before them to bail, pending an examination or trial (see *Potter v. Kingsbury*, 4 Day, 18), though the contrary seems to be laid down in *Davis*, in his Justice of the Peace. That statute provided that justices of the peace might take the recognizance, with sureties, of any person brought before them for any crime, misdemeanor, or other offense, for his appearance for further examination at a future time not exceeding ten days. Stat. 1783, chap. 42, was "An Act Describing the Power of a Justice of the Peace in Civil Actions," and provided that "every justice of the peace shall have power by public proclamation to adjourn the trial of any action brought before him from time to time, when equity may require it." Rev. Stat. chap. 85, § 32, authorized a continuance by a justice of the peace of all cases, civil or criminal, on trial before him, to any other time or place as occasion might require; and chap. 135, § 9,—the chapter relating to the arrest and examination of offenders,—re-enacts, with changes, Stat. 1821, chap. 98. It authorizes a magistrate to adjourn an examination or trial pending before him, from time to time, not exceeding ten days at one time, without the consent of the defendant or person charged. The words "without the consent of the defendant, or person charged," were not in the statute of 1821, nor in the draft of the Revised Statutes reported by the commissioners. These provisions of the

Revised Statutes were re-enacted in Gen. Stat. chap. 120, § 52, and chap. 170, § 17, and in Pub. Stat. chap. 155, § 71, and chap. 212, § 26, except that Pub. Stat. chap. 155, § 71, first expressed the exception from it of the provisions of chap. 212, § 26.

It is clear that the trial justice had no power to continue the case indefinitely, and to hold the defendant to appear at a time to be afterwards named. A commitment or recognizance under such an order would be simply void, and a discharge of a defendant under it would be absolute. The record does not expressly state that the defendant was discharged, but that appears, as do other essential things in the record, by implication, because it shows that he could not lawfully be longer held in custody. The record also shows that there was no final judgment, and no termination of the case, unless the discharge of the defendant of itself terminated the case. During the progress of the trial the case was indefinitely postponed, and the defendant discharged. Pronouncing sentence is a judicial act, and part of the trial. The indefinite postponement would relieve the defendant from lawful custody, and from any obligation to appear and answer further, and from any liability to be arrested and held to answer further. If the order of the magistrate discharged him without leaving him under any obligation to appear, the magistrate would have no authority to issue a *capias* to compel his appearance; it would work a discontinuance of the case as to him. In *Doggett v. Cook*, 11 Cush. 262, there was a final judgment and sentence which the defendant continued under obligation to perform. He appealed from the sentence of fine and costs, and the appeal was dismissed in the appellate court as improperly taken, and the case remained for enforcement of the sentence. The question was as to the mode of enforcing the sentence. The magistrate was held liable for causing the commitment of the defendant, a year after his sentence, on the common *mittimus*, without first having him brought up on a *capias* or other process, and giving him an opportunity to pay the fine and costs. But there is another fact disclosed in this record which also appeared in *Doggett v. Cook*, *supra*. The indefinite postponement was with the consent of the defendant. The payment of costs is not material otherwise than as showing this. The magistrate had no authority to impose it except as part of a final sentence; and the defendant was under no obligation to pay it. The payment was, by the magistrate, made the consideration of the postponement, and was paid by the defendant to secure the postponement. The postponement was not, and was not intended to be, a continuance, but an end, of the prosecution, unless the magistrate should see cause at some future time to notify the defendant that sentence was to be pronounced. It was obviously an arrangement between the trial justice and the defendant, like that sometimes made in the higher courts between the prosecuting officer and a defendant, with the approval of the court, by which, on payment of costs by the defendant, an indictment or complaint is "placed on file." See *Commonwealth v. Dowdican's Bail*, 115 Mass. 133.

The court says: "Such an order is not equiv-

alent to a final judgment or a *nolle prosequi* or discontinuance by which the case is put out of court, but is a mere suspending of active proceeding in the case which dispenses with the necessity of entering formal continuances upon the docket, and leaves it within the power of the court at any time, upon the motion of either party, to bring the case forward and pass any lawful order or judgment thereon."

When a case is pending in a permanent court of general jurisdiction with stated terms, in which continuances are from term to term, a defendant may waive the formal entries of continuances and consent that the case may remain in court without such entries until asked for by either party. The court then retains its jurisdiction of the case and of the defendant, and has authority at any term to make the entries of continuance from term to term and bring the case forward upon the docket of the term. A trial justice is not a permanent court with stated terms. His court is a court of record, but it is a temporary court for each case, kept alive by continuances, and exercising limited jurisdiction by prescribed methods. The indefinite postponement of a case before it is in effect the indefinite postponement of the court. He has no jurisdiction to suspend and revive at his will a case and court before him, and the question whether the consent of the defendant can give him such jurisdiction is very different from the question whether a defendant can consent to an indefinite continuance in the superior court. The authority to postpone a sentence by a continuance not exceeding ten days, without the defendant's consent,—and for a longer time with it,—may perhaps be inferred from the power given to trial justices, and from the particular provisions in the statute as to continuances; but there is nothing in the statute which gives to a trial justice authority to settle a criminal case before him by receiving the costs from the defendant, and discharging him, without judgment and without a continuance, on his agreement to present himself for sentence at any future time on notice. Apart from the abuse to which such a power would be liable, the functions and course of proceedings of justices of the peace in regard to offenders, prescribed by statute, show that it was never intended that they should have the general power of putting a prisoner convicted before them on probation by indefinitely holding the conviction over him, as is done in higher courts by putting an indictment on file. Where such power is given by statute, it is carefully guarded. See Pub. Stat. chap. 212, §§ 71, 80; Stat. 1885, chap. 359. We think that the defendant was not amenable to sentence by the trial justice, and the entry must be—

Proceedings quashed.

Edmond O'KEEFE, Admr.,

v.

City of NORTHAMPTON and Trustee.

1. The liability of a town for the support of paupers is purely statutory.
2. A debt can be created in favor of an individual against a town, for relieving a pauper, only by supplying his wants

after notice and request to the overseers thereof to provide for him, and their neglect so to do; or by furnishing him necessaries under an express contract with the overseers of the poor or its other duly authorized officers or agents.

3. The right to recover for support furnished after neglect or refusal in such a case is founded on the failure of the town to do its duty, and the consequent necessity, in the interest of humanity, that aid be rendered by an individual.

4. To recover against the town under an express contract, plaintiff must show that he took the pauper and took care of him in accordance with its terms.

5. Where an overseer of the poor agreed with plaintiff, a married woman, to pay her to take the pauper and take care of him as long as he lived, and he was then living with her husband, and continued to live with him, the town all the time, with the knowledge and consent of plaintiff, paying the husband for such support,—*Held*, that she could not recover therefor.

(Hampshire—Filed October 2, 1887.)

ON plaintiff's exceptions. *Overruled*.

Action of contract originally brought by Mary O'Keefe, wife of present plaintiff, and prosecuted by the plaintiff as administrator of her estate to recover of the defendant for the care and support of one Michael O'Keefe, the father of said Edmond, an aged person unable to support himself, from 1875 to 1885.

The plaintiff, Edmond O'Keefe, testified that Michael O'Keefe was his father, and lived with him over ten years, from 1875 to time of his death in July, 1885. That he was 94 years of age when he died. That on November 15, 1875, the said Michael's house was burned, after which he lived a few days with Edmond's sister and then came to live with him; and a few days after he came to live with him, Mr. Starkweather, head selectman and overseer, came to his house and told his wife to take the old man and take care of him as long as he lived, and she would be paid as much as he would cost at the poorhouse. That Mr. Starkweather only remained long enough to tell her that, and then went away. That Michael was living there at that time, and continued to live there till his death. That he was unable to work and very feeble during the last years of his life. That at that time Michael was not able to go out to work. That his wife told Mr. Starkweather she would take care of him, and that his wife did care for him and do everything for him the same as she would for her own father. The town allowed him (Michael) \$5 per month from the time he came to live with him in 1875 to 1885, when, a few months before he died, they raised it to \$6 per month. That the \$5 per month paid by the town was used as far as it would go for the support of said Michael and the family; and that none of the family were able to save much; that poorhouse prices were from \$2 to \$2.50 per week.

At the close of the plaintiff's testimony the

court ruled that, upon the whole evidence, the jury would not be warranted in returning a verdict for the plaintiff on either count, and directed a verdict for the defendant, to which ruling the plaintiff excepted.

Mr. Charles G. Delano, for plaintiff:

Michael O'Keefe was a pauper whom the defendant city was permanently bound to support. 188 Mass. 307.

The overseers had authority to contract for his support.

Aldrich v. Blackstone, 128 Mass. 151.

They had power to make it for his life.

Palmer v. Ferry, 6 Gray, 420.

And one could act for the rest so as to bind the town.

Per Metcalf, *J.*, *Dartmouth v. Lakeville*, 7 Allen, 285; *Oakham v. Sutton*, 13 Met. 197; *Lee v. Deerfield*, 3 N. H. 291; *Woodes v. Dennett*, 9 N. H. 55.

These positions being correct, the case was a proper one for the jury. Neither the Statute of Frauds (97 Mass. 212), nor of Limitations (9 Gray, 60), were relied on to bar the right of action.

Mr. Asro T. Crossley, for defendants:

1. There was no evidence of the notice and request required by Pub. Stat. chap. 84, § 27, made by the plaintiff upon the defendant, as was necessary, for the plaintiff to recover upon the count contained in his original declaration.

Walker v. Southbridge, 4 Cush. 199-203; *Williams v. Braintree*, 6 Cush. 399, 402, 403.

2. The evidence showed no such necessity for the relief which the plaintiff undertook to furnish as would entitle the plaintiff to recover under said count. Otherwise, it shows that a suitable poorhouse was provided by the defendant in which Michael O'Keefe could at all times, after he became a pauper and until the time of his death, have received proper care, shelter, and support.

Lamson v. Newburyport, 14 Allen, 30-32; *Rogers v. Newbury*, 105 Mass. 533, 534; *Rawson v. Uzbridge*, 113 Mass. 47, 48.

3. No promise or undertaking on the part of the defendant can be implied to pay for anything which may have been bestowed on said Michael unless it is shown to have been afforded under such circumstances as to come within the statute provisions by which towns are made liable for expenses incurred for such a purpose.

Lamson v. Newburyport, 14 Allen, 30, 31.

Knowlton, J., delivered the opinion of the court:

The plaintiff seeks to recover for the support of a pauper having a settlement in the town of Northampton before its incorporation as a city. The liability of towns for the support of paupers is purely statutory, and a plaintiff, to recover in an action of this kind, must bring his case within the provisions of the statute. Under our legislation there are only two ways in which a debt can be created in favor of an individual against a town for relieving a pauper,—one by supplying his wants after "notice and request to the overseers thereof" to provide for him, and their neglect so to do; the other by furnishing him necessaries under an express contract with its overseers of the poor or its other duly authorized officers or

agents. Pub. Stat. chap. 84, §§ 2-27; *Williams v. Inhab. of Braintree*, 6 Cush. 899; *Lamson v. Newburyport*, 14 Allen, 30; *Rogers v. Newbury*, 105 Mass. 533.

The first count of the plaintiff's declaration sets out a claim under Pub. Stat. chap. 84, § 27, and alleges "that she applied to the overseers of the poor of the said Northampton and requested them to make provision for the maintenance and support of the said Michael O'Keefe, which they refused and neglected to do." The notice contemplated by the statute and alleged in the declaration is an express and formal notice, and the request intended is a distinct request that the town provide for the pauper, and the right to recover for support furnished after neglect or refusal in such a case is founded on the failure of the town to do its duty, and the consequent necessity, in the interest of humanity, that aid be rendered by an individual. *Walker v. Southbridge*, 4 Cush. 199. No evidence that the plaintiff gave such a notice or made such a request was introduced at the trial.

The second count is in *indebitatus assumpsit*. The statute gives no right to recover under an implied contract in a case of this kind, and the inquiry comes whether there is evidence of performance of an express contract under which the plaintiff is entitled to compensation. The only evidence of any contract tends to show that one of the overseers of the poor, in the absence of his associates, agreed with the plaintiff to pay her "to take the old man and take care of him as long as he lived." The pauper lived after that ten years. The town had a poor-house in which to support its paupers. It does not appear that the overseer had authority to bind the town by this peculiar contract; and if he had, the plaintiff, to recover under it, must show that she took the pauper and took care of him in accordance with its terms. This she has failed to do. The uncontradicted evidence shows that the old man was then living with his son, her husband, and that he continued to live with him for ten years afterward; the town, all the time, with the knowledge and consent of the plaintiff, paying said son by the month for said support. Upon a proper interpretation of the evidence, it appears that what the plaintiff did in caring for the pauper she did on account of her husband, and as his wife, and the jury would not have been warranted in finding that she did anything in performance of the contract testified to by her husband.

Exceptions overruled.

Henry N. TUTTLE

GEORGE H. GILBERT MANUFACTURING CO.

On letting a farm to the plaintiff and another, the defendant agreed to repair and put in safe condition the stable floor. Its unsafe condition caused a personal injury to the plaintiff. No time within which the repairs were to be made was fixed; but, assuming they were to be made within a reasonable time,

and that the jury would be justified in finding that the defendant had **not performed it within a reasonable time**, the plaintiff cannot, for such a breach, maintain an action of tort. His only **remedy** is by **action in contract**, and, as there was no question of fact for the jury, a verdict for the defendant was properly ordered.

(Worcester—Filed October 20, 1897.)

ON plaintiff's exceptions. *Overruled.*

Action of tort for personal injuries. Plaintiff, with his brother, hired of defendant a farm. In consideration of the hiring, defendant agreed that it would repair the floor of the barn on the farm, and, if necessary, put in new timbers. Defendant neglected to make such repairs, and in consequence thereof the barn floor gave way and plaintiff was thereby injured.

The other facts are stated in the opinion.

The court ordered a verdict for defendant. Plaintiff excepted.

Messrs. Rice, King, & Rice, for plaintiff:

This action belongs to that class of actions which, though they have their basis in a parol contract, nevertheless may be treated as actions of tort. Negligent performance of contracts, or the unexcused neglect to perform a contract, "is a breach of duty that may be treated as involving liability *ex delicto* or *ex contractu* at the election of the injured party." From its neglect to perform its legal obligation to the plaintiff, thus incurred, the plaintiff was injured, and for those injuries the defendant is liable in tort.

Johnson v. Dixon, 1 Daly, 178; *Bigelow, Torts*, 263, citing *Mazetti v. Williams*, 1 Barn. & Ad. 415; *Boorman v. Brown*, 11 Clark & F. 1; *S. C.* 3 Q.B. 511; *Robinson v. Threadgill*, 13 Ired. L. 89.

The following cases also seem to support the statement of Maule, J., in *Howard v. Shepherd*, 9 C. B. 319, namely: "Generally speaking, the law has endeavored to assimilate actions of tort arising out of contracts, with actions on contracts, giving the plaintiff the election to adopt either form of remedy.

Dickinson v. Winchester, 4 Cush. 120, 121; *Ashley v. Root*, 4 Allen, 505, 506; *Norton v. Doherty*, 8 Gray, 373. See also *Sweeney v. Old Colony & N. R. R. Co.* 10 Allen, 372; *Minor v. Sharon*, 112 Mass. 477. See also Wood, Land. & T. p. 923, note.

The facts and the statements of the agent properly amounted to a warranty that, at least, the barn was safe so far as the floor timbers were concerned. This is a breach of duty of a tortious character, whether the warranty be in regard to the quality of goods and chattels sold, or in regard to the safe condition of the premises.

See *Norton v. Doherty*, *supra*.

All the statements of the defendant's agent would have the effect, equally with an express warranty of safety at the outset, of lulling the plaintiff into a sense of security, based upon the agent's assurance of safety. As to whether or not the *scienter* could be satisfactorily proved would be a question for the jury, irrespective of the consideration that the case may be one

of that class of cases which would require no more proof of the *scienter* than lies in the proof of the facts alleged. Similarly in regard to the question of the agent's intention that his assurance should be acted upon, this case may be one of the class of cases where, the effect of the false representation being to bring the plaintiff into a business transaction with the defendant, no more proof of the defendant's intention is necessary than proof of that effect.

Johnson v. Wallower, 15 Minn. 474; Bigelow, Torts, pp. 30, 31; Add. Torts, 4th Eng. ed. 1012-1015.

The present case is an exception to the general rule that it is the duty of the tenant, and not the landlord, to make the repairs on the demised premises. Had there been no agreement, it would not have been the duty of the tenant to make repairs of so general and substantial a nature as the putting of new timbers into the barn floor.

Taylor, Land. & T. 8th ed. § 343.

Neither is he liable for the ordinary wear and tear of the premises.

Torriano v. Young, 6 C. & P. 8, note 8; *Leach v. Thomas*, 7 C. & P. 328; *Horsefall v. Mather*, Holt, 7; *Eagle v. Swaze*, 2 Daly, 140; *Johnson v. Dixon*, 1 Daly, 178.

Messrs. W. S. B. Hopkins and Charles L. Gardner, for defendant:

Defendant had no knowledge of any defects in said barn, except so far as the attention of its agent was specially called to them by the plaintiff himself; and, of the defect which caused the injury, it is shown that it had no knowledge whatever.

The obligation which rested on the defendant to make repairs was based entirely upon the express terms of its contract.

Gill v. Middleton, 105 Mass. 477; *Looney v. McLean*, 129 Mass. 33; *Bowe v. Hunking*, 135 Mass. 383.

No other obligation is alleged, and it follows that the plaintiff's cause of action arose wholly from a breach of the defendant's contract. It is obvious that plaintiff's action cannot be maintained in its present form.

Hervey v. Moseley, 7 Gray, 479; *Hubbard v. Mosley*, 11 Gray, 170.

Under our form of pleading, actions of tort embrace (besides trover and actions for penalties) those which were formerly known as actions of trespass, and trespass on the case.

Gen. Stat. chap. 167, § 1.

Bouvier defines tort as "a wrong independent of contract." It frequently arises from, and is coincident with, a contract, as in the familiar case of a fraudulent sale. It must, however, be a distinct feature of the contract out of which it grows, and something more than a mere breach of, or failure to perform, such contract, which is all that is alleged in the case at bar.

Shearm. & Redf. Neg. p. 1; Ashley v. Root, 4 Allen, 504; *Bishop v. Weber*, 139 Mass. 411.

In the case of *Gill v. Middleton*, *supra*, the injuries resulted from the unskillful manner in which the defendant performed certain work which he had promised to do.

It cannot be contended that the defendant falsely or willfully represented that the premises were safe, because the evidence shows that at most its agent only stated that he so con-

sidered them; but even if it were so it would make no difference, as this is not the cause of action which the plaintiff has set up in his declaration.

Morton, Ch. J., delivered the opinion of the court:

It is the general rule that there is no warranty implied, in the letting of premises, that they are reasonably fit for use. The lessee takes an estate in the premises hired, and he takes the risk of the quality of the premises, in the absence of an express or implied warranty by the lessor, or of deceit. A lessee, therefore, if he is injured by reason of the unsafe condition of the premises hired, cannot maintain an action against the lessor, in the absence of warranty or misrepresentation. In cases where lessors have been held liable for such injuries to the lessees, the liability is founded in negligence. *Looney v. McLean*, 129 Mass. 33; *Bowe v. Hunking*, 135 Mass. 380, and cases cited.

The plaintiff admits the general rule, but claims that this case is taken out of it because, at the time of the letting, the defendant agreed to repair and put in a safe condition the stable floor, the unsafe condition of which caused his injury.

The contract relied on is a loose one; it fixed no time within which the repairs were to be made; and it is doubtful whether the evidence proved any breach of contract on the part of the defendant. But if we assume that the contract was to make the repairs within a reasonable time, and that the jury would be justified in finding that the defendant had not performed it within a reasonable time, the question is whether, for such a breach, the plaintiff can maintain an action of tort to recover for personal injuries sustained by reason of the defective condition of the stable floor.

The cases are numerous and confusing as to the dividing line between actions of contract and of tort, and there are many cases where a man may have his election to bring either action. When the cause of action arises merely from a breach of promise, the action is in contract. The action of tort has for its foundation the negligence of the defendant, and this means more than a mere breach of a promise. Otherwise the failure to meet a note or any other promise to pay money would sustain a suit in tort for negligence, and thus the promisor be made liable for all the consequential damages arising from such failure. As a general rule there must be some active negligence or misfeasance, to support tort. There must be some breach of duty distinct from breach of contract.

In the case at bar, the utmost shown against the defendant is that there was unreasonable delay on its part in performing an executory contract. As we have seen, it is not liable by reason of the relation of lessor and lessee; but its liability, if any, must rest solely upon a breach of this contract. We do not see how the cases would differ in principle if an action were brought against a third person who had contracted to repair the stable floor, and had unreasonably delayed in performing his contract. We are not aware of any authority for maintaining such an action. If the defendant had performed the work contemplated by its contract, unskillfully and negligently, it would

be liable to an action of tort, because in such case there would be a misfeasance, which is a sufficient foundation for an action of tort. Such was the case of *Gill v. Middleton*, 105 Mass. 477.

The case of *Ashley v. Root*, 4 Allen, 504, does not conflict with our view, but recognizes the rule that, to sustain an action of tort, there must be more than a mere breach of contract.

The plaintiff now argues that he had the right to go to the jury upon the question of warranty and deceit. It does not appear that this claim was made in the superior court; but it is clear that there is no sufficient evidence of any warranty that the stable was safe, or of any deceit or misrepresentation on the part of the defendant or its agent.

Exceptions overruled.

COMMONWEALTH of Massachusetts

v.

Dennis SHURN.

1. Where a **receipt** is admissible as evidence of the guilt of the defendant, and is shown to have been taken into the possession of the defendant and his counsel, and they have **refused to produce it**, a **copy** of it is **admissible**.
2. Where **liquor** was **ordered from the town of Millbury, by a resident of Worcester**, and the quantity ordered was delivered to the person ordering it in Worcester, and was there paid for by him, and he took a receipt for the amount paid, from the man who delivered it to him, this is sufficient **evidence of a sale in Worcester**.
3. The **receipt for payment for the liquor** delivered to the purchaser, purporting to be **signed by an agent for the defendant**, which the counsel of the latter, in his presence, asked for on the trial in the police court, and insisted on his right to retain, and did retain, and which, when subsequently demanded by the prosecuting attorney on the trial in the superior court, was not produced, when connected with its contents, affords some **evidence that the transaction with the purchaser was a sale made by defendant through his agent**.

(Worcester—October 20, 1887.)

ON defendant's exceptions. *Overruled.*

Complaint charging the unlawful sale of spirituous and intoxicating liquors.

The case is stated in the opinion.

Mr. John Hopkins, for defendant:

The defendant was charged with the unlawful sale of liquor, June 5, 1886, to one John Buckley, in Worcester, where Buckley lived. The defendant lived in Millbury, and there had a license to sell liquors. Millbury was a license town in 1886, and Worcester was not.

The evidence does not prove a sale made by defendant in Worcester, and is insufficient to warrant a conviction.

When the dealer delivers to the purchaser

the article that is wanted by him, and that has been selected, the transaction has in it all the elements of a complete sale, although the price is to be paid at another time and in another place.

The dealer had no control over the porter after Mr. Reardon received it in Millbury.

It does not affirmatively appear that the porter referred to in the bill was that referred to in the complaint.

Mr. Andrew J. Waterman, for the Commonwealth:

The rulings of the court were correct.

The copy of the receipt offered in evidence by the government was properly admitted. The materiality of the original receipt was sufficiently shown by the whole evidence; and, the defendant and his counsel having been duly requested to produce the same, the government, upon their refusal so to do, was entitled to offer a copy.

Commonwealth v. Goldstein, 114 Mass. 272.

The presiding justice properly refused to rule that the evidence was insufficient to sustain the charge in the complaint. The rulings asked for by the defendant were properly refused; but no exceptions were taken to the refusal, or to the rulings given by the court, which were sufficiently favorable to the defendant.

Commonwealth v. Burgett, 136 Mass. 450;

Commonwealth v. Greenfield, 121 Mass. 40.

Devens, J., delivered the opinion of the court:

The defendant excepted to the admission in evidence of a copy of a certain receipt purporting to be from Shurn, by one Harper, of the price of a certain half-barrel of porter. If the receipt itself would have been admissible as material upon the issue of the guilt of the defendant, it having been shown to have been taken into the possession of the defendant and his counsel, and they having refused to produce it, a copy was admissible. *Commonwealth v. Goldstein*, 114 Mass. 272.

The defendant further excepted to the refusal of the court to rule that there was no evidence sufficient in law to sustain the complaint. There was evidence that Buckley ordered, by one Reardon, porter from Millbury; that the quantity ordered was delivered to him in Worcester; that it was there paid for by him; and that he took a receipt for the amount paid from the man who delivered it to him. This was sufficient evidence of a sale in Worcester, although not of a sale by Shurn. While the receipt, if identified as the one delivered to Buckley, which purported to be signed by one Harper for the defendant, did not of itself prove that Harper was entitled to act for the defendant, or that the porter came from defendant, it was for the jury to say whether the original receipt was thus identified, and whether, when produced at the trial in the police court, Shurn had by his acts and conduct admitted it to be his, or as given by his authority as a voucher for the payment set forth therein, or that he then endeavored to suppress a paper which would have afforded one step in the evidence against him. If so, evidence was afforded that the sale was made by him through his agent, Harper. At the trial in the police court Buckley made no claim to

the original receipt; when it was produced, the defendant was present with his counsel, who in his presence asked for it, then insisted on his right to retain it, did so, and, at the subsequent trial in the superior court, although demanded by the prosecuting attorney, it was not produced. This was an assertion of a claim, made in defendant's presence by his counsel, of his right to this paper as his own property as against the government; and, when connected with the contents of the paper, affords some evidence that the transaction with Buckley was a sale made by defendant through his agent.

To other rulings and refusals to rule no exception was taken.

Exceptions overruled.

Charles H. BRACKENRIDGE

v.

City of FITCHBURG.

Nellie M. BRACKENRIDGE v. SAME.

1. In an action to recover for injuries to plaintiff, received on account of a defect in a highway,—*Held*, that defendant's request to the court to rule, as matter of law, that plaintiff could not recover for a defect in the highway, because he was driving a blind horse on a dark night, was properly refused.
2. The degree of darkness, and whether the horse's possession of sight would have diminished the chance of the accident, were questions for the jury.
3. It was open to the jury to find that plaintiffs had a right to assume that defendant had done its duty, and therefore that they were not bound to provide against its possible neglect.

(Worcester—Filed October 20, 1887.)

ON defendant's exceptions. *Overruled.*

Actions of tort brought by the plaintiffs to recover damages for injuries received by them on account of an alleged defect in North Street in defendant city. Separate actions tried together. North Street is a side street leading off Main Street, and substantially level; and at the place of accident the land upon each side of location of highway is low and wet. The plaintiffs, who are husband and wife, left their house in the evening. They were riding in an open buggy,—the husband being the driver of the horse,—when the horse suddenly went into a hole in the street, and the left side of the wagon went down, and the wagon was soon thrown over, and the plaintiffs were thrown out and suffered the injuries complained of. It was raining a little and quite dark at the time of the accident. The defect complained of consisted of a channel or ditch about three feet wide and two feet deep, and from forty to sixty feet long, about in the line of the left wheel-ruts of the street, which had been caused by the water undermining the street and causing the street to cave in.

It appears that the plaintiff Charles H. Brackenridge had owned the horse for about five years, and that for two years prior to accident the horse had been totally blind, but was

otherwise safe, and had been in constant use by himself and family. The plaintiff testified that he was at the time driving at the rate of five miles an hour, and there was some evidence that he was driving faster than this. The defendant asked the judge to instruct the jury that under the circumstances stated a blind horse was not a safe and suitable horse to drive on the highway, and that the plaintiffs could not recover. The presiding judge declined so to rule, but instructed the jury upon that point as follows: "If the blindness of the horse rendered him unsafe or unsuitable to drive on the highway at this time and in this manner, the plaintiffs cannot recover; nor can they if their negligence or the unsafety of the horse in any way contributed to the injury."

The jury returned a verdict in favor of each of the plaintiffs. To the above refusal so to rule the defendant excepted, etc.

Mr. Edwin P. Pierce, for defendant:

The undisputed evidence shows that at the time they left their home it was raining a little, and quite dark; that they were being conveyed in a wagon drawn by a totally blind horse; that they sought to pass over a highway having on either side low and wet land; that there had been rain and thaw; that frost was coming out of the ground; and that their rate of speed was at least five miles per hour.

The defendant conceives that the above statement of the evidence makes the case one that leaves nothing, either of inference or facts, for the determination of a jury, and is therefore one of the extremely few cases wherein the question of contributory negligence is a question of law.

Can it be said that the horse was being driven at all; or, if so, with due care?

The fact that a traveler has a right to assume that a city or town has performed its duty in providing a way reasonably fit to travel upon certainly does not go to the extent of allowing one to deprive himself of ordinary safeguards against its neglect.

While one may, in the exercise of reasonable care, rely to a certain extent upon the performance of his duty by the other, no negligence of such other can be so dominant as to relieve him from his own obligation; and if a performance of such obligation might have prevented the injury, his failure so to perform must be considered as contributing thereto.

Hinckley v. Cape Cod R. R. Co. 120 Mass. 262.

If one drives an unsafe or unsuitable horse, and its characteristics contribute to the accident, the defect in the highway is not the sole cause.

Wright v. Templeton, 132 Mass. 52.

The contention of the defendant is not that a blind horse is unsafe or unsuitable to be driven in the daylight or under ordinary circumstances, for under such a condition of things it is or might be under the direction and control of its driver.

In all cases which have involved the determination of the question of the liability of towns and cities for defects in the way, the court has, in one form or another, made the statement that "the defect must be the sole cause;" that is to say, there must be such a connection between the cause and effect that the effect

can, without any intervening cause, be inferred to that cause as the one possible and absolutely essential cause.

If, in the present case, it was shown that the female plaintiff, being possessed of and exercising ordinary skill and care, drove a safe horse, suitable for the road, the plaintiff may recover, even if some imperfection of vision in the horse has contributed to the accident.

Wright v. Templeton, 132 Mass. 52.

The line of cases of which *Alger v. Lowell*, 3 Allen, 405, and *Maguire v. Middlesex R. R. Co.*, 115 Mass. 239, are examples, are cases where the alleged drunkenness of the plaintiffs is not claimed to have been such as deprived them of other than the partial use of their faculties, and are therefore cases that were properly left to a jury to determine whether their drunkenness led them to acts of negligence; or rather, whether they exercised ordinary care under the circumstances.

Partial intoxication becomes but a condition which, nevertheless, the jury may consider as an element in determining the question of due care.

The case of *Smith v. Wildes*, 2 Mass. (L. ed.) 204, 3 New Eng. Rep. 744, 143 Mass. 556, and cases relating to the deaf and dumb, are all cases of the deprivation of single faculties, leaving, in some instances, others more acute by reason of the loss, and are but conditions or circumstances.

Measrs. T. K. Ware, George A. Torrey, and C. E. Ware, for plaintiffs:

As a matter of law, can the court say that a blind horse is an unsafe horse to drive? As is stated by Hunt, *Ch. J.*: "The blind have means of protection and sources of knowledge of which all are not aware."

Davenport v. Ruckman, 37 N. Y. 573.

This is especially true of the horse. This court has already decided that a person is not, as a matter of law, guilty of contributory negligence by reason of driving a horse of imperfect vision, which is therefore likely to be frightened, and shy, on account of seeing objects imperfectly. That question is settled in this Commonwealth.

Wright v. Templeton, 132 Mass. 49. See also Mayhew, *Illust. Horse Management*, p. 293; Mayhew, *Illust. Horse Doctor*, p. 43.

Ladd, *J.*, says: "Blindness is no more negligence than near-sightedness, and probably is no more likely on the whole to contribute to an accident."

Sleeper v. Sandown, 52 N. H. 253. See *Gregory v. Adams*, 14 Gray, 248.

Courts have ever been diffident about assuming, as lawyers, to know much about horses. Almost without exception, all questions of horse lore have been left to the jury.

Liston v. Central Iowa R. Co. (Iowa) 29 N. W. Rep. 445.

The Supreme Court of Michigan declined to rule that the plaintiff could not recover if he knew that one of his horses was young, tough-bitted, and skittish.

Peterson v. Chicago & W. M. R. Co. 1 Mich. (L. ed.) 608, 7 West. Rep. 854.

This court has declined to rule that riding bareback without a martingale was carelessness. The courts of New York refused to rule that it is careless to leave a horse untied in a

public street; and—perhaps the closest question of all—the Supreme Court of Missouri leaves it to the jury whether it is safe for a woman to drive a spirited horse.

Steeens v. Boxford, 10 Allen, 25; *Abbot v. Bleeker St. R. R.* 2 Daly, 389; *Cobb v. Standish*, 14 Me. 198. See also *Alexander v. Dutton*, 58 N. H. 282; *Daniels v. Lebanon*, Id. 284.

There seems to be a peculiar hesitancy on the part of the courts of law to assume that questions relating to horse-flesh are so clearly well settled and universally understood as to render them subjects of judicial interpretation.

Kennon v. King, 2 Mont. T. 487.

The cases involving blind men have frequently been before the courts, and have always been decided to be questions of fact for the jury.

Smith v. Wildes, 2 Mass. (L. ed.) 204, 3 New Eng. Rep. 744, 143 Mass. 556; *Glidden v. Reading*, 38 Vt. 52; *Harris v. Uebelhoefer*, 75 N. Y. 169; *Sleeper v. Sandown*, 52 N. H. 244.

But the defendant may say that the ruling asked for was not that a blind horse was generally unsafe and unsuitable to drive, but that it was so "under the circumstances stated." What were these circumstances? The only material ones were two: first, that it was "quite dark;" and, second, that a serious defect existed in the highway. We contend that the first rendered the blindness of the horse totally immaterial, and that the second constituted a state of things which the plaintiff was not bound to foresee. It is well settled that a traveler has the right to presume that the highway is safe and fit for travel.

Thompson v. Bridgewater, 7 Pick. 188; *Kenyon v. Indianapolis*, 1 Wilson, 129; *Glidden v. Reading*, 38 Vt. 57; *Sleeper v. Sandown*, *supra*.

Holmes, *J.*, delivered the opinion of the court:

It is too plain for extended argument that the court was right in refusing to rule, as matter of law, that the plaintiffs could not recover for a defect in the highway, because they were driving a blind horse on a dark night. See *Smith v. Wildes*, 2 Mass. (L. ed.) 204, 3 New Eng. Rep. 744, 143 Mass. 556; *Wright v. Templeton*, 132 Mass. 49; *Daniels v. Lebanon*, 58 N. H. 284. It was for the jury to consider how dark the night was. They might have found that the plaintiffs could see the road. They might have found that a horse with sound eyes could not have done so. Whatever the degree of darkness, it was for them to say whether the horse's possession of sight would have diminished appreciably the chances of the accident; and it was at least open to them to find that the plaintiffs had a right to assume that the city had done its duty, and therefore that they were not bound to provide against its possible neglect. See *Smith v. Wildes*, *supra*; *Thompson v. Bridgewater*, 7 Pick. 188; *Leavroy v. Godfrey*, 138 Mass. 315, 324; *Glidden v. Reading*, 38 Vt. 52, 57.

Exceptions overruled.

William I. MARSHALL
v.

BOSTON & ALBANY R. R. CO.

1. A ruling requested by plaintiff, on the
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trial of an action for an assault and false imprisonment for arresting plaintiff and removing him from defendant's car for an alleged refusal to pay fare, that "the evasion or attempt to evade the payment of fare, for which a passenger may be lawfully ejected or removed from a railroad car, must be a fraudulent evasion with an intent to defraud the railroad company,"—*Held*, properly refused, and that the ruling requested is not in words confined to removals by arrest.

2. Exclusion of the testimony of the plaintiff, that he had frequently seen the conductors on defendant's railroad accept, without objection, in payment of fare, detached coupons similar to those offered by plaintiff, is not available error where his intent is only material to a count for malicious prosecution, and the verdict for defendant on that count was based on the finding that it acted under advice of counsel.
3. Such evidence would be admissible to prove a custom of defendant to accept such coupons when so tendered.
4. Plaintiff cannot, as of right, strengthen his direct testimony as to what his belief was, by swearing to other facts which would make it likely that he believed as he said.

(Worcester—Filed October 20, 1887.)

ON exceptions by plaintiff in an action for an assault, for an assault and false imprisonment, and for a malicious prosecution, in different counts. *Overruled*.

Plaintiff was owner of a 1,000-mile coupon mileage ticket, good to bearer, over defendant's railroad. From the book containing the coupons he had torn 140 pages for his own use, giving the balance to his assistant, with instructions to meet him at the depot in Palmer, on the arrival of the train, with this book. When the conductor called for plaintiff's ticket, he offered the coupons which he had torn from the book, and which more than equaled the coupon fare. The conductor declined to accept the coupons, demanding the cash fare to Springfield, as far as he (conductor) went on that train, stating that the coupons were not good without the book.

Upon the arrival of the train at Pittsfield the conductor called a policeman of the town of Pittsfield into the car, and again, in the presence of the police officer, demanded of the plaintiff the payment of his fare; the plaintiff again tendered the coupons, and refused to pay otherwise; and thereupon the conductor, who was a railroad police officer, arrested the plaintiff and placed him in charge of the police officer, who took the plaintiff to the police station in Pittsfield and afterwards to the district court, where he made a complaint against the plaintiff, which complaint was signed and sworn to by the said police officer, for "fraudulently evading the payment of the fare by refusing to pay the fare lawfully established by the Boston & Albany Railroad Corporation," and the plaintiff was placed under

recognizance for his appearance before said court on April 15.

The plaintiff testified that the conductor was insulting in his language to him at Pittsfield, in that he said to him in a loud tone, as he came into the car with the policeman, "What are you going to do about that fare of yours to Pittsfield or Springfield, or wherever you are going," and that this was said in the presence of a large number of passengers who had entered the train at Pittsfield. The conductor denied using this language.

It appeared from evidence of the defendant that the following, among other rules for the government of conductors, had been established by the defendant corporation, and was in force at the time: "Coupons detached by passengers will be refused, and fare collected, unless passengers can show the book from which coupons were detached, which must agree in number and form." This rule was not known to the plaintiff.

The plaintiff stated to the conductor his name, business, and residence; he offered to show the mileage book when the train arrived at Palmer, and had made arrangements to have the book there upon arrival of the train; and the conductor himself told the plaintiff that he had no doubt that he owned the mileage book.

The jury found, upon a special issue submitted to them, that the arrest of the plaintiff was made by the conductor as a railroad police officer; and after the return of their verdict the foreman of the jury, in reply to a question of the court, replied that they found that the defendant, in its prosecution of the plaintiff, was acting under the advice of counsel, to whom a full statement of the facts had been made by the defendant. The jury returned a verdict for the defendant.

Measures. A. Norcross, H. C. Hartwell, and C. F. Baker, for plaintiff:

I. The plaintiff asked the court to rule that "the evasion or attempt to evade the payment of fare for which a passenger may be lawfully ejected or removed from a railroad car must be a fraudulent evasion with an intention to defraud the railroad company." This the court declined to give, but ruled in substance that the coupons were not a legal tender of fare, and that, upon the plaintiff's refusal to make other payment, the conductor might arrest him without a warrant.

There was no removal or attempt to remove the plaintiff from the car, except by arrest.

A passenger refusing to pay fare may be removed without being arrested.

Beckwith v. Cheshire R. R. 1 Mass. (L. ed.) 808, 3 New Eng. Rep. 186, 143 Mass. 68.

It is only a fraudulent evasion, or attempt to evade, that is punishable as a crime under the statute.

Pub. Stat. chap. 112, § 197; chap. 108, § 18.

It is not the purpose of the statute to allow conductors on a train to arrest, without a warrant, a passenger who for good cause is disabled from paying his fare, or is honestly mistaken as to what is a legal payment.

See *Krulevitz v. Eastern R. R. Co.* 140 Mass. 573; *S. C.* 1 Mass. (L. ed.) 949, 2 New Eng. Rep. 87, 143 Mass. 228; *Murdock v. Boston & A. R. R. Co.* 137 Mass. 293.

The ruling requested by the plaintiff was material, as there was sufficient evidence to go to the jury that the conductor, in making the arrest, was acting without probable cause and maliciously.

The language used by the conductor to the plaintiff at the time of his arrest, the loud tone, and the occasion,—being in presence of a large number of passengers,—were evidence of malice. These facts, together with the conductor's statement at the time, that he believed the plaintiff's story, did not warrant a belief on the part of the conductor that the plaintiff was fraudulently attempting to evade payment of his fare, but showed his conduct to have been reckless, unreasonable, and without probable cause.

Mitchell v. Wall, 111 Mass. 492.

II. The evidence offered by the plaintiff, that he had frequently seen the conductors of the defendant accept similar detached coupons in payment of fare, was competent upon the question of the plaintiff's intent and belief.

In case of fraud, any facts which fairly bear upon the intent and belief of the party are admissible in evidence.

Maroney v. Old Colony & N. R. Co. 106 Mass. 153; *Murdock v. Boston & A. R. R. Co.* *supra*; *Commonwealth v. Elwell*, 2 Met. 190.

Mr. Frank P. Goulding, for defendant:

The company could lawfully adopt this form of ticket, and sell it at a lower rate than ordinary single tickets, to be used under the conditions imposed. Such an arrangement is, in principle, precisely like the rule of many railroad companies, fixing fares of those who purchase tickets before entering the cars at a lower rate than if paid on the train.

Swan v. Manchester & L. R. R. 182 Mass. 116; *Townsend v. N. Y. Cent. & H. R. R. Co.* 56 N. Y. 295; *Frederick v. Marquette, H. & O. R. R. Co.* 37 Mich. 342; *Petrie v. Pennsylvania R. R. Co.* 42 N. J. L. 449; *Boston & L. R. R. Co. v. Proctor*, 1 Allen, 267; *Coleman v. New York & N. H. R. R. Co.* 106 Mass. 160.

It is well settled that if a passenger declines to pay his fare, much more if he evades or attempts to evade payment of it, he may be "ejected or removed" at a station.

O'Brien v. Boston & W. R. R. Co. 15 Gray, 20; *Swan v. Manchester & L. R. R.* 182 Mass. 116; *Beckwith v. Cheshire R. R. Co.* 1 Mass. (L. ed.) 808, 3 New Eng. Rep. 186, 143 Mass. 68; Pub. Stat. chap. 112, § 197.

The ruling is in exact accord with the terms of the statute.

Pub. Stat. chap. 103, § 18.

The maxim, *ignorantia legis non excusat*, applies.

Kruleritz v. Eastern R. R. Co. 140 Mass. 578; *S. C.* 1 Mass. (L. ed.) 349, 2 New Eng. Rep. 87, 143 Mass. 228.

The word "fraudulently," in the statutes, means no more than "with unlawful intent;" and the defendant must be held to intend the necessary and probable consequences of his act, if he knows what the facts are which condition his act, whether he entertains correct or incorrect views of the law.

Stat. 1849, chap. 191, § 2; Gen. Stat. chap. 63, § 113; Pub. Stat. chap. 112.

The evidence offered by the plaintiff, as to what he had seen other conductors do, was im-

material as the case was submitted, and upon the finding of the jury, and was incompetent for the purpose for which it was offered.

There was no evidence that any conductor had any authority to waive or abrogate the contract contained in the mileage tickets, or to disregard the rules of the corporation. And certainly no unauthorized act of other conductors could constitute evidence against the defendant.

The excluded evidence was wholly *res inter alios*. The plaintiff could not prove his good faith by his private instructions to his agent, or by proof that his instructions were obeyed by the agent.

Holmes, J., delivered the opinion of the court:

1. The ruling requested by the plaintiff was that "the evasion or attempt to evade the payment of fare, for which a passenger may be lawfully ejected or removed from a railroad car, must be a fraudulent evasion with an intent to defraud the railroad company." There is no question, and the plaintiff does not dispute, that this ruling, if taken literally, was rightly refused. *Beckwith v. Cheshire R. R. Co.* 1 Mass. (L. ed.) 808, 3 New Eng. Rep. 186, 143 Mass. 68.

We are asked to construe the words "ejected or removed," in connection with the facts, and with instructions given and not excepted to, as meaning "removed by arrest," or, in other words, "arrested." We think, however, that the suggestion does too great violence to the language used, and that we should not be warranted in assuming that the judge to whom the request was addressed understood it as the plaintiff would have us understand it.

2. The plaintiff, for the purpose of showing his intent and belief that the said coupons were a proper tender of his fare, offered to prove that he had frequently seen the conductors on the defendant railroad accept without objection, in payment of fare, similar coupons which had been detached from similar mileage books by passengers or others than such conductors; but the court excluded the evidence in this form, and for the specific purpose for which it was offered, but stated, if the plaintiff proposed to prove a custom of the defendant to accept coupons so tendered, the evidence would be admissible; and the plaintiff excepted.

It would seem that the plaintiff could not have been injured by the exclusion of the evidence as stated; for, upon the rulings of the court under which this case was tried without objection by the plaintiff, his belief or intent was only material to the court for malicious prosecution; and the verdict for the defendant on that count was based on the finding that it acted under the advice of counsel. But the evidence was properly excluded. If the plaintiff's actual belief was material and was really controverted, he could not as of right strengthen his direct testimony as to what his belief was, by swearing to other facts which would make it likely that he believed as he said. *Delano v. Smith Charities*, 138 Mass. 63. This seems to have been the purpose for which the evidence was offered. If it had been offered to show that the defendant company had justified the plain-

tiff's conduct by its own, the court was ready to admit it, subject to proper limitations. The other exception is waived.

Exceptions overruled.

NORTHAMPTON

v.

County Commissioners of HAMPSHIRE.

1. **Acts 1849, chap. 96, § 4**, incorporating the trustees of the Smith Charities, which provides that no part of the funds of the corporation shall be exempted from taxation, and apportion the tax among eight towns named therein, of which Northampton is one, is **not in violation of the Constitution of Massachusetts, part 2, chap. 1, art. 4**, which provides that taxes on property within the Commonwealth shall be proportional and reasonable.
2. The business of the corporation was done and its funds were in Northampton. It is the general rule in Massachusetts that **personal property is to be taxed where the owner resides**; but where, as in this case, the inhabitants of the eight towns named in the Act were the principal beneficiaries, and the corporation makes no complaint, the provisions of the Act are constitutional and valid.
3. **This Act of 1849 is not in conflict with art. 14, § 1, of the Amendments of the Constitution of the United States**, as denying to the inhabitants of Northampton the equal protection of the laws.
4. **A party assailing the constitutionality of a legislative Act must establish beyond a reasonable doubt that it is in violation of the Constitution**. Every presumption is in favor of its validity.

(Hampshire—October 20, 1887.)

CERTIORARI to review the adjudication of the Commissioners of Hampshire County, abating an assessment by petitioners upon personal property of the Smith Charities. *Dismissed.*

The case and material facts are given by the court.

Mr. Azro T. Crossley, for petitioners:

The amount of \$146,720 was properly assessed by the assessors of Northampton, and the county commissioners erred in abating seven eighths thereof.

Greenfield v. Franklin County, 185 Mass. 566-568; *Greene Foundation v. Boston*, 12 Cush. 54-60; *St. Albans v. National Car Co.* 57 Vt. 68, 80, 81.

The personal property of trustees of the Smith Charities, to the amount of \$146,720, was taxable in the year 1885, and the only question is whether the whole amount was properly assessed.

This is not an excise or duty on the privilege or franchise of the corporation.

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Commonwealth v. People's Five Cent Sav. Bank, 5 Allen, 428-482; *Greenfield v. Franklin County*, 185 Mass. 566-569.

Taxation and protection are reciprocal.

Berlin Mills Co. v. Wentworth's Location, 60 N. H. 156, 157; *State v. United States & C. Exp. Co.* Id. 219-251; *Weeks v. Gilmanton*, Id. 500, 502; *Cooley*, Tax. 121, and cases cited.

Northampton is the only one of the eight towns named in the will which furnishes any protection to the property, or any part of the property, included in this tax, and is also the only one in which any part of said property has any *situs*. It is the only one in which the will of Oliver Smith vests any pecuniary interest, legal or beneficial.

Northampton v. Smith, 11 Met. 390-397.

The provision of the Acts 1849, chap. 96, § 4, is unreasonable within the meaning of the Constitution, part 2, chap. 1, § 1, art. 4.

It fixes a *situs* to the personal property of the corporation, contrary to general laws and the one fixed by the will.

The tax on the personal property of said corporation, so assessed, was not and could not be proportional and reasonable within the meaning of said article 4 of the Constitution.

Dorgan v. Boston, 12 Allen, 228, 227, 235, 287; *Oliver v. Washington Mills*, 11 Allen, 268-274, 276, 277; *Portland Bank v. Apthorp*, 12 Mass. 252-255; *Commonwealth v. People's Five Cent Sav. Bank*, 5 Allen, 428-481; *Cheshire v. Berkshire County*, 118 Mass. 886-889; *Commonwealth v. Hamilton Mfg. Co.* 12 Allen, 298-301; *Lowell v. Oliver*, 8 Allen, 247-253; *State v. United States & C. Exp. Co.* 60 N. H. 219-237, 239-241, 243, 244, 251; *Commonwealth v. President Sav. Inst.* 12 Allen, 812, 813; *Commonwealth v. Lowell Gas Light Co.* 12 Allen, 75; *Exchange Bank of Columbus v. Hines*, 8 Ohio St. 1, 15; *Knowlton v. Rock County*, 9 Wis. 410, 421; *State v. Winnebago Lake & F. R. P. R. Co.* 11 Wis. 85.

Taxation requires a uniform valuation and a uniform rate. A State tax must be uniform throughout the State, a county tax throughout the county, a town tax throughout the town.

Boston, C. & M. R. R. v. State, 60 N. H. 95, and cases cited.

The Legislature cannot designate, without reference to proportion, a certain class of persons on whom to impose a tax.

Dorgan v. Boston, 12 Allen, 228-237.

Neither can it arbitrarily designate a certain number of towns,—outside the limits of municipal divisions,—without reference to proportion, and authorize a tax therein upon property having no *situs* in some of them.

Messrs. D. W. Bond and J. C. Hammond, for defendants:

Whether a tax is reasonable is a question which cannot be revised by the court so long as the objects for which the tax is raised are within those for which public money may be raised by taxation.

See *Lowell v. Oliver*, 8 Allen, 253.

By the Act of 1849, if the taxable property of the corporation is equally apportioned among the eight towns named, the rate of taxation in each town may be different from that of every other town. Because of this variation, the law providing for the apportionment among the eight towns is not unconstitutional.

Providence Inst. for Savings v. Boston, 101 Mass. 575, 586.

Reference is made in the petition to § 1 of article 14 of the amendments to the Constitution of the United States. It is difficult to see how the petitioner can claim that the denial to the city of Northampton of the right to tax this corporation is any denial to the city of equal protection under the laws, within the meaning of said amendment to the United States Constitution.

Devens, J., delivered the opinion of the court:

The trustees of the Smith Charities were incorporated under the Acts of 1849, chap. 96. The fourth section of this Act provided that no part of the funds of the corporation should, by the operation of the Act, be exempted from taxation, and enacted that, "for the purposes of taxation, said funds shall be equally apportioned among the eight towns named in said will, to wit: Northampton, Hadley, Amherst, Hatfield, Williamsburg, Whately, Deerfield, and Greenfield, or such of them as shall not have forfeited their rights therein; and said apportionment shall be made, and the assessors of each of said towns shall be notified of the same, by the trustees provided for in said will, on or before the 1st day of May, annually, and the portions of said funds thus assigned to said towns respectively may be assessed therein, in all the taxes legally rated and assessed by said towns."

The corporation made a correct apportionment (as appears by the answer of the respondents) of their taxable funds, among the eight towns, according to this section. The county commissioners have allowed an abatement of seven eighths of the tax assessed by Northampton, which was upon the whole of these funds; and have in effect decided that Northampton was entitled to tax only one eighth of them. This decision is in accordance with the statute, but the petitioner claims that the Act is in this respect unconstitutional, and further that it has therefore the right to tax the whole of the funds held by the corporation, which are personal property. The ground on which the plaintiff relies is that the tax provided for by the statute is unreasonable, and not proportional, under that article of the Constitution, part 2, chap. 1, § 1, art. 4; which authorizes the General Court "to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances," etc., "and to impose and levy proportional and reasonable assessments, rates, and taxes upon all the inhabitants of, and persons resident and estates lying within, the said Commonwealth." It is a familiar principle that a party assailing the constitutionality of an Act must show beyond reasonable doubt that it is in violation of the fundamental principles of our government, and that every presumption is in favor of the validity of a legislative Act. It is for the petitioner to show that its rights are invaded by this legislative Act; that the Act does not come within the legitimate exercise of the powers conferred by the Constitution; and that it has (this Act being pronounced unconstitutional) under some other Act an authority to lay the tax in question. It is obvious that the principal, perhaps the only, object of the constitutional provision that taxes

shall be "proportional and reasonable" is the protection of the taxpayer against any arbitrary, unjust, or oppressive exercise of the power of taxation. If, for instance, the Legislature should arbitrarily designate a certain class of persons on whom, or a certain class of property on which, a tax was to be imposed, without reference to any rule of proportion, or without regard to the share of the public charge which either should bear, relatively to that borne by other persons or property, or without regard to any special benefit which might accrue to the property subjected to the tax, such imposition would be unlawful. *Oliver v. Washington Mills*, 11 Allen, 268; *Dorgan v. Boston*, 12 Allen, 223.

In the case at bar the party upon whom the tax is imposed makes no complaint of the statute under which it is imposed; and the clause of the Constitution would seem to have no reference to the town or other corporation ordinarily invested with the taxing power, or to the mode in which the tax imposed is to be divided or distributed. But if this is otherwise, we can find no ground for pronouncing the tax unreasonable or not proportional. The principal beneficiaries under the Smith will are inhabitants of the eight towns in the Commonwealth described in the petition. If the fund intended mainly for their use is to be diminished by taxation, it would seem reasonable that the towns whose indigent persons are the immediate objects of the testator's bounty should have the benefit of it. Exact equality or proportion in the imposition of public taxes, or distribution of public burdens requiring taxation, it is practically impossible to secure. *Cheshire v. Berkshire County*, 118 Mass. 386.

The petitioner argues that, as the place where the business of the corporation is to be done is Northampton, this city is entitled, as of right, to tax the whole of its personal property. It is a general rule, under our statutes, that real estate is to be taxed where it is situate, and personal property where the owner resides; but to this there are many exceptions. The Legislature may treat as realty, for the purposes of taxation, that which is not so by the common law, and may provide for taxation of personal property in places other than that where the owner resides. Thus, shares of stock in banks are assessed to the owners thereof where the bank is located; livestock is assessed, when kept throughout the year in a town other than that where the owner resides, to the owner in that place; goods, merchandise, and other stock in trade, in cities or towns within the Commonwealth other than where the owner resides, are taxed where the owners occupy manufactories, stores, etc. Pub. Stat. chap. 11, § 20. The personal property of individuals is thus taxed at a different rate from that which prevails where they reside. The legislation which exists as to the taxation of trust property, or property of that nature, closely resembles that adopted by the Legislature as to the taxation of these funds, and it has certainly always been treated as constitutional. Thus, personal property held by a guardian is taxed to the guardian, but in the place where the ward is an inhabitant, if in this State; personal property held in trust by executors, administrators, or trustees is assessed to them where the benefi-

ciary resides, if in this State; personal property held by a corporation or individual to accumulate is assessed where the beneficiaries reside, if in this Commonwealth. The objections which the petitioner in the case at bar makes, that the fund is taxed where the securities, etc., are not kept; that the fractions of it permitted to be taxed are taxed at different rates according to the exigencies of the different towns entitled to tax, all exist in the general laws relating to the taxation of trust property. It is not necessary, in order that taxes should be proportional, that the rate should be identical in all the municipal corporations of the State. However widely rates may differ, it cannot be held that they are not proportional on account of differences of that nature.

The petitioner also contends that the Act is unconstitutional within § 1 of art. 14 of the amendments to the Constitution of the United States, in that it denies to it the equal protection of the laws. We see no ground for this contention, nor has the petitioner suggested any argument in support of it. *Slaughter House Cases*, 58 U. S. 16 Wall. 86 (21, L. ed. 394).

If we were able to hold Acts 1849, chap. 96, § 4, to be unconstitutional, such a decision would not aid the petitioner, but the contrary. By Pub. Stat. chap. 11, § 5, cl. 3, the personal property of literary, benevolent, charitable, and scientific institutions is exempt from taxation. This corporation comes within the class of benevolent and charitable institutions. If so much of the Act of incorporation as takes it out of the general law, and renders its personal property taxable, is unconstitutional, it would come under the general law, and its personal property would not be subject to taxation.

Petition dismissed.

COMMONWEALTH of Massachusetts

v.

Valentine EWIG.

1. On a trial for selling intoxicating liquor without a license, the judge having charged the jury, as requested by the defense, that if a club purchased liquors, and it was a *bona fide* club, and distributed them among its members for money, this did not constitute a sale and was not a violation of the statute, and the intent was immaterial, the *bona fides* of the club being in issue as a question of fact, it was not error to add: "If this is a mere device to cheat the government out of its license fee and prevent the due execution of law, it is not a protection, and the defendant does not act with impunity."
2. An objection to the admission of testimony not referred to in the argument may fairly be deemed waived; but, if not,—*Held*, that testimony of an independent alleged similar offense on the same occasion was competent when admitted and received only as it affected the offense charged on a disputed question of fact.

(Hampden—Filed October 20, 1887.)

ON defendant's exceptions. *Overruled.*
Complaint that defendant sold intoxicating liquor to a person to the complainant unknown. The case was brought into the Superior Court on the defendant's appeal from the judgment of the Springfield Police Court, and was tried before Bacon, J., and a jury, resulting in a verdict of guilty.

When the evidence was all in, the defendant asked the judge to instruct the jury as follows:

1. "If this was a *bona fide* club, and the liquors owned in common by the members, and the members, on receiving liquor, gave in return money instead of checks, it would not constitute a sale within the meaning of the statute." This instruction was given.

2. "If two or more persons unite in buying intoxicating liquor, and then distribute it among themselves, they do not violate the statute, and the intent with which they do this is immaterial. If they intend in this manner to obtain intoxicating liquor to drink without thereby subjecting any person to the penalties of the statute; they still act with impunity."

This instruction the judge gave to the jury, and added this qualification: "It is not a violation of law if they unite in good faith in dividing it. If two persons buy a gallon of liquor, and divide it among themselves, they act with impunity; but if this is a mere device to cheat the government out of its license fee, and prevent the due execution of law, it is not a protection, and the defendant does not act with impunity."

To which instruction, as qualified, the defendant excepted.

The case is further sufficiently stated in the opinion.

Mr. J. E. Dunleavy, for defendant:

1. In this case, the defendant was one of a club, the members of which, according to the defense, jointly bought some liquors and divided it among themselves in the manner explained in the evidence.

2. The government sought to show that there was, in this transaction, a sale, and that the defendant was guilty under the statute.

3. The charge of the judge was equivalent to charging that, if the members of a club adopted this means of obtaining liquor because they thought thereby to avoid the necessity of a license and the payment of a fee, the defendant was guilty; when, as a matter of law, a citizen has a right to adopt a course to avoid the necessity of paying a license fee.

4. The jury were practically instructed that if "two persons buy a gallon of liquor and divide it among themselves," and if this course is a device to cheat the government out of its fee, they are guilty in a proceeding of this kind.

5. To the minds of a jury, this is an assumption that a purchase of a gallon of liquor by two persons, and a division of the same among themselves, may of itself constitute such a "device" to cheat the government, providing there be a disposition or purpose to cheat in the minds of the parties.

6. Against the above the defendant contends that this introduced into the case a false issue; that the law does not broadly prohibit the dis-

pensing of liquors without a fee (*Commonwealth v. Smith*, 102 Mass. 144); and the defendant is not being tried for cheating the government, but for selling liquors. The only question before the jury was, Did the transaction or "device" amount to a sale? The case presumed in the charge is manifestly not a case of sale.

7. The charge assumed that some way the government was entitled to a fee, which it could be cheated out of by the defendant adopting a particular course of business, and that the license law is primarily a revenue measure, when, as a fact, it is a police regulation, the fee being only incidental.

Commonwealth v. Certain Intoxicating Liquors, 115 Mass. 155.

8. The body of the offense is a sale; and this must be proved as a distinct fact, and not as an equivalent for something else.

9. A sale is a fact which cannot be inferred from an intent. It is not characterized by the purpose which induced it. It is or is not a sale, according to what inhered in the transaction itself.

10. An intent does not prove the body of the offense. Even a confession will not prove the fact that a homicide has been committed. A transfer of property is not a sale, or something else, according to an intent respecting a license fee. A sale depends on the fact that there was a consideration.

11. The charge ought not only to be correct, but to be so adapted to the case and so explicit as not to be misconstrued or misunderstood by the jury in the application of the facts as they find them from the evidence.

Little Miami R. R. Co. v. Wetmore, 19 Ohio St. 110.

Mr. Edgar J. Sherman, Atty-Gen., for the Commonwealth:

The evidence to which defendant objected was competent and properly admitted, under appropriate instructions limiting its use and effect.

Commonwealth v. Dearborn, 109 Mass. 368; *Commonwealth v. Sloehr*, Id. 365; *Commonwealth v. Kelley*, 116 Mass. 341.

All of the instructions asked for by the defendant were given by the presiding judge, and were sufficiently favorable to the defendant. The additional instruction was in no way a contradiction of, or inconsistent with, that asked for by the defendant. In view of the fact that the government claimed that the club was founded in fraud and deceit, and was gotten up to cover the illegal acts and transactions of the defendant, the instruction to the jury, who were to pass upon that question, is not inconsistent with the ruling that the intent with which the liquors are bought or sold is immaterial. The ruling of the judge is directed and applies to the whole scheme. If this scheme, or alleged club, is but a form or device apparently legal, but the substance of which is within the prohibition of the statute, then the defendant does not act with impunity.

The evidence being conflicting as to the nature of the alleged club, claimed by the government to be only such in name, with devices and forms intended to deceive and defraud, and by the defendant to be duly organized and properly conducted, it became a pertinent inquiry whether the alleged club was really a *bona fide*

organization, with a limited membership, and not open to any person at his pleasure, or whether it was only a form and name adopted to cheat the government out of its license fee and prevent the due execution of the law. The case differs from *Commonwealth v. Pomphret*, 137 Mass. 564, in that in that case the testimony of the defendant to the facts was admitted to be true, while in the present case they are in dispute.

In *Commonwealth v. Smith*, 102 Mass. 144, it was decided that the court had no right to rule, as a matter of law, that such an arrangement as constituted the facts in that, as well as the present, case was an evasion of the law, but that it was a question for the jury upon all the facts and under appropriate instructions.

In all of the cases cited in *Commonwealth v. Pomphret*, *supra*, the question of the *bona fide* nature of the club was the chief inquiry, and there were appropriate instructions thereupon.

See *Graff v. Evans*, L. R. 8 Q. B. Div. 373; *Seim v. State*, 55 Md. 566; *Rickart v. People*, 79 Ill. 85; also *Marmont v. State*, 48 Ind. 21; *State v. Mercer*, 82 Iowa, 405; *Martin v. State*, 59 Ala. 34.

Knowlton, J., delivered the opinion of the court:

The contention between the parties upon these exceptions relates solely to the interpretation of the judge's charge. The defendant excepted to the qualification of the last instruction which he had requested. He contends that the jury must have understood the judge as saying that if several persons buy liquor and divide it among themselves, even though the transaction is real and genuine, and do it with a purpose thereby to obtain their liquor more economically than to buy it of someone who is obliged to pay the government a license fee, and with an additional purpose to deprive in that way the government of a license fee which it would otherwise get, the transaction is unlawful. If that were the meaning of the instruction, it would be clearly wrong. To ascertain its true interpretation let us revert to the circumstances under which it was given. The defendant had introduced evidence that he was one of a club organized for the distribution of liquor among its members. The Commonwealth claimed that the club was organized to defraud the government "of its revenue received from licensees for the sale of intoxicating liquor," and that the books and records put in evidence "were not genuine, and were not the evidence of a genuine organization, and were founded in fraud and deceit, and were gotten up to cover up the illegal acts and transactions of the defendant." An important, if not the principal, question of the case was, whether this was a real and genuine arrangement for the division of liquor among the owners of it, or was a mere pretense and device to cover up unlicensed sales. Very likely this question had been fully discussed by counsel. The presiding judge gave both instructions requested by the defendant. In the first, he told the jury unqualifiedly that the distribution of liquor of a club among its members would not constitute a sale, even though they gave money in return for it. In the second, he told them that the distribution

of liquor among themselves by the owners of it was not unlawful, whatever their intention might be. Having stated in their boldest form the propositions relied on by the defendant upon the theory that the liquor was really distributed among the owners of it, he apparently thought it proper to bring to the attention of the jury the rule applicable to the claim of the Commonwealth,—that the division testified to was not real, but a mere sham and pretense, and he gave the qualification objected to, saying, "It is not a violation of law for them if they unite in good faith in dividing it. If two persons buy a gallon of liquor and divide it among themselves, they act with impunity,"—which was equivalent to saying "If it is a real and genuine division, and not a mere pretense to cover something else, it is lawful;" and then, to state the other alternative, he added, "But if this is a mere device to cheat the government out of its license fee and prevent the due execution of law, it is not a protection, and the defendant does not act with impunity,"—meaning to say, "If the transaction is not real, but is a mere form and device under cover of which to sell intoxicating liquor without a license, and so violate the law, it will not avail the defendant in this prosecution." The words "to cheat the government out of its license fee" can hardly mean anything else than "to sell intoxicating liquor without a license;" for the only license fee to which the government is entitled in connection with the delivery of liquors is for sales, and one cannot be cheated out of that which does not belong to him. In view of the attendant circumstances we think the language of the instructions, taken together, was intended by the judge to be used, and was understood by the jury, in a sense which correctly represents the law.

The exception to the admission of evidence was not referred to in argument, and may fairly be deemed to have been waived, but, if not, we think it cannot be maintained. The testimony introduced by the defendant raised the questions whether that which the Commonwealth's witnesses had testified was money paid him for beer was in fact money or zinc checks, and whether money was ever paid him for beer in the rooms of the so-called club. It was therefore competent for the jury to consider the testimony of the Commonwealth's witnesses, that before the man left the table, and within fifteen minutes after the sale relied on, they saw him buy three glasses of beer and pay for it the ten-cent piece and the five cent piece which had just before been given him for change.

Exceptions overruled.

Alexander HANDYSIDE

v.

Lewis J. POWERS.

1. A landlord is not liable for personal injuries sustained by plaintiff, a plumber, by falling down the well of an elevator in the building leased, occasioned by the tenant procuring and using, without the consent or knowledge

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of the landlord or his agent, a key to the lock on the door to the elevator, and unlocking the door and leaving it unlocked, the landlord having previously duly locked the door and deposited his key in his office.

2. The act of the tenant in obtaining a key without knowledge of the landlord, and his subsequent carelessness, cannot be attributed to the landlord.

3. Pub. Stat. chap. 104, § 14, amended by Stat. 1882, chap. 208, being part of an Act for the inspection of buildings and for the appointment of building inspectors in such towns or cities as shall accept the Act, it not appearing that the city of Springfield, in which the accident occurred, ever accepted the Act, or that any directions were ever given by building inspectors, does not apply to the case.

(Hampden—Filed October 20, 1887.)

ON report. Verdict ordered for defendant.

Judgment on verdict.

Action of tort against the owner of a building, for personal injuries occasioned to the plaintiff by a fall down the elevator well in said building.

The plaintiff testified: "I am a plumber. I was hired by M. J. King, a tenant of a portion of the building, to do some work therein: I was taken to the top or fourth floor, and was shown the sink and watercloset, and was told that the waste water to the sink, and the aqueduct water, failed to run. I went to my shop for some tools, returned in half or three quarters of an hour with my tools. I went up to the third story. I understood that the tenement up stairs (meaning the fourth floor) was vacant for a long time, and the water didn't run since the people came there. I thought the water must be shut off on the flight below to keep the water from freezing, and I went there to see if the water wasn't shut off. This was the third floor. I tried the first door at the head of the stairs and found it locked. I then went to the next door, which was the door of the elevator well. Had my tools on my shoulder, done up in a carpet-bag; this door was not locked; went in; the room was all dark. 'Thinks I, this is the watercloset;' there is no gas in it. Had no idea there was an elevator there. I stepped on the threshold, and the next step I fell. There was no light; I thought there must be a light some place. It was totally dark; couldn't see anything. I had never been in this building above the basement before this day. I had no knowledge that there was an elevator in the building."

The defendant testified: "I am the owner of the building where the accident happened. The basement, the fourth story, and the two front rooms on the third story, were leased to M. J. King."

The lease was put in evidence. The leased premises were "the basement, the upper story together with the two front rooms in the third story of the granite block," etc., also, the use, in common with other tenants, of the stairways in said building, and the elevator. Provided, however, said King agrees to take care of and clean said stairways."

This lease also contained the following clause: "That he (the lessee) will allow the lessor, his heirs and assigns, and their agents, at seasonable times, to enter upon said premises, and examine the condition thereof, and make necessary repairs."

The defendant then testified: "No other tenant than King used the elevator or had authority to use it. I had never given the elevator key on the third story to anyone; supposed it was at my office. Had no knowledge that there were two keys to the elevator door on this story. The fourth story was used by King for no other purpose than as a tenement for living purposes. The building was entirely occupied by tenants."

Dwight Holland, called by defendant, testified: "I am the cashier of defendant; have charge of this building. The key to the elevator door was, at the time of accident, at our office. I have possession of the keys to that building. After King moved out of the upper tenement I examined all the doors and found they were all locked. This must have been a year before the accident. I examined the elevator door in question, and found it locked; I never let any person have the key, and never had any knowledge of any person having the key to this elevator door on third floor. Nobody ever went to me for a key to it. The elevator on that story has never been used, so far as I know, since I have been with Mr. Powers. I have been with him 18 years."

M. J. King, called by defendant, testified; "I am the person named in lease. Powers never gave me any key or anything for the use of the elevator in the third story. I got a key to it from Mr. Hall; can't tell where he got it. I wanted to use it, and borrowed the key. I used the elevator regularly the winter previous to the accident. I used it the morning of the accident, I think. Mr. Powers had no knowledge of the use of the elevator on third floor while I was there. I didn't know the plaintiff was going on the third floor."

The defendant, being recalled, testified: "I never gave key to this elevator door to Mr. Hall. I had no knowledge that he had a key to it; never gave him the use of the elevator in any form, and never knew of his using it."

Dwight Holland, recalled, testified: "Never let Mr. Hall have key of elevator door on this story; never knew of his using it; never knew of but one key to that elevator, and that was in the box in my possession."

It is agreed that the lease to King was in force at the time of the accident; that the door to the elevator opened from the hallway and swung on perpendicular hinges and had no trap-door or self-closing hatch or safety catch. The only entrance to the fourth story was through the hallway on the third story. On the third story there was a bell knob on the inside of the elevator, connecting with a gong in the basement. The elevator was closed in with doors opening into it from each story, and could not be seen from the hallway.

At the close of the evidence the court ruled that, upon the evidence, the plaintiff was not entitled to maintain his action, and ordered a verdict for the defendant, which the jury returned.

Mr. J. B. Carroll for plaintiff:

The plaintiff had no knowledge that an elevator was in the building. He felt for the floor with his foot, and, in view of all the circumstances, there was evidence of due care to go to the jury.

Gaynor v. Old Colony & N. R. Co. 100 Mass. 208, 212; *Gahagan v. Boston & L. R. R. Co.* 1 Allen, 187; *Warren v. Fitchburg R. R. Co.* 8 Allen, 227; *Davis v. Central Cong. Soc.* 129 Mass. 867; *Dewire v. Bailey*, 131 Mass. 169.

In *Taylor v. Carew Mfg. Co.* 1 Mass. (L. ed.) 54, 1 New Eng. Rep. 210, 140 Mass. 150, the plaintiff knew the danger, was walking quickly, and did not seek to avoid it by using either his hands or feet.

The plaintiff was rightfully on the premises, and the defendant owed him the duty of keeping the premises safe.

Gilbert v. Nagle, 118 Mass. 278; *Parker v. Barnard*, 135 Mass. 116; *Indermaur v. Dames*, L. R. 1 C. P. 274.

It was at least a question of fact whether the plaintiff had an implied license to do what he did.

Gilbert v. Nagle, *supra*.

The plaintiff was not a mere intruder, as in *Severy v. Nickerson*, 120 Mass. 306. It was necessary for the plaintiff to go over this hall to get to the upper story, and in the performance of his work he was obliged to see about the water and pipes on the floor from which he fell.

The control of the hallway and elevator remained in defendant by the terms of the lease.

The tenant is liable only when he has the entire control.

Stewart v. Putnam, 127 Mass. 408; *Kirby v. Boylston Market Assn.* 14 Gray, 249; *Shipley v. Fifty Associates*, 101 Mass. 251; *Leonard v. Storer*, 115 Mass. 86; *Homan v. Stanley*, 66 Pa. 464.

Where a portion only of the building is leased, and the tenant has the right of passage over halls and stairways in common with others, there is no such leasing as will exonerate the landlord from all responsibility.

Looney v. McLean, 129 Mass. 38; *Readman v. Conway*, 126 Mass. 374; *Milford v. Holbrook*, 9 Allen, 17.

At the time the lease was made, the statute was in force requiring safeguards to elevator openings, and at this time the elevator was not properly protected, and the defendant is liable for thus authorizing the continuance of the danger.

Pub. Stat. chap. 104, § 14, as amended by Acts 1882, chap. 208; *Gandy v. Judder*, 5 B. & S. 78; *Dalay v. Savage*, 2 Mass. (L. ed.) 607, 4 New Eng. Rep. 893; *Suttonsall v. Banker*, 8 Gray, 195; *Jackman v. Arlington Mills*, 137 Mass. 277; *Rex v. Pedley*, 8 N. & M. 627.

It was the duty of the owner to supply the safety appliances. The analogies of the statute at least make it apply to owner equally with tenant.

Pub. Stat. chap. 104, §§ 4-8, 11, 22.

The elevator was in use when the lease was given, and the safety appliances were never in use, and the jury had a right to pass on the question whether, in view of all the circumstances, the defendant did not contemplate the use to which the lessee was to put the elevator.

Larue v. Farren Hotel Co. 116 Mass. 67.

The statute applies to all elevators, whether in use or not, and the evidence shows that this was fitted for use on this floor. The fact that the negligence of the tenant contributed does not excuse the defendant. It was a result which should have been guarded against by complying with the statute.

At common law, the defendant would be liable for doing that from which injury might reasonably have been expected, and from which injury resulted.

Lane v. Atlantic Works, 111 Mass. 186; *Hughes v. Macfie*, 2 H. & C. 744; *Burrows v. March G. & C. Co.* L. R. 5 Exch. 67, 71; *Illidge v. Goodwin*, 5 C. & P. 190.

The injury happened from acts which the defendant ought to have apprehended and guarded against.

Gray v. Boston Gas Light Co. 114 Mass. 149; *Peterly v. Boston*, 136 Mass. 366; *Bartlett v. Boston Gas Light Co.* 117 Mass. 538; *Burt v. Boston*, 122 Mass. 223; *Jager v. Adams*, 123 Mass. 26.

Mr. Timothy M. Brown, for defendant: The plaintiff failed to show that he was in the exercise of ordinary care when he received the injuries for which he claims damages.

Murphy v. Deane, 101 Mass. 455; *Chaffee v. Boston & L. R. R. Corp.* 104 Mass. 108; *Taylor v. Carrow Mfg. Co.* 2 Mass. (L. ed.) 271, 3 New Eng. Rep. 875, 143 Mass. 470; *S. C. 1 Mass.* (L. ed.) 54, 1 New Eng. Rep. 210, 140 Mass. 150; *Hinkley v. Cape Cod R. R. Co.* 120 Mass. 257; *Kent v. Todd*, 2 Mass. (L. ed.) 444, 4 New Eng. Rep. 254, 144 Mass. 479.

The plaintiff was a mere intruder. He was not employed to do any work on the third story, or invited to any room on that story.

A plumber who is employed to do work in a specified room or tenement in a block occupied by several tenants is not authorized by such employment to enter other rooms in the block simply because he has a theory that he may find the means of letting on or shutting off water there. In this case there were no such means in the elevator where he was hurt. The defendant owed him no duty, and was under no obligation to make the place safe for him.

Sweeny v. Old Colony & N. R. R. Co. 10 Allen, 368; *Zochisch v. Tarbell*, 10 Allen, 385; *Severy v. Nickerson*, 120 Mass. 306.

No negligence can be attributed to the defendant because his tenant procured a key that fitted the lock, without his knowledge or consent or that of his agent, and unlocked and left unlocked the door.

Kendall v. Boston, 118 Mass. 234; *Tully v. Fitchburg R. R. Co.* 134 Mass. 499; *Sullivan v. Scripture*, 3 Allen, 564.

If anybody is liable to the plaintiff, it is the tenant, King, who occupied the premises, and surreptitiously obtained a key that would unlock the door, and carelessly left it unlocked.

While the defendant's lease to King gave him the use of the elevator "in common with other tenants," no other tenant or person had been given any right to use it.

Leonard v. Storer, 115 Mass. 86; *Boston v. Gray*, 2 Mass. (L. ed.) 158, 3 New Eng. Rep. 608, 144 Mass. 53; *Lowell v. Spaulding*, 4 Cush. 277; *Oakham v. Holbrook*, 11 Cush. 299; *Stewart v. Putnam*, 127 Mass. 403; *Boston v. Worthing-*
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ton, 10 Gray, 496; *Saltonstall v. Banker*, 8 Gray, 195; *Mellen v. Morrill*, 126 Mass. 545.

Devens, J., delivered the opinion of the court:

Without considering whether the plaintiff was an intruder or licensee in entering on the premises, we do not find that there was evidence in the case of neglect on the part of the defendant. The door to the elevator had been provided with a lock, had been locked, and the key deposited in defendant's office. This was the only key known by defendant or his agent to exist, and it was found in its place in defendant's office after the accident. There was evidence that a key had been procured by King, and used, but without the consent or knowledge of defendant or his agent; and that the neglect of King in unlocking the door, and in leaving it unlocked, had been the cause of the injury. But the act of King in obtaining a key without knowledge of defendant, and his subsequent carelessness, cannot be attributed to defendant.

It is the contention of the plaintiff that Pub. Stat. chap. 104, § 14, amended by Stat. 1882, chap. 208,—which requires that hoistways, hatchways, elevators, and well-holes, upon every floor of a factory or mercantile or public building shall be protected by good and sufficient trap-doors or self-closing hatches and safety catches, or such other safeguards as the inspectors of buildings shall direct,—rendered it obligatory on the defendant to supply the safety appliances there described, and responsible if any injury occurred by a failure so to do. It will not be necessary here to consider what is the construction of this section. It is a part of an Act for the inspection of buildings and for the appointment of building inspectors in such towns or cities as shall accept the Act or certain sections of previous Acts. Whether it was ever accepted by the city of Springfield does not appear, nor does it appear that any directions were ever given by building inspectors. The section cited does not have any connection with the question in the case at bar as presented to us by the report.

Judgment on verdict.

Lowell L. HINDS

v.

E. C. COTTLE.

George F. BOUVÉ v. SAME.

An appeal held frivolous and vexatious, and judgment affirmed, with double costs from time of appeal, under Stat. 1883, chap. 223, § 15.

(Suffolk—Filed November 10, 1887.)

APPEAL by plaintiff from a judgment ordered upon a verdict for defendant. *Affirmed.*

This case had already been before the court on a bill of exceptions taken by the plaintiff.

Bouvé v. Cottle, 1 Mass. (L. ed.) 890, 3 New Eng. Rep. 388, 143 Mass. 310.

The case was fully argued, and the plaintiff's exceptions were overruled.

The rescript was sent down in January, 1887. The defendant thereupon became entitled to judgment on the first Monday of February following, *i. e.* February 7, 1887.

The plaintiff, however, filed his motion for judgment *non obstante veredicto*, and obtained an order for a stay of judgment until this motion should be heard.

The defendant immediately filed his motion for judgment on the verdict, and set both the motions down for hearing at the first motion day of the superior court.

On that day the court heard the motions, and on February 25, 1887, ordered judgment for the defendant, and judgment was entered accordingly.

The plaintiff appealed, but delayed entering his appeal in this court until after the session in March, 1887.

Mr. Calvin P. Hinds, for plaintiff:

The plaintiff in this action, being aggrieved by a judgment of the superior court rendered against him, founded upon matter of law apparent on the record, appeals to this court in accordance with and agreeably to the provisions of Pub. Stat. 152, § 10.

The plaintiff's declaration, as shown upon the record, alleges with substantial precision and certainty a cause of action. The answer of the defendant, as also appears, is a general denial of the sum claimed in the plaintiff's declaration, except the sum of \$25.20; and, as it does not appear that the balance of said claim is denied in clear and precise terms, it is deemed to be admitted.

Steph. Pl. 9th Am. ed. 97; *Devoey v. Humphrey*, 5 Pick. 187; Pub. Stat. chap. 167, §§ 28, 20, 18; *Granger v. Halsey*, 12 Gray, 521; *Mulry v. Mohawk Valley Ins. Co.* 5 Gray, 541; *Marvin v. Mandell*, 125 Mass. 562.

Tender admitted the cause of action, in addition to its admission under the provisions of the statute as before noted, and there is nothing upon the record showing any defense set up to the action, in avoidance or discharge or otherwise.

Bacon v. Charlton, 7 Cush. 581; *Hosmer v. Warner*, 7 Gray, 186; *Currier v. Jordan*, 117 Mass. 260; *Devoey v. Humphrey*, *supra*.

Tender and a general denial are inconsistent, and cannot be pleaded together to the same cause.

Steph. Pl. 9th Am. ed. 274.

As to costs, see—

Pub. Stat. chap. 168, §§ 24, 25; *Boyden v. Moore*, 5 Mass. 865; *City Bank v. Cutter*, 3 Pick. 414.

The plaintiff, it would seem, may well claim judgment on his claim stated in the writ.

Clark v. Lamb, 6 Pick. 515; *Suffolk Bank v. Worcester Bank*, 5 Pick. 106; *Claffin v. Hawes*, 8 Mass. 261.

Messrs. M. F. Dickinson, Jr., and Hollis R. Bailey, for defendant:

This appeal is frivolous, immaterial, and clearly intended for delay.

The defendant has been put to great trouble and expense by reason of this appeal. The defendant hereby moves this court that, in accordance with the provisions of the Act of 1888, chap. 223, § 15, he may be awarded double costs from the time when said appeal was taken, and also interest from the same time, at the rate of

12 per cent per annum, on such sum as he became entitled to as costs of suit under the judgment of February 25, 1887, entered in his favor against the plaintiff on that date.

Before this Act of 1888, double costs could be allowed for frivolous exceptions (Pub. Stat. chap. 150, § 14), but not in cases of frivolous appeals (*Ames v. Stephens*, 120 Mass. 218).

This is apparently the first case under the new statute.

Under the former statute, in cases of frivolous exceptions, double costs were very frequently imposed.

Phillips v. Granger, 134 Mass. 475; *Butchers & D. Bank of St. Louis v. McDonald*, 130 Mass. 264; *Gallagher v. Galletley*, 128 Mass. 367; *Lorjoy v. Middlesex R. R. Co.* 128 Mass. 480; *Blackington v. Johnson*, 126 Mass. 21; *Gilman v. Gilman*, 126 Mass. 26; *Witt v. Potter*, 125 Mass. 360.

The new statute differs from the old one, also, in providing for interest at 12 per cent on a judgment for costs as well as upon a judgment for debt or damage.

An appeal only lies for some error apparent upon the record. It is a convenient substitute for writ of error.

Ward v. American Bank, 7 Met. 488.

It is provided by the statutes relating to writs of error.

Pub. Stat. chap. 187, § 8.

A judgment in a civil suit shall not be arrested or reversed for a defect or imperfection in matter of form, which might by law have been amended; nor because the judgment is not in conformity with the allegations of the parties, if it is in conformity with the verdict.

The defendant submits, however, that in the present case there is no error whatsoever; that his answers—one of them being a general denial—are entirely sufficient, both in form and substance, and fully support the verdict.

By the Court:

The questions presented by the plaintiff were argued and decided when this case was before us at a former sitting. *Bouvé v. Cottle*, 1 Mass. (L. ed.) 890, 3 New Eng. Rep. 338, 143 Mass. 310.

The appeal is frivolous and vexatious, and the judgment against the plaintiff is affirmed, with double costs from the time when the appeal was taken. Stat. 1888, chap. 223, § 15.

Judgment affirmed.

Adelaide COBURN

v.

TRAVELERS INSURANCE CO.

1. When a defendant intends to rest his defense upon a fact which is not included in the allegations necessary to the support of the plaintiff's case, he must set it out in precise terms in the answer.
2. The "conditions" on an accident policy provided that "immediate written notice" should be given to the company at its home office of any accident, with full particulars; and that, unless affirmative proof of death or disability was so furnished within seven months from

the accident, all claims should be forfeited. The conditions concluded with a "notice" that, in case of death or disabling injury, notice should be given immediately to the local agent of the company. Full proofs were given to the company within seven months after the accident, but the company claimed, on the trial of an action on the policy, that the "immediate written notice" had not been given. *Held*, that "immediate notice" was not a fact which the plaintiff was compelled to allege and prove; that the failure to give it was a matter which, if available as a defense, was so in defeat or avoidance of the plaintiff's claim; and that such defense was not open to the defendant where it had not been set up in the answer.

3. On the back of an accident policy against injuries effected through "external, violent, and accidental means," were certain conditions, commencing, "This insurance does not cover," etc., and including "intentional injuries." The declaration alleged that death was caused by external, violent, and accidental means, and did not allege that it was not caused by intentional injuries; the answer denied that death was caused by external, violent, and accidental means, but did not aver that it was caused by intentional injuries. *Held*, that the fair inference was that the defense relied on was that death resulted from natural causes, and that under such answer the defense that death was caused by intentional injuries was not open.

4. When a policy against death or injury by external, violent, and accidental means is general, and is subject to certain conditions annexed thereto, the occurrence of which is to operate to defeat the policy, the occurrence of such conditions should be shown by the party relying thereon, and the burden of negating such occurrence should not be imposed upon the party seeking to enforce the policy.

(Hampden—Filed October 24, 1887.)

ON report. *Verdict set aside.*

Action of contract, brought to recover on a policy of insurance on the life of F. C. Coburn, and payable, in case of death, to his widow, the plaintiff. Trial in the Superior Court before Dewey, J., with a jury, who, at the conclusion of the evidence, ordered a verdict for the defendant.

The plaintiff's counsel, in opening to the jury, claimed that the insured came to his death by violence inflicted by a boy, whom he, the insured, was chasing from his premises; that the boy threw a stone at the insured and hit him in the head, which caused his death. Counsel, among other things, stated to the jury that a lot of boys began stoning his trees. Coburn went out, and followed them up the street; they stoned him. As one stoned him, he was seen to turn to go towards the house; his hand was on his forehead; he attempted to speak, and fell

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dead. There was a cut on his forehead and a bruised mark.

The plaintiff offered evidence tending to show the following facts: F. C. Coburn, on the afternoon of August 30, 1886, on his return from his daily occupation of a locomotive engineer, found a party of boys (from eight to ten in number, and of various ages, from nine to thirteen) in the yard of his residence at the corner of Boylston and Clinton streets, in said Springfield. He drove the boys away, and followed them some distance, and turned to go towards his home. As he returned, the boys followed him, and when at a point about one hundred feet from the yard one of the boys ran towards him and threw a stone. As the boy was running towards him, and before the stone was thrown, Mr. Coburn turned and faced him. The witnesses for the plaintiff testified that the stone hit him in the forehead. As he was hit, he placed his hand on his face and turned and walked towards his yard. As he entered the yard he fell on his right side. There was a slight cut on his nose, and a black and red bruise upon his forehead, which the plaintiff claimed was inflicted by the stone thrown at him. At the time the stone was thrown, Coburn and the boy were about six to ten feet apart, and were facing towards each other. When he fell in his yard, he died immediately.

It was admitted that the injuries were not inflicted by the procurement of the assured or the plaintiff.

At the time of her husband's death the plaintiff was away from the city, and shortly after his burial she sent her son, Thomas W. Coburn, to the defendant's agent in Springfield, H. G. Gilmore, and found Gilmore away. On Gilmore's return he called on Thomas W. Coburn, and, according to the testimony of said Thomas W., said Gilmore seemed to know all about said F. C. Coburn's death. After the conversation with said Thomas W., Gilmore called on the plaintiff, and she testified that she told him (Gilmore) that her husband was hit by the boys, and that he died from the violence so inflicted.

Thomas W. Coburn said he went to Gilmore's office in seven or eight days after his father's death, and the plaintiff saw Gilmore in a few days after that.

Blank proofs were sent by said Gilmore to Thomas W. Coburn, and by him given to the plaintiff, and were filled out and sent to the defendant October 16, 1886. It was admitted that the proofs were proper and regular in form, and that they were due proofs under the policy.

At the conclusion of the evidence the defendant claimed that the plaintiff could not recover (1) because the plaintiff had not complied with the provisions of condition No. 2 on the back of the policy; (2) that, upon the evidence, the jury would not be justified in finding that the injury from the stone thrown, as aforesaid, which the plaintiff claimed was the cause of Mr. Coburn's death, was not an intentional injury within the meaning of paragraph No. 3 on the back of the policy.

The defendant claimed that immediate written notice, within the meaning of paragraph No. 2 on the back of the policy, was not given to the company; that the only evidence of notice, or of waiver thereof, was contained in cer-

tain letters in evidence. The defendant also claimed that the only notice it had was contained in said letters, and that it was for the court to construe, as a matter of law, whether they amounted to a notice such as was required by the policy.

The plaintiff claimed (1) that the question of notice under condition No. 2 was not open to the defendant under its answer; (2) that the requirements of the condition had been complied with; (3) that there was evidence upon which the jury would be warranted in finding a waiver of the required notice by the defendant. With reference to the intentional injuries, referred to in said condition 3 on the back of the policy, the plaintiff claimed (1) that this question was not open to the defendant under its answer; (2) that there was evidence of the waiver of this condition; (3) that the question should be submitted to the jury, whether the boy, in throwing the stone, intended to hit F. C. Coburn; (4) that intentional injuries meant injuries inflicted by the assured himself, intentionally, or by his procurement, or by the plaintiff directly or indirectly, or by some one interested in the insurance; (5) that it was a question of fact for the jury whether the boy, in throwing the stone, intended not only to hit the assured, but also intended to accomplish the result which was accomplished, and intended, at the time of throwing the stone, to kill said F. C. Coburn.

The court ruled that the question whether the notice required in paragraph 2 on the back of the policy had been given, or, if not given, whether the same had been waived by the defendant, was a matter of fact for the determination of the jury on all the evidence, under proper instructions by the court; and the court further ruled that, assuming that the death of F. C. Coburn was due to the injury caused by the stone thrown in the manner claimed by the plaintiff, the jury would not, upon the evidence, be warranted in finding that the same was not an intentional injury within the meaning of the policy, and that this ground of defense was open to the defendant under the pleadings, and directed the jury to return a verdict for the defendant.

Thereupon the case was reported for the determination of the Supreme Judicial Court.

The nature of the conditions on the policy referred to above, and the material allegations in the pleadings, are set forth in the opinion.

Mr. J. B. Carroll, for plaintiff:

The failure to give immediate written notice to the defendant was matter in avoidance of the plaintiff's claim, and should have been specially pleaded.

Orrell v. Hampden F. Ins. Co. 13 Gray, 481; *Mulry v. Mohawk Valley Ins. Co.* 5 Gray, 541; *Jones Mfg. Co. v. Manufacturers Mut. F. Ins. Co.* 8 Cush. 82; *Pierce v. Cohasset Mut. F. Ins. Co.* 128 Mass. 572.

Immediate notice can mean no more than notice within a reasonable time.

Edwards v. Baltimore F. Ins. Co. 3 Gill, 176, 187; *Providence L. Ins. & I. Co. of Chicago v. Martin*, 32 Md. 310; *Kingsley v. New England Mut. F. Ins. Co.* 8 Cush. 398, 402.

It was a question for the jury whether or not the plaintiff had given the notice required.

Edwards v. Baltimore F. Ins. Co. 3 Gill, 176, 188.

Construing the whole condition together, it means that notice must be given within seven months.

The proofs of loss, being admitted as regular and proper in form, and due proofs under the policy, and the defendant placing its refusal to pay on separate and distinct grounds, waived the necessity of giving immediate notice.

Clark v. New England Mut. F. Ins. Co. 6 Cush. 842; *Underhill v. Agawam Mut. F. Ins. Co.* Id. 440; *Butterworth v. Western Assur. Co.* 182 Mass. 489, 492; *Blake v. Exchange Mut. Ins. Co.* 12 Gray, 265, 271; *Covenant Mut. Ben. Assn. v. Spies*, 1 Ill. (L. ed.) 167, 2 West. Rep. 69, 114 Ill. 463, 468; *Grattan v. Metropolitan Life Ins. Co.* 80 N. Y. 281.

And it was a question of fact for the jury.

Penn. F. Ins. Co. of Phila. v. Kittle, 39 Mich. 51, 54; *Gans v. St. Paul F. & M. Ins. Co.* 43 Wis. 108.

The burden of proving that the deceased died of intentional injuries was upon the defendant, and it should have been specially denied.

Freeman v. Travelers Ins. Co. 2 Mass. (L. ed.) 559, 4 New Eng. Rep. 621, 144 Mass. 572; *Germain v. Brooklyn L. Ins. Co.* 30 Hun, 535, and cases cited.

The right to rely on this provision of the policy was waived by relying on a separate and distinct defense. The defendant relied solely on the fact that the death of F. C. Coburn resulted from natural causes, and thus negated the presumption that he died from intentional injuries.

Barrie v. Earle, 1 Mass. (L. ed.) 776, 3 New Eng. Rep. 112, 143 Mass. 1; *Butterworth v. Western Assur. Co.* 182 Mass. 489, 492; *Blake v. Exchange Mut. Ins. Co.* 12 Gray, 265, 271.

This being an accident policy, death resulting from the intentional acts of others, not designed by the assured, is not excluded from the provisions of the policy.

Schneider v. Provident L. Ins. Co. 24 Wis. 28; *Trew v. Railway Pass. Ins. Co.* 6 H. & N. 839; *Providence L. Ins. & I. Co. of Chicago v. Martin*, 32 Md. 310; *Ripley v. Railway Pass. Ins. Co.* 2 Bigelow, L. & A. Ins. Cas. 788.

The burden was upon the defendant to show, and it was a question of fact whether, the intent existed in the mind of the boy to accomplish the precise result which happened in this case. If, by design, a train is thrown from the track, and passengers killed, it does not prevent the policy attaching, unless it is proved that the death of the passengers was intended. In this case the jury may have found that the boy did not intend to kill Coburn, although he did intend to hit him.

Utter v. Travelers Ins. Co. 1 Mich. (L. ed.) 886, 9 West. Rep. 108.

Mr. E. H. Lathrop, for defendant:

The declaration alleges that the plaintiff's intestate "died through external, violent, and accidental means." This the defendant denied generally and specially. The denial of this allegation made the issue, and was properly alleged in the answer even by a general denial.

Pub. Stat. chap. 167, § 20.

"Immediate notice," as required by the policy contract, is an essential prerequisite to recovery.

Even the agent had no notice from the de-

defendant until after the burial, and that a verbal one. The agent, Gilmore, was not a general agent, and could not waive the notice. Even if he were a general agent, the policy contract expressly stipulates that its conditions are "not waivable by agents."

Little v. Phoenix Ins. Co. 123 Mass. 380; *Lohes v. North American Ins. Co.* 121 Mass. 439; *Kyle v. Commercial Union Assur. Co.* 2 Mass. (L. ed.) 280, 3 New Eng. Rep. 884, 144 Mass. 48.

Immediate notice in this case means reasonable notice under the circumstances.

President L. Ins. & I. Co. v. Baum, 29 Ind. 236; *Railway Pass. Assur. Co. of Hartford v. Burwell*, 44 Ind. 460.

The injury claimed by the plaintiff as the cause of death was "intentional," and the opening of plaintiff's counsel to the jury indicated it as an intentional injury."

The assault, if made as claimed by the plaintiff, was a criminal one, and the law assumes that the party committing an injury by assault entertained the felonious intent. The court, in its ruling, assumed the fact to be true, as claimed by the plaintiff, that the insured came to his death by injuries inflicted by the boy. It was not necessary for the jury to find that the boy intended to murder the assured.

The case differs from *Utter v. Travelers Ins. Co.* 1 Mich. (L. ed.) 886, 9 West. Rep. 108, as the language of the policy in the case at bar is largely different from the case cited.

Devens, J., delivered the opinion of the court:

The policy upon which the plaintiff seeks to recover is known as an accident policy. It insured F. C. Coburn in the sum of \$10 a week against loss of time, not exceeding 26 weeks, "resulting from bodily injuries effected during the term of this insurance through external, violent, and accidental means" which should wholly disable him from transacting the business of his occupation; or, if death should "result from such injuries within ninety days," the defendant agreed to pay to his wife Adelaide the sum of \$2,000. The policy thus written had on the back certain "agreements and conditions under which this policy is issued and accepted." The declaration of the plaintiff sets forth a contract made by the policy, alleges the death of F. C. Coburn from "bodily injury effected through external, violent, and accidental means," which injury occasioned his death within ninety days thereafter. It further alleges that due proof of such death and injuries was given to said company. The answer of defendant denies every material allegation of plaintiff's declaration, and alleges that if the death of the assured shall be proved to have occurred within the term of the policy, "he did not die in consequence of external, violent, or accidental means."

The second of the "agreements and conditions" provided: "Immediate written notice is to be given said company, at Hartford, of any accident or injury for which claim is made, with full particulars thereof and full name and address of the insured. Unless affirmative proof of death or duration of disability is so furnished within seven months from the time of such accident, all claims based thereon shall be

forfeited to the company." These agreements and conditions concluded with a "notice" that in case of the death or disabling injury of the assured, notice, with full particulars, etc., "should be given immediately to Homer G. Gilmore, Agent, 425 Main Street, Springfield, Mass."

That the full proofs were given to the company within seven months after the injury was conceded, but the defendant contended that the immediate written notice required by the clause of the conditions above quoted had not been given. The first question presented is whether this defense is open under the answer.

Immediate notice was not a fact which the plaintiff was compelled to allege and prove in order to maintain his case; the failure to give it was a matter which, if available as a defense, was so in defeat or avoidance of the plaintiff's claim. When a defendant intends to rest his defense upon a fact which is not included in the allegations necessary to the support of the plaintiff's case, he must set it out in precise terms in the answer. *Mulry v. Mohawk Valley Ins. Co.* 5 Gray, 541; *Orrell v. Hampden F. Ins. Co.* 13 Gray, 431; *Pierce v. Cohasset Mut. F. Ins. Co.* 123 Mass. 572.

The presiding judge, by ruling that the question, whether the notice required in paragraph 3 had been given, or, if not given, whether the same had been waived, was for the determination of the jury, and, by directing a verdict for the defendant, in substance ruled, against the request of the plaintiff, that this defense was open, and further that there was no evidence offered by plaintiff, sufficient to go to the jury, that immediate notice had been given. The effect of this ruling was to place upon the plaintiff the burden of negating by proof that which was matter in avoidance of the action, and which had not been pleaded by defendant. This was, we think, erroneous. It would not be profitable now to consider whether there was evidence that the condition as to immediate written notice had been complied with, or that this condition had been waived.

It is further to be considered whether it was correctly ruled at the trial that the defense that the injury occasioned to Coburn was intentional was open under the answer, and further that there was no evidence upon which the jury would be warranted in finding that the same was not intentional.

The third paragraph of the conditions on the back of the policy commences as follows: "This insurance does not cover disappearances," and enumerates a large number of injuries, and death from a variety of causes, as not covered by it, including "intentional injuries inflicted by the insured or any other person." The answer denying that the death of Coburn was occasioned "by external, violent, or accidental means" makes no averment that he died from intentional injuries, and leaves it to the fair inference that the defense relied on was that the death of Coburn resulted from natural causes. If the defense of intentional injury is now open, it is because the plaintiff in his declaration should have negated every cause of death enumerated in paragraph 3, and have been ready to prove the same in order to establish his cause of action. Stipulations added to a principal contract, which are intended to avoid the

defendant's promise by way of defeasance or excuse, must be pleaded in defense and must be sustained by evidence. They are in the nature of provisos. Exceptions which leave the defendant liable to perform that which remains after the part excepted is taken away are to be negatived, and it is not always easy to determine to which class a stipulation belongs. In the case at bar the paragraph 3 states that the insurance does not cover certain causes of death named; but the nature and character of a stipulation is to be considered as well as the form of it, and the use of this phrase, "does not cover," is by no means decisive of its character. *Freeman v. Travelers Ins. Co.* 2 Mass. (L. ed.) 554, 4 New Eng. Rep. 621, 144 Mass. 572.

In *Sohier v. Norwich F. Ins. Co.* 11 Allen, 386, this clause was inserted: "This policy not to cover any loss which may originate in the theatre proper," and it was held that it was for the plaintiff to show a loss not originating in the theatre proper. But the clause was there found written in between the statement of what was insured and the promise to pay in case of loss, in close connection with, and qualification of, the description of the subject-matter of the insurance. Certain provisos were also set forth in a different part of the instrument, and the clause was on that account also deemed a direct limitation of the risks against which insurance was effected.

In the case at bar the policy itself is general, and insures against death or injury to Coburn by external, violent, and accidental means. It is made subject to certain agreements and conditions annexed thereto. The occurrence of these conditions is to operate to defeat the policy, and thus should be shown by the party relying upon them. If the rule of pleading as stated in *Commonwealth v. Hart*, 11 Cush. 190-194, be applied, it will be seen that intentional injury must be held to be a condition by reason of which the policy is not applicable. When operative it has the effect of taking out of the general clause that which otherwise is included in it. The fair construction of this policy, with its agreements and conditions, is that the defendant insures Coburn against death or injury from external, violent, and accidental causes, provided that such death or injury does not proceed from those causes enumerated in paragraph 3. *Freeman v. Travelers Ins. Co. supra*. We are therefore of opinion that the defense of intentional injury was not open to the defendant, and that it was erroneous, also, to place the burden of negativing this as a cause of death upon the plaintiff.

On account of the different posture, upon the evidence, which the case may hereafter assume, should the defendant be permitted to amend his answer and again proceed to trial, it would not be desirable now to consider the construction of the phrase "intentional injury" within the meaning of the policy, which was somewhat discussed in the argument.

Verdict set aside.

COMMONWEALTH of Massachusetts

v.

Simon SAVERY.

1. One who keeps liquor for sale is

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bound to know the kind and quality of the article he so keeps,—here, whether beer was lager beer or 3 per cent beer.

2. If a person keeps beer containing alcohol for sale, without a license, intending that the beer shall not contain more than 3 per cent of alcohol, and by mistake he buys beer for sale which contains more than the amount of alcohol, he may be said to keep this beer with the intention of selling it, unless his intention is that the quantity of alcohol in the beer shall be ascertained by examination of analysis before it is offered or exposed for sale.

(Worcester—Filed October 21, 1887.)

ON defendant's exceptions. *Overruled.*
Complaint for keeping liquor with intent to sell contrary to law.

The case was tried in the Superior Court, before Knowlton, J., and a jury. The government introduced witnesses who testified that they found upon the defendant's premises, in different cases, beer in bottles known as lager-beer bottles, and four bottles of this beer were taken by the officers, one from each case. It was agreed that in one of these bottles so taken the beer contained more than 3 per cent alcohol per volume at 60° Fahrenheit. The contents of the other bottles were not analyzed. The defendant offered to show that when he purchased this beer he ordered what is known as 3 per cent beer, and did not order lager beer; that he did not know that any lager beer was upon his premises, and that the case containing the lager beer or beer that contained more than 3 per cent alcohol per volume was brought there by the person of whom he ordered the 3 per cent beer, and was left by mistake; that he purchased this beer in good faith for 3 per cent beer, and if he had found, when he opened the beer, that it was lager beer, he should not have sold it.

The defendant then asked the court to give the following instructions to the jury:

1. If you find that the defendant ordered in good faith a beer which the law permits him to sell, known as 3 per cent beer, and that he did not order lager beer, and that the case of lager was left there at his place by mistake on the part of the person delivering it, and through no fault of his, and that the defendant honestly believed that he had nothing except 3 per cent beer upon his premises for sale, and did not intend to sell anything which he had not a right to sell under the law, then he should not be found guilty.

2. If the jury shall find that the defendant believed that he had not any lager beer in his possession to sell, but did believe and had good reason to believe that the beer which he had to sell was not lager beer, but a beer known in the market as 3 per cent beer, which he had a right to sell under the law, and that he did not intend to sell any lager beer, and did not know that he had any lager beer in his possession to sell,—then he cannot be convicted under this complaint.

3. Before you can convict the defendant under this complaint, you must be satisfied, upon

the evidence, that the defendant knew or had good reason to know that the beer which he had in his possession to sell was a beer which was prohibited by law to sell.

4. If the jury shall find that the lager beer found with the defendant was there by mistake, and that the defendant did not know it was lager beer, and did not intend to sell the same when the opportunity presented itself to him to know the true character of the beer, and when he did know the true nature of it, and you find that he would have found out whether it was lager or not when he attempted to sell it, then he cannot be convicted under this complaint.

Upon the evidence introduced and offered, the court declined to give any of said instructions in the form in which they were requested, and ruled that, in order to convict the defendant, it must be proved that at the time referred to he kept for sale intoxicating liquor,—that is, that he kept in his place of business liquor which was in fact intoxicating, intending to sell it as he had opportunity; and if that was proved it would be no defense for the defendant to show that he was mistaken as to the kind or quality of liquor, or that he ordered or bought it for liquor which was not intoxicating, and believed that it was not intoxicating, or that the person who delivered it was mistaken about its quality.

The jury returned a verdict of guilty.

To the above rulings and refusals to rule the defendant excepted.

Mr. John B. Thayer, for defendant:

The ruling given did not permit the jury to find the purpose for which the defendant had the beer.

Commonwealth v. Goodman, 97 Mass. 117;

Commonwealth v. Boynton, 2 Allen, 160.

Defendant admitted that sales had been made, and his only defense was that he believed the article sold not to be intoxicating. In the case at bar there was no evidence that there had ever been a sale out of these cases; the defendant simply had them in his possession, and offered to show that he was to test the beer before he should sell it, and, if it proved to be such as he was not authorized to sell, not to sell it.

Mr. Andrew J. Waterman, Atty-Gen., for the Commonwealth:

The presiding judge properly refused to give the instructions asked for by the defendant, and the instructions given upon the question of intent were clearly correct. The defendant was bound to know the facts in the case and obey the law, at his peril. Such is the rule where acts which are not *mala in se* are made *mala prohibita*, and not because of their moral turpitude or the criminal intent with which they are committed.

Commonwealth v. Goodman, 97 Mass. 119;

Commonwealth v. Boynton, 2 Allen, 160; *Commonwealth v. Hallett*, 103 Mass. 452; *Commonwealth v. Raymond*, 97 Mass. 569; *Commonwealth v. Julius*, 1 Mass. (L. ed.) 828, 3 New Eng. Rep. 206, 143 Mass. 132; *Commonwealth v. Barnes*, 188 Mass. 511.

Field, J., delivered the opinion of the court:

At the argument in this court, the counsel for the defendant conceded that, if the defendant

kept the beer with the intention of selling it, it was not a defense to show that the defendant believed that the beer contained not more than 3 per centum of alcohol. The keeping of intoxicating liquor for sale without a license is prohibited from consideration of public policy, and the defendant was bound to know the kind and quality of the articles he kept for sale. *Commonwealth v. Goodman*, 97 Mass. 117; *Commonwealth v. Boynton*, 2 Allen, 160; *Commonwealth v. Hallett*, 103 Mass. 452; *Commonwealth v. Raymond*, 97 Mass. 567. The ruling of the court was in accordance with this view of the law, and the first three instructions asked for by the defendant ought not to have been given. There is more difficulty in considering the fourth request.

The counsel for the defendant contends that if the defendant kept the beer, not with the absolute intention of selling it, but with the intention of first testing or analyzing it in order to ascertain the amount of alcohol it contained, and then of offering it for sale only if it was found to contain not more than 3 per cent of alcohol, he could not be convicted. It is unnecessary to determine the correctness of this contention. The fourth request is not predicated upon the assumption that the defendant actually had the intention of testing or analyzing the beer before offering it for sale, but upon the assumption that he would have found out that the beer was lager beer before he attempted to sell it, and that if he had found this out he would not sell it. It is implied in the exceptions that what is called 3 per cent beer is different from lager beer, but it is not found or implied that they differ except in the amount of alcohol they respectively contain. It does not appear that they are distinguishable in appearance by persons having no special knowledge of beer, or that one is anything more than a weaker solution of the other. It may be that if a person, for example, keeps soda water in bottles for sale, and if by mistake a case of lager beer instead of soda water has been left at his place of business by the person of whom he has ordered soda water, he could not be convicted of keeping lager beer for sale, if he never intended to sell lager beer, and if the mistake would have been detected before the lager beer was offered for sale, and the beer would not have been sold by him. Soda water and lager beer are articles of different kinds, easily distinguishable at sight, and a person may well intend to deal in one and not in the other. If, however, a person keeps beer containing alcohol for sale, without a license, intending that the beer shall not contain more than 3 per cent of alcohol, and by mistake he buys beer for sale which contains more than this amount of alcohol, he may be said to keep this beer with the intention of selling it, unless his intention is that the quantity of alcohol in the beer shall be ascertained by examination or analysis before it is offered or exposed for sale. This is merely a mistake in the quality of the article he intends to sell, which may or may not be discovered before he sells it.

The defendant testified "that he purchased this beer in good faith for 3 per cent beer, and, if he had found when he opened the beer that it was lager beer, he should not have sold it;" and that the beer found on his premises was

left there by mistake. The nature of the mistake does not appear, unless it was the mistaken belief on the part of the buyer, and perhaps the seller, that the beer did not contain more than 3 per cent of alcohol. Upon this evidence, the jury were not required to speculate upon the probability of the defendant's finding out that the beer contained more than 3 per cent of alcohol before he sold it, in the absence of evidence that he actually intended to test the beer before he offered it for sale.

Exceptions overruled.

COMMONWEALTH

v.

Amos INGERSOLL *et al.*

1. **Witness purchased liquor, and procured liquor to be purchased, of defendant, for the purpose of making complaints for violation of the liquor law, under Pub. Stat. chap. 100. Refusal of the trial judge to instruct the jury that they "are to look upon the witness with the greatest caution and distrust," sustained.**
2. **Held, further, that the weight to be given to the testimony of the witnesses of the government was for the jury.**

(Essex—Filed November 2, 1887.)

ON defendants' exceptions. *Overruled.*
Complaint to the Police Court of the City of Gloucester, for maintaining a building used for the illegal sale or keeping of intoxicating liquors. At the trial in the Superior Court for Essex County, before Hammond, J., the Commonwealth called as a witness one Thompson, who testified that he lived in Watertown, Mass.; that he had been hired by a person in said Watertown to go to said Gloucester, and there make purchase of intoxicating liquors, and obtain testimony for the purpose of making complaints for violation of the liquor law; that, in pursuance of said purpose, he went to said Gloucester, and that while there he purchased, in the building claimed by the Commonwealth to have been kept and maintained as aforesaid, intoxicating liquors; and that he obtained from another person in the defendants' employ certain intoxicating liquor by purchase. He testified, further, that he did this for the purpose of prosecuting said defendants, under Pub. Stat. chap. 100. The defendants requested the court to instruct the jury as follows: "The jury are to look upon the testimony of the witness Thompson with the greatest caution and distrust." The court declined to give said request, but instructed the jury in reference to the witness Thompson as follows: "Judge him from his appearance, the plausibility of his story, and his relation to the case; judge of him as you would any other witness. See if he has any motive to falsify. Look at him in all his relations to the case, and say whether, upon the whole, you believe his story." The jury returned a verdict of guilty, and the defendants alleged exceptions.

Mr. F. L. Evans, for defendants:

The witness Thompson procured the com-

mission of the crime with which the defendants were charged. Such a person is not an accomplice.

Commonwealth v. Willard, 22 Pick. 476.

But in view of the acts of the witness as they appeared upon the trial, and in view of the purpose for which such acts were done, it is submitted that the defendants were entitled to the instruction substantially as requested. The instructions given were not sufficiently favorable to the defendants.

Commonwealth v. Putnam, 3 Allen, 301.

They were, in substance, to judge of the witness as they would of any other. Under these instructions the jury must have attached too great weight to the testimony of this witness. In the case of *Commonwealth v. Downing*, 4 Gray, 29, the court was asked to rule "that a witness who would come into court, and testify that he had purchased and procured another person to commit a crime, for the purpose of prosecuting a person so hired and procured to offend, was not a credible witness, and the jury ought not to found a conviction upon such testimony." The instruction was refused, and the court held such refusal to be correct; but added that an instruction to the effect that such testimony should be received with the greatest caution and distrust might well have been given.

In the case of *Commonwealth v. Whitcomb*, 13 Gray, 126, the defendant requested an instruction similar to that asked by the defendants in this case. In that case, however, there was nothing in the facts disclosed which called for such a ruling. The instruction requested was in accordance with that given in *Commonwealth v. Putnam*, *supra*.

Mr. A. J. Waterman, Atty-Gen., for the Commonwealth.

By the Court:

The court was not required to give the instructions requested by the defendants. The weight to be given to the testimony of the witnesses of the government was for the jury, and the instructions given were sufficiently favorable to the defendants. *Commonwealth v. Trainor*, 123 Mass. 414; *Commonwealth v. Mason*, 135 Mass. 555.

Exceptions overruled.

Charles W. WOOD

v.

William T. BOYD *et al.*

1. **A clause in a deed, as follows: "Reserving to the owner and his assigns of the adjoining estate the right of a passageway from the dwelling-house on said estate to the turnpike aforesaid, and through the premises, as the same is now enjoyed;" and a clause in a subsequent deed as follows: "Reserving to the owner of the estate and others adjoining on the south a right of passageway over the granted premises, as specified in the first-mentioned deed,"—operated as exceptions and not as reservations.**

2. **A reservation in a deed vests in the**

grantor some new right or interest not before existing in him. It cannot vest any right in a stranger to the deed.

3. It operates by way of an implied grant; and, if it does not contain words of inheritance, will give only an estate for the life of the grantor.

4. The operation of an exception is to retain in the grantor some portion of his former estate, which, by the exception, is taken out of or excluded from the grant; whatever is thus excepted remains in him as of his former title.

5. The use of the word "reserving" is of little importance where the plain purpose is not to reserve any new right, but to except rights of way existing, by prior grants, in third persons.

6. The "granted premises," which are covenanted to be free from incumbrances, is not the land in fee, but the fee diminished by existing easements which are excepted from the grant.

(Worcester—Filed October 20, 1887.)

ON plaintiff's exceptions. *Overruled.*

Action to recover damages for breaches of covenant against incumbrances, and of the covenant of seisin and right to convey. The incumbrance and breach of the covenant of seisin was claimed to be a right of way over the lands conveyed by defendant to plaintiff, existing in favor of third persons; and the question was whether the right of way was excepted from the conveyance. The jury rendered a verdict for defendants. Plaintiff excepted to the ruling of the court.

The facts appear in the opinion.

Mr. Burton W. Potter, for plaintiff:

The language relating to the passageway imports a reservation, and the word "heir" not being used, only a life estate was thereby created, which terminated at the death of John F. Clark or of Edward Earle.

By the conveyance from Estabrook to Miller, the grantee took the estate to his own use, and not in trust, and the want of words of limitation to heirs limited the right of a passageway to the life of John F. Clark, the owner of the adjoining estate.

Bean v. French, 1 Mass. (L. ed.) 57, 1 New Eng. Rep. 213, 140 Mass. 230; *Ashcroft v. Eastern R. R. Co.* 126 Mass. 196; *Buffum v. Hutchinson*, 1 Allen, 60; *Sedgwick v. Laflin*, 10 Allen, 430.

But whether the language constitute a reservation or an exception, it does not relate to the passageway in question. Clark had been the owner of the "adjoining estate" for over three years, and afterwards he conveyed the same, reserving any right of way, to Rodney A. Miller, from whom the defendants derived their title to the land conveyed by them to the plaintiff; and thus the right of way reserved to him, as "the owner and his assigns of the adjoining estate," was extinguished or merged in the owner of the Estabrook place.

Bitter v. Parker, 8 Cush. 145; *Atwater v. Bodfish*, 11 Gray, 150.

But whether it was merged or extinguished, 2 Mass.

it terminated upon his death, and was separate and distinct from the right of way reserved to "Heard, his heirs and assigns," in the deed from Heard to Estabrook, in August, 1836, and which has passed by mesne conveyances to Ann B. Earle, who now owns and enjoys the same.

Parol evidence cannot be admitted to show that the grantee actually knew of the existence of an incumbrance which was not excepted under the covenant.

Spurr v. Andrew, 6 Allen, 420.

And likewise the record of a prior incumbrance cannot be used to relieve the grantor from his express covenant against incumbrances. Even if plaintiff had searched the records and found additional rights of way, he would still be entitled legally to hold the defendants responsible on their covenants to him.

Estabrook v. Smith, 6 Gray, 572; *Harlow v. Thomas*, 15 Pick. 66.

Mr. Frank P. Goulding, for defendants:

I. The words in Estabrook's deed to Miller, "reserving to the owner and his assigns of the adjoining estate, formerly of Heard, the right of passageway from the dwelling-house on said estate to the turnpike aforesaid, and through the premises as the same is now enjoyed, being the same estate conveyed to me by deed from Nathan Heard, bearing date August 19, 1836," etc., are an exception from the general words of the grant of the easement upon the premises created by the Heard deed, and not a new estate then reserved and vested in a third person; for:

1. "If created by reservation, it must be to the grantor himself."

Washb. Easem. 4th ed. 34; Co. Litt. 1, 47 a; Kent, Com. 11th ed. 468, note 4.

2. The definite reference as to the "right of passageway * * * and through the premises as the same is now enjoyed," shows that the subject is a thing *in esse*, and not a new creation.

3. The words "adjoining estate" are not to be strictly construed, with reference to the division of the Heard estate which Clark had made a few weeks before by his deed to Earle.

Those words are explained by the words "formerly of Heard," and, the immediate reference to the deed of Heard to the grantor and to the dwelling-house being taken into account, it becomes clear that the meaning is "the whole estate which was formerly of Heard, and which adjoined the granted estate."

4. It is extremely unlikely that, instead of describing an easement which his estate was already subject to, and excepting it from the grant, Estabrook intended to create a new easement over the same line, and to grant it as a life estate. Such a construction violates "the broad rule of construction of instruments, viz., the intention of the parties." It also ignores "the connection of the instrument with other instruments to which it refers, * * * and the state of the title."

Parker, Ch. J., in *Cutler v. Tufts*, 3 Pick. 272.

The owner of the adjoining estate would be unlikely to accept such a limited easement in lieu of his estate of inheritance in the easement existing.

5. The use of the word "reserving" is not decisive or important.

Washb. Real Prop. 4th ed. 441; *Doe v. Lock*,

4 Nev. & Man. 807; Shaw, *Ch. J.*, in *Hurd v. Curtis*, 7 Met. 94, 110; *Cutler v. Tufts*, *supra*; *Stockbridge Iron Co. v. Hudson Iron Co.* 107 Mass. 290, 321; *Farnum v. Platt*, 8 Pick. 339, *Ashcroft v. Eastern R. R. Co.* 126 Mass. 196.

6. It was not necessary to describe the quantity of the estate in the existing easement in order to except it; and the use of the word "heirs," which would have been essential in creating an inheritable interest, was wholly unnecessary.

II. The deed of the defendants to the plaintiff sufficiently and accurately describes the same easement created by Heard and excepted by Estabrook, and excepts it from the general words of the grant.

1. The reference to the Estabrook deed to Miller for a specification of what right of passageway was "reserved," renders the description certain.

2. The words "owner of the estate and others adjoining on the south" must be read "owner of the estate adjoining on the south and others."

The words "and others" can have no sensible meaning otherwise, unless read parenthetically.

8. There is no ambiguity in the language of the exception when it is applied to the estates as they existed.

The words "and others" can refer only to Ann B. Earle, and the description sufficiently indicates that the entire estate of easement created by the Heard deed to Estabrook was the subject of the exception.

Morton, Ch. J., delivered the opinion of the court:

The plaintiff's lot was formerly a part of a larger lot owned by one Heard. In 1886 Heard conveyed the plaintiff's lot to Estabrook by a deed containing the following clause: "Reserving to said Heard, his heirs and assigns, the right of passageway from his dwelling-house to the turnpike aforesaid, and through the premises, as the same is now enjoyed." This right of way was conveyed by deed of Heard, and several mesne conveyances, to Ann B. Earle, who now owns and occupies the house formerly owned by Heard. It is this right of way in favor of said Earle which the plaintiff claims is an incumbrance on his estate, and within the covenant of his deed from the defendant.

His deed contains a covenant that the granted premises are free from all incumbrances, and the question in this case is, What are the granted premises? This deed, after the description of the land by metes and bounds, contains this clause: "reserving to the owner of the estate and others adjoining on the south a right of passageway over the within granted premises as specified in deed of James Estabrook to Rodney Miller, dated November 22, 1889." We think the purpose and effect of this clause was to except out of the grant to the plaintiff any rights to use the passageway specified in the deed of Estabrook belonging to any of the owners of the estate formerly of Heard. The deed of Estabrook to Miller contains this clause: "reserving to the owner and his assigns of the adjoining estate, formerly of said Heard, the right of a passageway from the dwelling-house on said estate to the turnpike aforesaid, and through

the premises, as the same is now enjoyed." Prior to this deed Heard had conveyed to one Clark, his heirs and assigns, all his estate south of the plaintiff's lot, together with "the right of a passageway from the dwelling-house on the estate to the turnpike," over the estate conveyed to Estabrook, "meaning to convey the passageway as it is now enjoyed;" and there was a defined existing passageway, the same as is now used.

We are of opinion that both the above-cited clauses, in the deed of Estabrook to Miller and in the deed of the defendant to the plaintiff, operated as exceptions and not as reservations.

A reservation in a deed vests in the grantor some new right or interest not before existing in him. It cannot vest any right in a stranger to the deed. *Murphy v. Lee*, 2 Mass. (L. ed.) 392, 4 New Eng. Rep. 202, 144 Mass. 371. It operates by way of an implied grant, and, if it does not contain words of inheritance, will give only an estate for the life of the grantor. The operation of an exception is to retain in the grantor some portion of his former estate, which, by the exception, is taken out of or excluded from the grant; and whatever is thus excepted remains in him as of his former title, because it is not granted. *Ashcroft v. Eastern R. R. Co.* 126 Mass. 196.

In both clauses the word "reserving" is used, but this is of little importance. The plain purpose of the parties was not to reserve any new right which should vest in the grantor, but to recognize and except from the grant rights of way existing, by prior grants, in third persons, who were not parties to the deed. Nothing is reserved to the grantor in either deed; the terms used in both are "reserved to the owner of" the adjoining estate and others. Both clauses are of no effect unless they are held to be exceptions.

Construing the clause in the plaintiff's deed as an exception, it qualifies and limits the estate granted. "The granted premises" which are covenanted to be free from incumbrances, is not the land in fee but the fee diminished by existing easements, which are excepted out of the grant. Such easements are not incumbrances upon "the granted premises." They are excepted as they existed,—that is, as perpetual easements,—and there is no ground for contending that they terminated at the death of Heard or Clark.

Exceptions overruled.

Samuel E. SIMANOVICH

2.

Minard WOOD.

1. In an action of contract on a covenant of warranty against incumbrances, in a deed from the defendant to the plaintiff, the defendant cannot prove by parol testimony that, at the time the deed was given, and as a part of the consideration, the plaintiff agreed to pay the incumbrance.
2. It is not permissible to contradict or vary by parol a written covenant, under the guise of showing the consideration.

(Worcester—Filed October 20, 1887.)

ON defendant's exceptions. *Overruled.*

Action of contract on covenant of warranty against incumbrances in deed from defendant to plaintiff, dated July 29, 1886.

The facts sufficiently appear in the opinion.

Mr. Joseph Mason, for defendant:

The consideration clause in a deed is not within the rule excluding parol evidence in contradiction of a writing.

Stackpole v. Robbins, 47 Barb. 212, 219, and cases cited; *Bullard v. Briggs*, 7 Pick. 538; *Clapp v. Tirrell*, 30 Pick. 247, 250; *Bassett v. Bassett*, 55 Me. 127; *McCrea v. Purmort*, 16 Wend. 460, 474, 475.

The promise of the plaintiff to pay the assessment was a promise made for a good consideration.

Proble v. Baldwin, 6 Cush. 549-555; *Brackett v. Evans*, 1 Cush. 79; *Carr v. Dooley*, 119 Mass. 284; *McCormick v. Cheevers*, 124 Mass. 262.

The plaintiff's promise to pay the assessment is not within the Statute of Frauds. A party who receives a grant of land, on his promise to pay for it, cannot avoid payment by showing that his promise was not in writing.

Williams v. Scott, 17 Mass. 249-257; *Weld v. Nichols*, 17 Pick. 588, 589; *Brackett v. Evans*, *Proble v. Baldwin*, and *Clapp v. Tirrell*, *supra*; 1 Greenl. Ev. §§ 26, 28, note; 8 Washb. Real Prop. 399.

A defense in this action is the proper remedy of the defendant. He might have paid this assessment and sued the plaintiff for the amount of it. This is the better course as it avoids circuitry of action.

Carr v. Dooley, and *McCormick v. Cheevers*, *supra*; Rawle, Cov. 4th ed. tit. 258, note; 8 Washb. Real Prop. 5th ed. 398-400.

In the trial in the district court the plaintiff cited the case of *Flynn v. Bourneuf*, 1 Mass. (L. ed.) 895, 3 New Eng. Rep. 343, 148 Mass. 277, and will probably rely on it before this court. The facts in that case are materially different from the case at bar. In that case a third party is concerned. In that case there was an "independent and distinct agreement." The consideration of the promise was the execution and delivery of the two deeds. It was no part of the consideration of either deed, or of the contract of sale to the plaintiff.

Mr. Rockwood Hoar, for plaintiff:

The defendant cannot limit, restrict, or control the scope of his covenant against all incumbrances by showing that it was orally agreed that an incumbrance existing at the time of the deed should be assumed by the grantee.

This is true whether the agreement to assume is claimed to have been independent and distinct, or to have been a part of the consideration for the conveyance of the land.

Flynn v. Bourneuf, 1 Mass. (L. ed.) 895, 3 New Eng. Rep. 343, 148 Mass. 277; *Howe v. Walker*, 4 Gray, 318.

The evidence is not offered or pleaded by defendant by way of equitable defense, under Stat. 1883, chap. 228, § 14. The rule of law established in the above-cited cases must prevail in equity.

Glass v. Hulbert, 102 Mass. 24.

3 MASS.

Morton, Ch. J., delivered the opinion of the court:

This is an action of contract on a covenant of warranty against incumbrances in a deed from the defendant to the plaintiff. It is admitted that the unpaid assessment upon the land was an incumbrance within the covenant. *Carr v. Dooley*, 119 Mass. 294.

The defendant offered to prove by parol testimony that, at the time the deed was given, and as a part of the consideration, the plaintiff promised to pay said assessment. This evidence was rightly rejected. It directly varied and contradicted the written contract of the defendant. The covenant is against all incumbrances. The evidence offered was for the purpose of showing an oral agreement that the incumbrance created by the assessment was not within the covenant.

While for some purposes it is competent to show what the real consideration of a deed is, a party cannot, under the guise of showing what the consideration is, prove an oral agreement, either antecedent to or contemporaneous with the deed, which will cut down or vary the stipulations of his written covenant. This would violate the well-settled rule of law which will not permit a written contract to be varied or controlled by such parol testimony. *Howe v. Walker*, 4 Gray, 318; *Spurr v. Andrews*, 6 Allen, 420; *Flynn v. Bourneuf*, 1 Mass. (L. ed.) 895, 3 New Eng. Rep. 343, 148 Mass. 277.

Exceptions overruled.

Eckford W. TYLER

v.

ODD FELLOWS MUTUAL RELIEF ASSOCIATION of Connecticut River Valley et al.

1. Where a wife was designated by her husband, who had become a member of the defendant association, as his beneficiary, and thereby became entitled, under defendant's Act of incorporation and its by-laws, to receive, after his death, the sum of \$1,000, and subsequently obtained a divorce from him, she thereby lost her rights as his beneficiary.
2. To make such a designation available after the death of the member, there must then be a relation to the deceased such as is contemplated by the agreement of association and the by-laws relating to payment.
3. The attempted designation to a sister of the deceased, who was not a member of his family or dependent upon him, is invalid.
4. The only son and heir at law of the deceased member, who was designated by his father as his beneficiary of a portion of the fund, is entitled as such heir at law, or as such designated beneficiary, to the entire fund, notwithstanding such attempted designation to said sister.
5. A receipt executed by the guardian of

plaintiff, who was a minor, for a portion of the fund, in full of all demands against the association, is without consideration, and ineffectual as a bar to his claim to the whole fund.

6. The plaintiff is not stopped from recovering the whole fund by the conduct of his guardian in accepting payment to himself of part of the fund, and signing and returning such receipt to the association, at its suggestion, although such association paid a portion of said fund to another claimant.

(Hampden—Filed October 20, 1887.)

BILL in equity against above-named association and Ruetta A. Massure, to compel said association to pay a balance of the benefit due upon the death of L. Eckford Tyler, who at the time held a certificate of membership therein.

The case was heard in the Superior Court before Dewey, J.; and, at the request of the parties, all questions of law therein were reserved for the consideration of this court.

The following facts and reservations were found:

The Odd Fellows Mutual Relief Association of the Connecticut River Valley is a corporation established and existing for the purpose of defraying the expenses of the sickness and burial of its deceased members, and of rendering pecuniary aid to the families of deceased members, or their heirs. This association was in existence on, and prior to, May 31, 1873, and was duly incorporated February 3, 1876.

On May 31, 1873, one L. Eckford Tyler, then of Chicopee, in the county of Hampden, became a member of this association. Said Tyler also became a member of said association in "Class C." He continued to be and was a member of said Odd Fellows Mutual Relief Association of the Connecticut River Valley, under both said certificates, and entitled to all the rights of said membership, at the time of his death, which took place June 16, 1885. The plaintiff was the only child and heir at law of said L. Eckford Tyler, at the time of his decease, and is a minor.

The defendant Ruetta A. Massure is the mother of the plaintiff, and was the lawful wife of said L. Eckford Tyler at the time he became a member of said association, and at the date of the two certificates of membership above named. A few months before the death of said L. Eckford Tyler, said Ruetta A. obtained a decree of divorce from said L. Eckford, in a court of competent jurisdiction in the State of Connecticut.

The by-laws of the defendant corporation, art. 7, § 2, provide that, "upon the death of a member of either class, each surviving member of said class shall be assessed \$1." The plaintiff says that, upon the death of said L. Eckford Tyler, such an assessment was made, and the money was paid to said association in trust for, and to be paid to, the person or persons legally entitled thereto.

Said by-laws, art. 9, § 1, provide that, "when a member dies, the sum of \$1,000 shall be paid for each class to which he belongs (provided the class to which he belongs had a member

ship of one thousand), from the treasury, as follows: "The benefit shall be applied to the payment of the expenses of the funeral and last sickness of the deceased, unless otherwise paid."

Plaintiff says that each class to which said L. Eckford Tyler belonged had a membership of at least one thousand. (He also says that the expenses of the last sickness and funeral of said L. Eckford have been paid.)

Said by-laws, art. 9, § 2, also provide: "The balance shall be paid to the person or persons designated by the member, in his application for membership, or last legal assignment, provided such person or persons are heirs or members of the decedent's family." Said section also provides: "If either of the persons so designated have died, the sum which would have been paid to said decedent's assignee, had he been living at the time of the member's death, shall be payable to the widow of the designator, for the use of herself and his minor children, if any; or if he leave no widow, it shall be payable to a guardian or trustee appointed for said children."

The defendant Ruetta A. Massure was married to said L. Eckford Tyler on April 24, 1865, and this relation continued till the divorce referred to in the bill, which was granted on February 4, 1885. Having no knowledge that said L. Eckford had made any change in the original designation of the beneficiaries made by him to the defendant corporation, she, from time to time, paid out of money furnished by him to her, for her support, assessments made by said corporation upon him to the amount of \$110.80; and of this sum, one payment, of \$1, was made after the divorce. The evidence on this point was received, subject to the objection of the defendant corporation.

Since 1876 there has been no action by the defendant corporation, adopting or modifying by-laws, that would affect the rights of the parties to this suit. The association, prior to its incorporation, had in all material respects the same by-laws as those adopted by the corporation.

When said L. Eckford Tyler joined the association in May, 1873, he made application in writing, and received a certificate of membership. Under this certificate, the said L. Eckford became a member of "Class A" in said association.

The "Mrs. Etta A. Tyler," mentioned in said application as the beneficiary, was meant for his then wife, one of the defendants in this suit, whose full name was then Ruetta A. Tyler.

After the association was incorporated in 1876, such proceedings were had that those who at that time were members in good standing in the association, among whom was said L. Eckford Tyler, became members of the corporation with all their rights unimpaired, and the rights and obligations of the association were transferred to and assumed by the corporation.

On January 16, 1878, said L. Eckford Tyler became a member of Class C in the defendant corporation, and received a certificate of said membership.

On July 16, 1880, the said L. Eckford Tyler sought to make a new designation of the beneficiary in Class C, changing it from his son, the plaintiff, who was designated as sole beneficiary

the original application, and making his share, one of the defendants, beneficiary for tenths of the sum that might become payable, and the said son eight tenths; and for that purpose said L. Eckford Tyler then filed with said defendant corporation a writing, called an "order for change of assignment."

For some time prior to his death, the said L. Eckford Tyler had resided in the city of Boston, in this State. In the spring of 1885, becoming ill, he was for about two months an inmate of a hospital there, and then, withdrawn from the hospital, he went to the home of his sister, Emily Jane Cook, in Preston, in the State of Connecticut, and remained there about six weeks, till his death.

The said Emily Jane Cook was then, and had for some time been, a married woman, living with her husband, and she was not during that time, nor was she at any time, so far as appeared, dependent on the said L. Eckford Tyler, nor a member of his family.

While said L. Eckford Tyler was at the home of his said sister, as above stated, and shortly before his death, namely, on or about June 10, 1885, he sought to change the beneficiary in said A, by substituting for said Ruetta A. Tyler, formerly his wife, the said sister, Emily Jane Cook, and for that purpose filed with said defendant corporation an "order for change of assignment," a copy whereof, marked "B," is annexed to the answer of the defendant corporation, and may be referred to. And at the same time he sought to change the beneficiary in said C, making the plaintiff a beneficiary one half, and the said sister a beneficiary the other half that might become due in said class; and for that purpose filed with said defendant corporation an "order for change of assignment."

It appeared that record was kept in a book, of the meetings of the defendant corporation, and to some extent of the meetings and action of the board of directors, provided for by the by-laws; but no record evidence was introduced of any consent, by the board of directors, to the assignments or changes of designation of the person or persons to whom the money should be payable, which the said L. Eckford Tyler attempted to make, and which is hereinbefore set forth. On April 12, 1887, the directors passed a vote, which was duly recorded, "to authorize the secretary to accept or change assignments when not conflicting with the by-laws." This vote has not been changed.

The defendant offered oral evidence touching consent to said changes of designation, which was received, subject to plaintiff's objection, and from which the following facts were found:

At or about the time of the passing of the above vote, the secretary of the defendant corporation procured to be made certain books, for the purpose of keeping therein a record of the particulars of membership, of assessments of each member and payments thereof, and of any assignments, so called, or changes of designation. The books, before they were used, were shown to the directors, and approved of, as to their form, by them, but there was no action by the directors as a board on the subject. The

entries in these books were made by clerks and other assistants in the office of the secretary. The books were open at all times to the inspection of the directors, and were from time to time examined by individual members of said board, as inclination might prompt or occasion require. There were no facts, other than those here found, to show consent by the directors to the said assignments, or changes of designation made by said L. Eckford Tyler. There is no written evidence of any acceptance or change of assignments or designations by the secretary, except by the entries as herein stated in said books. The records in said books of the changes of designation sought to be made by said L. Eckford Tyler, as herein set forth, and dated June 10, 1885, are in the handwriting of a clerk.

A Mr. Winans, who was at that time secretary of defendant corporation, was sick for a long time, and did not come to the secretary's office where said books were kept, from July, 1884, till his death, June 29, 1896, and there was no evidence that he saw or knew of the said changes of designation by said Tyler, of June 10, 1885, or of the entries in regard to the same in said books. The records were kept during the absence of said secretary by his wife, who all the time acted as secretary *pro tempore*, with consent of the directors, although no formal vote was had by which a secretary *pro tempore* was chosen.

At the time of the death of said L. Eckford Tyler, the plaintiff, who is now nearly twenty-one years of age, was living with his mother, one of the defendants, and his grandfather, in Meriden, in the State of Connecticut. Said grandfather, Reuben Waterman, who appears as guardian in this suit, was duly appointed guardian of the plaintiff, and of his estate in Connecticut, by the proper probate court in that State, in July, 1885. And said Waterman, having filed in the probate court for the county of Hampden an authenticated transcript of the records of the probate court in Connecticut, showing his appointment as guardian there, was, after due proceedings had by said probate court in the county of Hampden, on March 9, 1887, duly appointed guardian of the property of the plaintiff in this State, pursuant to Pub. Stat. chap. 189, § 20. Soon after the death of said L. Eckford Tyler, said Waterman, having been appointed guardian of the plaintiff in Connecticut, had an interview with one William W. Gardner, the president of the defendant corporation, in which he informed said Gardner that he thought the plaintiff was entitled to the whole amount due, namely, \$2,000. The said Gardner, acting for the defendant corporation, did not dispute that the plaintiff was entitled to \$500, but claimed to said Waterman that said Emily Jane Cook was entitled to the balance, viz., \$1,500.

In July, 1885, the case of Elsey and another against the defendant corporation, reported in 142 Mass. 224, was pending, and said Waterman had at that time knowledge thereof.

On August 12, 1885, a form of receipt was sent to said Waterman by mail, and was by him received at said Meriden, and signed and returned by mail to the defendant corporation. A true copy of this receipt, marked "D," is annexed to the answer of the corporation. There-

upon a check, order, or draft on the treasurer of the corporation, for the sum of \$500, and dated August 15, 1885, and payable to the order of Waterman, as guardian, was sent to him by mail, and the same was received and indorsed by him, and the money collected. In the transaction, the check or draft was regarded and treated by the parties as money.

On August 14, 1885, said Emily Jane Cook executed to defendant corporation two receipts, and on August 15, 1885, the defendant corporation paid her \$1,500, by two checks or drafts.

When said Waterman received said \$500, he understood that the defendant corporation would pay the remaining \$1,500 to said Emily Jane Cook, as being legally entitled to the same, and he made no objection thereto other than as hereinbefore stated.

After the decision of the supreme judicial court in the case of Elsey and another, before mentioned, was announced, the said Waterman made further claim in behalf of the plaintiff for the \$1,500 which he had not received. And on December 9, 1886, a demand in writing was made on the corporation. No later demand was made by him before instituting this suit.

Said Gardner, the president, testified, subject to plaintiff's objection, that, after the death of said L. Eckford Tyler, all the original papers relating to his membership and assignments or changes of designation hereinbefore referred to, and the records thereof in said books, were laid before the directors, examined and approved by them, and payment was ordered to be made to plaintiff and Emily Jane Cook, as was afterwards done.

Mr. A. M. Copeland, for plaintiff:

The designation of Mrs. Cook as a beneficiary was illegal.

Elsey v. Odd Fellows Mut. R. Asso. 1 Mass. (L. ed.) 655, 2 New Eng. Rep. 667, 142 Mass. 224; *American Legion of Honor v. Perry*, 1 Mass. (L. ed.) 267, 1 New Eng. Rep. 715, 140 Mass. 580, 592.

The Statute of 1882, chap. 195, § 2, has no effect upon this case.

The attempted change of designation or assignment to Mrs. Cook did not receive consent of the board of directors in Tyler's lifetime. The action of the directors after his death could have no effect.

Daniels v. Pratt, 2 Mass. (L. ed.) 94, 3 New Eng. Rep. 480, 143 Mass. 216, 221.

This action of the directors should have been proved by the record.

The authority of the board of directors to consent to changes of designation is a personal trust reposed in them, and judicial in its nature. They cannot delegate it to anyone.

Stoughton v. Baker, 4 Mass. 522, 580; *Town v. Jaquith*, 6 Mass. 46; *Emerson v. Providence Hat Mfg. Co.* 12 Mass. 237, 241; *First Parish in Sutton v. Cole*, 3 Pick. 244, 245; *Brewster v. Hobart*, 15 Pick. 309; *Boylston Market Asso. v. Boston*, 113 Mass. 528.

Plaintiff is not cut off by the receipt signed by his guardian, even if the receipt of the guardian could be conclusive upon him, which we do not admit. Nothing is better settled in this Commonwealth than that a receipt in full for a less sum than is due does not prevent a creditor's recovering the balance of his claim.

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Harriman v. Harriman, 12 Gray, 341; *Carran v. Rummell*, 118 Mass. 482.

A demand for the whole sum was made by Mr. Waterman as guardian of plaintiff before the money was paid to Mrs. Cook. The defendant corporation having paid the money to one not entitled to receive it, and having done it wilfully, no further demand was necessary. If further demand was necessary, it was given in writing, December 9, 1886, several months before bringing this suit.

Mr. E. H. Lathrop, for the Odd Fellows Association, defendant:

The former wife lost any and all rights she may have had as original beneficiary, by her divorce. As a stranger, she could not receive benefit as a beneficiary, assuming that the subsequent designations to the son and sister were void. She was neither dependent upon Tyler, a member of his family, wife, nor relative.

The board of directors is the governing power of the association.

The vote of the directors "to authorize the secretary to accept and change assignments, when not conflicting with the by-laws," is an act within the authority of the board.

Burrill v. Nahant Bank, 2 Met. 163.

The plaintiff, Tyler, is a minor, and under guardianship. A guardian has authority "to settle all accounts of his ward; and demand, sue for, and receive all debts due to him," etc.

Pub. Stat. chap. 139, § 29; *Munson v. Felton*, 13 Pick. 206.

The guardian demanded and received payment August 15, 1885, and gave a discharge in full. It was a settlement, with full release given. Even if it partly involved the element of compromise, it is a good settlement.

Daniels v. Pratt, 2 Mass. (L. ed.) 94, 3 New Eng. Rep. 480, 143 Mass. 216; *Loddy v. Barney*, 139 Mass. 394; *Emerson v. Knowler*, 8 Pick. 68; *Hyde v. Baldwin*, 17 Pick. 307; *Aborn v. Rathbone*, 1 Conn. (L. ed.) 386, 4 New Eng. Rep. 80, 54 Conn. 444.

Payment of money to an executor or guardian in good faith is a discharge of indebtedness.

Allen v. Dundas, 8 T. R. 125; *Prosser v. Wagner*, 1 C. B. N. S. 289; *S. C.* 26 L. J. C. P. 81. See 20 & 21 Vict. chap. 77, §§ 75-77.

The ward was not a resident of this Commonwealth. He appeared here by his guardian, a properly accredited person, to receive money from the respondent. The guardian was appointed by competent authority in Connecticut. The respondent not being an administrator, executor, or trustee, appointed by our court, had the right to pay the money to the accredited authority from Connecticut.

Pub. Stat. chap. 139, §§ 89, 40.

Mr. D. E. Webster, for Ruetta Massure, defendant:

This defendant claims that her rights to the fund in question are to be determined the same as if this was an ordinary life policy on the life of her husband for her benefit. She claims the whole sum due, by virtue of her designation as the beneficiary, in Class A.

The attempted change by Tyler was not to a person within that class of persons, to whom he could transfer the benefit; the sister was not a member of his family, nor his heir.

Elsey v. Odd Fellows Mut. R. Asso. 1 Mass.

2 Mass.

(L. ed.) 655, 2 New Eng. Rep. 667, 142 Mass. 224-226.

The attempted change was never consented to by the directors; and no act of the board of directors after Tyler's death could change or affect rights to the fund, which became fixed by his death.

Daniels v. Pratt, 2 Mass. (L. ed.) 94, 3 New Eng. Rep. 480, 143 Mass. 221; *Hellenburg v. Enai Berith*, 94 N. Y. 580.

The records do not show that any action was taken by the directors in the lifetime of Tyler.

Stoughton v. Baker, 4 Mass. 522-530; *Boylston Market Assn. v. Boston*, 113 Mass. 528; *Story*, Ag. § 13.

No change in the wife's relation will terminate her right to the fund derived from the policy.

Phoenix Mut. L. Ins. Co. v. Dunham, 46 Conn. 79; *McKee v. Phoenix Ins. Co.* 28 Mo. 333; *Bliss*, Life Ins. § 30; *May*, Life Ins. § 107.

A policy of insurance originally valid does not cease to be so by the cessation of the party's interest in the life of the insured, unless such be the necessary effect of the provisions of the instrument itself.

Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U. S. 447 (24 L. ed. 251); *Daly v. India & L. Life Assn.* Co. 15 C. B. 365.

Knowlton, J., delivered the opinion of the court:

Previous to July 16, 1880, L. Eckford Tyler, the plaintiff's father, had become a member of classes A and C of the defendant association, and had designated his wife, Etta A. Tyler, now Ruetta A. Massure, one of the defendants, as his beneficiary in Class A, and his son, the plaintiff, as his beneficiary in Class C; and thereby each of said beneficiaries became entitled, under the defendant's Act of Incorporation, and its by-laws, to receive after his death the sum of \$1,000. On the 4th day of February, 1885, his wife obtained a divorce from him, and the first question of the case is whether she thereby lost her rights as his beneficiary.

The defendant corporation was organized, under an agreement of association, "for the purpose of defraying the expenses of the sickness and burial of its members, and rendering pecuniary aid to the families of deceased members or to their heirs." The by-laws of the corporation provide that, after payment of the expenses of the funeral and of the last sickness, "the balance shall be paid to the person or persons designated by the member, in his application for membership or last legal assignment, provided such person or persons are heirs or members of the decedent's family." Also, that "if either of the persons so designated have died, the sum which would have been paid to said decedent's assignee, had he been living at the time of the member's death, shall be payable to the widow of the designator, for the use of herself and his minor children, if any; or, if he have no widow, it shall be payable to a guardian or trustee appointed for said children;" and that "if the designator leave no widow, or children, or assignee, then it shall be payable to his heirs." The principal object of the association manifestly is to provide, after the death of any of its members, for those

nearest to them whom they leave behind. Each of the several expressions touching the persons to whom the moneys are to be finally paid has reference to the relation of such persons to the member at the time of his death. The language in the agreement of association, "to the families of deceased persons or to their heirs," the proviso limiting payments upon designations to "heirs or the members of the decedent's family," and the word "widow," in the next clause, are inconsistent with any other interpretation.

Assuming, then, but not deciding, that the validity of a designation is to be determined at the outset with reference to the relation then existing between the member and his beneficiary, we think, to make it available after his death, there must then be a relation to the deceased such as is contemplated by the agreement of association, and the by-laws relating to payment. And this view is strengthened by a consideration of the statute under which the corporation was organized. Pub. Stat. chap. 115, § 8; *Elsey v. Odd Fellows Mut. R. Assn.* 1 Mass. (L. ed.) 655, 2 New Eng. Rep. 667, 142 Mass. 224.

At the time of the death of L. Eckford Tyler, his former wife, Etta A. Tyler, was not a member of his family, nor one of his heirs, but her connection with him had been severed by the divorce. We therefore think she had lost her rights under the designation of her former husband, and was not entitled to anything from the defendant corporation after his death.

The attempted designations to Emily Jane Cook, a sister of the deceased, who was not a member of his family, or dependent upon him, was invalid for the reasons set forth in *Elsey v. Odd Fellows Mut. R. Assn.*, *supra*.

The plaintiff, being his only son and heir at law, was entitled, either in that relation or as his designated beneficiary, to the entire fund in each class, and it becomes unnecessary to consider whether any of the attempted changes in designation were sufficiently approved by the defendant corporation.

But the defendants claim that the plaintiff's right to receive the balance has been barred by the acts of his guardian. This claim suggests two questions: Is the plaintiff concluded by a written contract? Is he barred by an estoppel *in pais*?

His guardian, Reuben Waterman, acting under an appointment in Connecticut, had an interview with the president of the defendant corporation, in which he informed him that he thought the plaintiff was entitled to \$2,000. Defendant's said officer did not dispute that he was entitled to \$500, but claimed that the balance belonged to Emily Jane Cook. It is fairly to be inferred from the report that said Waterman yielded readily to said claim, believing it to be well founded. There is nothing to indicate that he made any further assertion of his right, or that there was any controversy between the parties. Thereupon he was paid \$500, and he signed, as guardian, a receipt for said sum, containing these words: "which I hereby acknowledge to be in full of all demands or claims against said association, which I now hold, or to which I may be entitled as the assignee of L. E. Tyler, now deceased, and who was a member in Class C in said association at the time

of his death." Without considering whether a Connecticut guardian could bind his ward by a contract relating to property here, and assuming this to be in form a contract and not a mere admission, we are of opinion that there was no consideration for an agreement not to claim the balance of the \$2,000 to which the plaintiff was entitled. It is well settled that the payment of a part for the whole of an ascertained and liquidated debt is not a sufficient consideration to support a promise to accept it as a full payment and satisfaction. *Harriman v. Harriman*, 12 Gray, 341; *Perkins v. Lockwood*, 100 Mass. 249; *Curran v. Rummell*, 118 Mass. 482.

Where a controversy is compromised, or where a claim is for unliquidated damages, and the parties fix a sum which one agrees to pay, and the other to receive, as a final settlement of what was before undetermined, the rule is different. In such a case the agreement of each is a good consideration for that of the other.

The writing in this case was apparently made under a mistake. The parties evidently supposed that the attempted designations of said Cook were valid, and that the plaintiff had no right to anything from Class A. The word "assignee" relates to his connection by designation, and the description of the claim refers to Class C alone. In any event, therefore, the writing can only apply to the claim under the certificate in Class C; and, for the reasons above stated, we think it cannot prevent the plaintiff's recovering the unpaid balance in that.

It remains to inquire whether the plaintiff is estopped, by the conduct of his guardian, from maintaining this bill. An estoppel results from conduct which was intended to induce, and has induced, another to act to his disadvantage. It can only come from a successful effort to get one to change his situation. *Plummer v. Lord*, 9 Allen, 455; *Andrews v. Lyons*, 11 Allen, 349; *Turner v. Coffin*, 13 Allen, 401; *Carroll v. Manchester & L. R. R. Corp.* 111 Mass. 1.

The act of the corporation by which its situation was changed to its detriment, and which is relied on as a foundation for an estoppel, was the payment of \$1,500 to Emily Jane Cook. It does not appear that Waterman had a willful design to induce this act. On the other hand, the corporation seems to have proposed, and Waterman to have merely accepted, the payment to himself. It prepared a writing, and sent it to him for his signature. He signed and returned it, and the draft was then sent him by mail. He passively assented to the arrangement which the corporation suggested. There is nothing to indicate that he received the plaintiff's money, and signed the receipt, with a view thereby to induce the making of a payment to said Cook. He seems rather to have understood that the corporation had decided for itself its action with reference to her as well as to himself, and to have had no purpose beyond getting what he supposed belonged to his ward. If the plaintiff could have been estopped by conduct of his guardian in a transaction of this kind, outside of the State of his appointment, which we do not intimate, an essential element of estoppel was wanting, and this defense cannot prevail.

The divorce having deprived the defendant Massure of her interest in the fund, and the des-

ignations to the defendant Cook being invalid and nothing having occurred to bar a recovery by the plaintiff of the balance of the money being long to him, there must be a decree in his favor, against the defendant corporation, for the sum of \$1,500, and interest from August 15 1885; and as to the defendant Massure, the bill may be dismissed.

Decree accordingly.

Eben H. SPRING

v.

Freeman S. HAGER *et al.*

1. The provision of Pub. Stat. chap 102, § 16, that when a claim is made against an innholder for loss sustained by a guest, the innholder may show that the loss is attributable to the negligence of the guest, is only declaratory of the common law.
2. If there are no regulations brought to the notice of a guest at an inn, requesting him to bolt the door of his room, and it is not known to the guest that there is a bolt in addition to the lock, and his attention is not in any way called to it, the fact that, after locking the door with the key, he does not search for a bolt and find it, is not evidence of negligence on his part which will relieve the innkeeper from liability to the guest for a loss.

(Franklin—Filed October 21, 1887.)

ON plaintiff's exceptions. *Sustained.*
Action of tort to recover the value of a watch and chain and a sum of money from the defendants, who were the keepers of an inn known as the Elm House, Greenfield.

It appeared at the trial in the Superior Court, before Baker, J., and a jury, that the plaintiff registered as a guest at the Elm House; that he had on his person a gold watch of the value of about \$100, and a gold watch chain of the value of about \$40. The watch was carried in his vest watchpocket and the chain was attached to the vest. That he had in the pocket of his trousers \$15 or \$20 in money. It was admitted by the defendants at the trial that the watch and chain were articles worn or carried on the person and were reasonable in value and amount, and that the money was for traveling expenses and personal use.

In the evening, about half-past nine, the plaintiff was shown to his room by one of the defendants. The room was about 10 feet wide and 15 feet long, and had but one door. The plaintiff closed the door and locked it, but did not bolt it. The lock was a common mortise lock connected with the doorknob. After locking his door, the plaintiff prepared to retire. His vest, with the watch in it and the chain attached, he laid upon a light stand on

NOTE.—*Innkeeper's liability.* For citations of cases upon the subjects of innkeeper's liability, what constitutes a guest, notice to guests, and negligence on the part of the guest which will relieve the innkeeper, see note to *Burbank v. Chapin*, 1 Mass. (L. ed.) 7, 1 New Eng. Rep. 79, 140 Mass. 123.

farther side of the bed from the door, and at the head of the bed, his trousers containing the money he laid upon a chair; and repeated. When he awoke in the morning, it was found that, during the night, the lock on the door had been picked, the room entered, and the trousers and vest carried away by some person unknown. The vest was soon found in the hallway, and the trousers were found on the street at some distance from the hotel, and the watch and chain and the money stolen. The door to the room was found to be slightly open. It appeared that there was a bolt on the side of the door about six inches from the top. This bolt was about four inches long and one half inch in diameter. The door was about six feet six inches high and opened into the room. The plaintiff did not fasten the door with this bolt, and his attention was not called to the defendants or anyone else to said bolt, and he testified he did not know it was there after the robbery.

One of the defendants testified that the plaintiff told him, the day following the plaintiff's loss, that he, the plaintiff, did not bolt the door, he did not think of it, and another witness, called by the defendants, testified that the plaintiff said on the same occasion that he did not see said bolt. The plaintiff denied that he made either of said statements.

The plaintiff testified, on cross-examination, that he had traveled considerably, and stopped at hotels on numerous occasions, and that his bolt had always been on such occasions when there was both a bolt and lock upon the door of his room, to use both the bolt and lock.

The defendants claimed and argued to the jury that, upon the evidence, the plaintiff must have seen the bolt. The defendants claimed that the plaintiff's loss was attributable to his failure to bolt this door with the bolt near the top, in addition to locking it, and that such failure was such negligence on his part as to exonerate the defendants from liability to the plaintiff. There was no claim on the part of the defendants that there was any other negligence on the part of the plaintiff except his failure to bolt the door as aforesaid.

The plaintiff requested the court to instruct the jury that, the plaintiff having locked the door of his room, his failure to also then bolt the door was not such negligence on his part as would preclude his recovery in this action. He asked the court to instruct the jury that the failure of the plaintiff to bolt the door of his room after having locked it, if said bolt was not known to the plaintiff, nor his attention in any way called to the same, was not negligence on his part, and will not preclude the plaintiff from recovery in this action.

The court declined to give the instructions prayed for, but submitted to the jury, as a question of fact for them to determine, whether the failure of the plaintiff to bolt his door in addition to locking it was negligence on his part to which the loss was attributable, with appropriate instructions, not objected to, denying negligence on the part of the plaintiff and its effect on the case.

The jury returned a verdict for the defendants. To the said rulings and refusals to rule the plaintiff duly excepted.

Merr. Conant & Conant, for plaintiff:
Mann.

I. There was no evidence of negligence of the plaintiff.

The question of negligence is to be decided as a question of law by the court when the facts are undisputed.

Gavett v. Manchester & L. R. R. Co. 16 Gray, 505; *Todd v. Old Colony & F. R. R. Co.* 7 Allen, 207; *Grows v. Maine Cent. R. R. Co.* 87 Me. 100.

The plaintiff was only required to use such reasonable care as it would be expected that a person of ordinary prudence would have exercised under the circumstances.

Cashill v. Wright, 6 E. & B. 891.

The question of reasonable care, when the facts are agreed, is one of law.

Grows v. Maine Cent. R. R. Co. 87 Me. 100.

II. A guest at an inn is not required to bolt the door of his room to entitle him to recover for a robbery.

Filipowski v. Merryweather, 2 Fost. & F. 285; *Murchison v. Sergeant*, 69 Ga. 206; *Gile v. Libby*, 36 Barb. 70; *Buddenburg v. Benner*, 1 Hilt. (N. Y.) 84; *Classen v. Leopold*, 2 Sweeney (N. Y.), 705; *Morgan v. Ravey*, 6 H. & N. 265; *S. C.* 2 Fost. & F. 288.

The failure of a guest to bolt his door is only to be considered evidence of negligence in connection with other facts which may be proved, all of which taken together may amount to negligence.

Herbert v. Markwell, 45 L. T. 649.

III. Innkeepers are regarded as insurers of the goods of their guests in their custody.

Burbank v. Chapin, 1 Mass. (L. ed.) 7, 1 New Eng. Rep. 79, 140 Mass. 128.

Mr. John A. Aiken, for defendant:

The only question in this case is, Was there any evidence of negligence on the plaintiff's part, to which his loss was attributable? Pub. Stat. chap 102, § 15, provides that "an innholder against whom a claim is made for loss sustained by a guest may in all cases show that such loss is attributable to the negligence of the guest himself." The statute does not make any distinction as to degrees of negligence. The bill of exceptions shows that the jury were properly instructed as to what constitutes negligence, and its effects. The failure of a guest to lock his bedroom door has been a matter adjudicated.

See *Cashill v. Wright*, 6 E. & B. 900.

Oppenheim v. White Lion Hotel Co. L. R. 6 C. P. 515, is almost identical with the case at bar. Whether an innkeeper is liable for the loss of a watch and pistol stolen from a guest's room in the night because of the guest's failure to observe and fasten a window, was held in Georgia to be a question for the jury.

Bohler v. Owens, 60 Ga. 185.

In determining whether the loss was attributable to the plaintiff's negligence, all such facts as time, place, the number of people present, the nature of the property, the ease with which it may be removed, and the care that the owner has taken on other similar occasions,—in short, all the circumstances,—must be considered, and are for the jury.

Oppenheim v. White Lion Hotel Co. supra; *Read v. Ammidon*, 41 Vt. 15.

Field, J., delivered the opinion of the court: The only negligence of the plaintiff which the

defendant contended that the evidence proved was the neglect of the plaintiff to bolt the door. The plaintiff locked the door by a lock connected with the doorknob. The bolt was on the inside of the door, six inches from the top, and the door was "about six feet and six inches high." The plaintiff testified that "he did not know it was there until after the robbery." It does not appear that there were any regulations of the inn, which were posted in the room or anywhere else, or which were in any manner brought to the notice of the plaintiff; and it is conceded that the attention of the plaintiff "was not called by the defendant or anyone else to said bolt." The defendant claimed, however, upon all the evidence, that "the plaintiff must have seen the bolt."

The first request of the plaintiff for a ruling is in effect that the failure of the plaintiff to bolt the door, after having locked it, is not such negligence as will defeat the action even if the plaintiff saw the bolt; and the second request is in effect that the failure to bolt the door after having locked it will not defeat the action "if said bolt was not known to the plaintiff, nor his attention in any way called to the same." This second request raises the question whether it was the duty of the plaintiff to examine the door to see if there were other fastenings upon it besides the lock. It may be conceded that the bolt and lock together afforded greater security than either of them alone; and that, although the bolt was in an unusual place upon the door, it could easily have been seen if the plaintiff had searched for it.

Pub. Stat. chap. 102, § 16, provides that "an innholder against whom a claim is made for loss sustained by a guest may, in all cases, show that such loss is attributable to the negligence of the guest himself, or to his noncompliance with the regulations of the inn, if such regulations are reasonable and proper, and are shown to have been duly brought to the notice of the guest of the innholder." This provision was first enacted in Stat. 1853, chap. 405, § 3, which was soon after the decision in *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417; and although this statute made some changes in the law, the clause that it is competent for an innkeeper to show that the loss is attributable to the negligence of the guest is only declaratory of the common law. *Mason v. Thompson*, 9 Pick. 280; *Berkshire Woolen Co. v. Proctor*, *supra*; *Oppenheim v. White Lion Hotel Co.* L.R. 6 C. P. 515; *Cushill v. Wright*, 6 E. & B. 890; *Morgan v. Rarey*, 6 H. & N. 265; *Elcox v. Hill*, 98 U. S. 218 [25 L. ed. 108].

It has, indeed, been said that, "in the absence of notice of a rule of the inn to lock and bolt the door, the failure to do so is not legal negligence at common law. *Murchison v. Sergeant*, 69 Ga. 206.

It has been often decided that not locking or fastening the door of a bedroom is not, as matter of law, negligence, but that this fact, in connection with others, may be evidence of negligence for the jury; and the weight of modern authority is, we think, that the failure to lock or bolt the door of a lodging-room at an inn, when there is a lock or bolt upon it, is evidence of negligence for the jury. *Oppenheim v. White Lion Hotel Co.* *supra*; *Spice v. Bacon*, 86 L. T. N. S. 896; *Herbert v. Markwell*, 45 L. T. N. S. 649.

At common law "innkeepers as well as common carriers are regarded as insurers of the property committed to their care, and are bound to make restitution for any injury or loss not caused by the act of God or the common enemy, or the neglect or fault of the owner of the property." *Mason v. Thompson*, 9 Pick. 284. The statutes have not changed the general nature of the liability of an innholder, and, subject to the statutory provisions, he is liable to his guests in cases where no actual negligence on the part of himself or his servants is shown. It has been held that the burden of proof is upon the innholder to show that the loss was caused by the negligence of his guests. *Norcross v. Norcross*, 53 Me. 168.

The language of Pub. Stat. chap. 102, § 16, implies that this burden is upon the innholder. The case at bar is not, therefore, an action for negligence; and it may be doubted whether the rulings in such actions upon evidence of contributory negligence are in all respects applicable. No case has been cited in which it has been held that the single fact that the plaintiff did not bolt his door, after having locked it on the inside, is sufficient evidence of negligence.

In *Spice v. Bacon*, and in *Herbert v. Markwell*, *supra*, the jury must have found that the door was left unfastened either by bolt or lock. In *Morgan v. Rarey*, 2 Fost. & F. 283, it is said that the plaintiff locked the door, but did not bolt it. In the same case in the Court of Exchequer, 6 H. & N. 265, 266, it is said that "witnesses were however called on the part of the defendants to prove that the plaintiff had told them he had not locked the door." It was admitted that he did not use the bolt. There was a notice posted on the mantelpiece, requesting "all visitors to use the night-bolt," which the plaintiff admitted he saw, but said he did not read, beyond the word "notice." Pollock, Ch. B., at *Nisi Prius*, left the question of negligence to the jury, but told "them at the same time that the guest was not bound to lock his bedroom door," etc. The verdict was for the plaintiff.

It must often depend much upon the circumstances of the case, the customs of the age and country, and the usages of the place, whether the plaintiff has been guilty of such negligence that the loss can be said to be attributable to it; and we cannot say, as matter of law, that on the facts appearing in this case, if the plaintiff saw the bolt, and did not use it, this was not some evidence of negligence to be submitted to the jury. The delivery of a key to a guest may be held to be an intimation to him that he is to use it in locking his door. The lock, however, is the only fastening which the guest can use when not in the room. A bolt, if seen, may itself suggest that it ought to be used. If, however, there are no regulations brought to the notice of a guest requesting him to bolt the door, and if it is not known to the guest that there is a bolt, and his attention is not in any way called to it, we think the fact that, after locking his door with the key, he does not search for a bolt and find it, is not evidence of negligence on his part, and that the second ruling requested should have been given. See *Murchison v. Sergeant*, 69 Ga. 206; *Batterson v. Vogel*, 10 Mo. App. 235.

Exceptions sustained.

George W. BARBER
v.

Henry S. PARSONS.

SAME v. Joseph WELCH.

SAME v. Henry W. CROCKER.

1. It is not necessary that a witness be summoned, to entitle him to his fees; it is sufficient if he attends on request.
2. But when three cases are heard together, and the same attorneys are employed in each of the cases, and the witnesses are all summoned in but one case, they are not entitled to more than one travel, although the officer who served the subpoena on the witnesses requested them to attend for all the cases.
3. There may be, however, such separate requests for travel and attendance as, if acted upon, would show separate contracts, and entitle the witnesses to be paid for travel as well as attendance in each case.
4. If the witnesses, having appeared in obedience to a subpoena, are requested to remain as witnesses in all the cases, they are entitled to be paid for attendance in each case while they attended as witnesses in that case, and they may attend as witnesses in three cases at the same time.
5. If one case is tried before the trial of another is begun, the attendance of the witnesses should not be taxed in the former case after the trial therein is finished, nor ought it to be taxed in the latter for a length of time before the trial which, under all the circumstances, should be thought unreasonable.

(Hampden—Filed October 21, 1887.)

APPPEAL from taxation of costs. *Affirmed in part and reversed in part.*

These cases were referred to A. M. Copeland, referee, under rules of the court; by him tried together; and a report returned in each case in favor of the defendant.

After judgment was entered upon the awards, each defendant taxed in his bill of costs for the travel and attendance of the same witnesses, which, with the other items, were allowed by the clerk. It appeared that the witnesses were summoned in but one case but were requested to attend, and were paid for attendance in the three cases for the first day; that the trial lasted before referee several days, and that some of the witnesses were paid for attendance in each case after the first day. From these taxations the plaintiff appealed, but did not object to any other portions of the bills of cost than for the travel and attendance of those witnesses who certified in two or more of the cases. Taxation of the clerk affirmed in each case. Plaintiff appealed.

Messrs. Newell & Jennings, for plaintiff:

At common law, costs were not allowed.

Sayer, Costs, 64.

Costs were first allowed by the Statute, 23 Hen. VIII., chap. 15.

2 Mass.

See *Maus v. Maus*, 10 Watts, 87.

Statutes giving costs are to be strictly construed.

Cone v. Bowles, 1 Salk. 205; *Rea v. Glastonby*, Cas. t. Hardw. 357; *Dwarris*, Stat. 644.

Statutes in derogation of the common law are to be strictly construed.

Coke, Inst. 282, pt. 3, § 455; *Crayton v. Munger*, 11 Tex. 234.

Costs are or ought to be allowed simply as an indemnity—a recoupment to the successful party for his expenses in the suit.

These three cases, so far as all matters of trial and costs are concerned, should be treated as one. A statute was passed in 1784 (chap. 28) which allows the plaintiff to tax but one bill of costs in several actions which might have been joined in one. And in criminal cases, witnesses for two or more cases pending at the same time before the same tribunal shall not be allowed full travel and attendance in each case.

See Rev. Stat. p. 1181, § 89.

The practice, by analogy, in cases where the same principle or cause of action is at issue in different cases, is well laid down in—

Witherlee v. Ocean Ins. Co. 24 Pick. 67. See also *Kimball v. Thompson*, 4 Cush. 441; *Springfield v. Sleeper*, 115 Mass. 587; *Commonwealth v. Robinson*, 1 Gray, 555; *Commonwealth v. James*, 99 Mass. 438; *Commonwealth v. Powers*, 109 Mass. 353.

The principle we contend for is upheld in many Massachusetts cases.

West v. Brock, 3 Pick. 308; *Ever v. Beard*, Id. 64. And see *Griswold v. Sedgwick*, 8 Wend. 329; *Mason v. Waite*, 1 Pick. 458; *O'Connell v. Bryant*, 126 Mass. 232; *Fules v. Stone*, 9 Met. 318; *Miller v. Lyon*, 6 Allen, 514.

Certificates are filled out separately for each case, just as if the defendant had severally paid, in each case, the entire amounts indicated by the certificates. The correctness of the certificates is overturned by the finding which expressly states that they did not receive these full amounts.

These witnesses were in attendance in but one case in law or in fact. They had been paid in but one. The plaintiff should pay but one.

See *Upton v. Pratt*, 106 Mass. 346; *Mathers v. Cobb*, 3 Allen, 467; *Meagher v. Bacheider*, 6 Mass. 444; *Daves v. Bell*, 4 Mass. 106; *Paine v. McIntire*, 1 Mass. 69; *Hinman v. Booth*, 20 Wend. 666.

Messrs. Whitney & Dunbar, for defendants:

These were separate actions of tort for distinct slanders, referred under separate rules, and tried together before the referee by agreement of parties, and a report made in each case in favor of each defendant.

The travel and attendance of all the witnesses in each were properly taxed by the clerk.

Pub. Stat. chap. 198, § 1; chap. 199, § 14.

Neither summons nor payment is necessary to entitle a prevailing party to recover for his witnesses who certify. Attendance upon request is enough. All the witnesses who testified in each case were requested to attend, and all were paid for attendance in each case the first day, and each defendant is liable to pay each witness who attended at his request.

Joint defendants, who prevailed, were held to be entitled to tax separate bills of cost.

Taylor v. Jaques, 109 Mass. 270.

Where four actions between the same parties upon like causes of action were referred together under one rule of court, to referees, the defendants in error, prevailing, were allowed to recover for all witnesses who were summoned, attended, and paid in each case.

Day v. Berkshire Woolen Co. 1 Gray, 420.

Where two actions for the same injury were tried together by order of the court, the plaintiffs recovered for the travel and attendance of those witnesses who attended in both cases, as if the cases had been tried separately.

Taylor v. Vermont & M. R. R. Co. 1 Gray, 422, note.

If the plaintiff had prevailed in all the cases, would he not have been entitled to tax for all his witnesses in each case? If not, what would be the rule of apportionment?

Field, J., delivered the opinion of the court:

These are three actions of slander brought by the same plaintiff against three different defendants for the same or similar defamatory words; and, by agreement of parties, they were referred to the same referee, who heard them together on the 15th, 16th, and 17th days of December, 1886, and made an award in each case in favor of the defendant, on which judgment was entered. A certificate of witnesses has been filed in each case, from which it appears that the same twenty-seven witnesses for the defendants attended in each case the same number of days, and traveled the same number of miles, with a single exception. H. B. Lewis certifies in the first and second cases that he attended 1 day, and traveled 20 miles, and in the third case that he attended 1 day and traveled 2 miles. The number of days of attendance in each case is 73. The number of miles of travel in the first and second cases is 1202, and in the third case, 1184. The amount taxed for attendance in each case is \$36.50. The amount taxed for travel in each of the first and second cases, is \$60.10, and in the third case \$59.20, making the whole amount taxed for travel and attendance \$96.60 in each of the first and second cases, and \$95.70 in the third case, being at the rate of 50 cents a day for attendance, and 5 cents a mile for travel. Pub. Stat. chap. 199, § 14.

The principles which must govern these appeals are declared in *Miller v. Lyon*, 6 Allen, 514, and *Day v. Berkshire Woolen Co.* 1 Gray, 420. It must appear that the attendance of the witnesses "was reasonably and in good faith procured by the party making the taxation, and that they were paid, or actually attended, so as to be entitled to their fees." The certificates "are competent *prima facie* evidence for the allowance of the amount certified, but are not conclusive;" and the court "may decide upon the reasonableness of the conduct of the party as to the number of witnesses and the length of their attendance, in order to secure good faith and prevent oppression or reckless expense." 6 Allen, 515. "If the witnesses were summoned and attended and were paid in the different cases, their travel and attendance might be taxed in each." 4 Gray, 424. It was said at the argument, and not denied, that the three de-

fendants were represented by the same attorneys before the referee. The amount taxable in each case is the amount of the legal fees for witnesses in the case which the defendant has paid or is under liability to pay. If the witnesses were summoned in but one case, their travel, we think, should be taxed only in that case, although the attorneys may have requested them to remain in attendance for all the cases. It is not necessary that a witness be summoned to entitle him to his fees; it is sufficient if he attends on request. But when three cases are heard together, and the same attorneys are employed in each of the cases, and the witnesses are all summoned in but one case, they are not entitled to more than one travel because the officer who served the subpoenas on the witnesses requested them to attend for all the cases. There might, however, be such separate requests for travel and attendance as, if acted upon, would show separate contracts, and would entitle the witnesses to be paid for travel as well as attendance in each case. We infer, however, from the facts found in these cases, that there was no such request as entitles the witnesses to travel, except in the case in which they were summoned. If the witnesses, having appeared in obedience to a subpoena, were requested to remain as witnesses in all the cases, we think they are entitled to be paid for attendance in each case while they attended as witnesses in that case, and that they might attend as witnesses in three cases at the same time. It is a question of fact whether, while a witness remains in attendance, he is attending as a witness in all the cases or in some one or more of them. If one case is tried before the trial of another is begun, the attendance of a witness should not be taxed in the former case after the trial is finished, nor ought it to be taxed in the latter for a length of time before the trial which, under all the circumstances, should be thought unreasonable.

On the somewhat meagre facts found in the superior court, and regarding the certificates as *prima facie* evidence, we think the fees for the attendance of witnesses should be taxed in all the cases, but that the fees for their travel should be taxed only in the case in which they were summoned. We infer from the copies of the taxation appearing in the papers that the witnesses were summoned in the first case, which is that in which Henry S. Parsons is defendant.

The order of the Superior Court in the taxation of costs in that case is affirmed. In the other cases the order is reversed; the fees for the travel of witnesses are to be stricken from the bills of costs, and when thus corrected, the taxation is to be affirmed. No costs are to be allowed on these appeals.

Harlan E. NASH, Exr.,
o.

Town of SOUTH HADLEY.

1. Where a party, injured through a want of repair of a highway, lived more than ten days, in a condition in which it was possible for him to have given the notice required by statute (Pub. Stat. chap. 52, § 21), as preliminary.

nary to an action against the town for the injury sustained by him, a notice given by his son within thirty days after the decease of the injured party, the son being the executor named in his will, and having been subsequently to the giving of such notice appointed executor upon the probate of the will, is insufficient.

2. Where the Legislature has provided for the circumstances under which a notice may be given by an executor or administrator, it must be understood that it has dealt with the whole subject, and has provided for all the cases in which a notice by either of them will be sufficient. The rule thus prescribed is the only one to be followed.
3. If the effect of this is to deprive a person, or one who represents him, of a right which he might otherwise have had, such effect must be held to have been contemplated by the Legislature.

(Hampshire—Filed October 20, 1887.)

ON plaintiff's exceptions. *Overruled.*

Action of tort for personal injuries received by plaintiff's testator through defendant's negligence.

The action was brought under Pub. Stat. chap. 52, § 18, by Harlan E. Nash, as executor of Erastus Nash, deceased, for injury received by his testator upon a highway which defendant was bound to keep in repair.

On the trial in the Superior Court, before Mason, J., the court ruled that the action could not be maintained for want of a sufficient notice, and ordered a verdict for the defendant.

The facts in relation to the notice given are set out in the opinion.

Mr. D. W. Bond, for plaintiff:

The court erred in ruling that the action could not be maintained for want of a sufficient notice. 1. The notice served on the defendant properly states the time, place, and cause of the injury. 2. It was served within thirty days after the injury. 3. There could have been no misunderstanding about the fact and object of the notice, for it states in whose behalf it was given, and that damages were claimed of the town. 4. The notice was signed by Harlan E. Nash, a son of the person injured, and the executor named in the will, which will was afterwards duly admitted to probate, and the son appointed executor, and as executor he brought this suit.

The executor named in the will had authority to do what was necessary to preserve his father's estate and right of property. He had, at the time he gave the notice, the right of administration on the estate, and he was afterwards appointed. He had the right to give the notice in behalf of his father, the person injured.

Taylor v. Woburn, 130 Mass. 494.

By Acts 1877, chap. 234, it was provided that the notice might be given by the person injured, or by someone in his behalf. Under this statute, notice was not required to be in writing. Acts 1879, chap. 244, required the notice to be in writing, signed by the person injured, or by some person by him duly au-

3 Mass.

thorized. By Acts 1881, chap. 236 (now Pub. Stat. chap. 52, § 21), it was provided that the notice should be in writing, signed by the person injured, or by someone in his behalf. The Act of 1879 was repealed by the Act of 1881.

The fact that plaintiff afterwards became administrator and adopted the notice which he had previously given would, perhaps, be sufficient evidence of compliance with the statute.

Taylor v. Woburn, *supra*.

The present case is not within the provision of Acts 1891, chap. 236, now Pub. Stat. chap. 52, § 21. The person injured lived more than ten days, in a condition such as this court has held it was possible for him, within the meaning of the statute, to have given the notice.

Mitchell v. Worcester, 129 Mass. 525.

Mr. R. O. Dwight, for defendant:

The giving of the notice required by statute is a condition precedent to the maintenance of this form of action.

Gay v. Cambridge, 128 Mass. 387.

The sufficiency of this notice is to be determined by the court.

Shea v. Lowell, 132 Mass. 187, 189.

The notice in this action is insufficient.

1. Because it should have been given by the testator who was, from the time of the accident, August 18, until his death, September 5, a period of eighteen days, of sufficient capacity. Pub. Stat. chap. 52, § 21.

Though physically unable to give the notice, testator was not so mentally incapacitated that he could not have given the notice through some other person.

Mitchell v. Worcester, 129 Mass. 525, 526.

2. Because, even though testator had been mentally and physically unable to give the notice before death, that given by plaintiff is insufficient; as he had not, at the time of giving it, been appointed executor.

Pub. Stat. chap. 52, § 21.

The authority given by Stat. 1881, chap. 236, now incorporated into Pub. Stat. chap. 52, § 21, to an executor or administrator to give such notice within thirty days after his appointment, renders inapplicable the reasoning and decision of this court in—

Taylor v. Woburn, 130 Mass. 494, 497.

Devens, J., delivered the opinion of the court:

In the case at bar, the party injured lived more than ten days in a condition in which it was possible for him to have given the notice required by statute, as preliminary to an action against the town for the injury sustained by him. *Mitchell v. Worcester*, 129 Mass. 525; Pub. Stat. chap. 52, §§ 19-21. The notice which is claimed to be sufficient under the statute was in fact given by his son within thirty days after the decease of the injured party—the son being the executor named in his will, and having been subsequently to the giving of such notice appointed executor upon the probate of the will. Without passing upon the question whether a notice given by one who is subsequently appointed executor of an injured party is now sufficient, although given previous to his appointment as such, if it is in other respects in compliance with the statute, we proceed to consider the contention of the plaintiff that a sufficient notice may be given by an

executor, even when the party injured has survived ten days or more, not exceeding thirty days, and during that time was himself of sufficient capacity. The statute, chap. 52, § 19, has provided that a notice in writing shall be given by the party injured, or someone on his behalf, within thirty days after the injury, to the town claimed to be responsible therefor; "but, if from physical or mental incapacity it is impossible for the person injured to give the notice within the time provided in said section, he may give the same within ten days after such incapacity is removed; and in case of his death without having given the notice, and without having been for ten days, at any time after the injury, of sufficient capacity to give the notice, the executor or administrator may give such notice within thirty days after his appointment." Pub. Stat. chap. 52, § 21.

It was held in *Taylor v. Woburn*, 130 Mass. 494, that a notice might be given by one who was the father of the person injured, and entitled to administer on his estate, and who was afterwards appointed administrator, as a person giving it on his behalf. This case was decided under Stat 1877, chap. 234, which statute contained, in terms, no provision for any notice which might be given by an executor or administrator. Such provision is first found in Stat. 1891, chap. 236, and is embodied in Pub. Stat. chap. 52, § 21, above recited. The plaintiff urges that this case is governed by precisely the same rules of law in respect to the death of the person injured without giving notice, as is the case of *Taylor v. Woburn*. But this argument loses sight of the fact that, since that case was decided, provision has been made for the circumstances under which an executor or administrator may give notice, and that the case at bar is not within them. It is true that, if the law had remained as it was when *Taylor v. Woburn* was decided, the notice in the case at bar would, under that decision, have been held sufficient. But when the Legislature has provided for the circumstances under which a notice may be given by an executor or administrator, it must be understood that it has dealt with the whole subject, and has provided for all the cases in which a notice by either of them will be sufficient. If the effect of this is to deprive a person, or one who represents him, of a right which he might otherwise have had, such effect must be held to have been contemplated by the Legislature.

The liability to which towns are subjected for injuries caused by defective ways is entirely statutory, and the provisions of the statute in regard to notice must be followed in order to subject them to it. The construction by which it was held in *Taylor v. Woburn* that "the statute authority for another"—to wit, for a person in his stead—"to act for the person interested, and the clear purpose manifested thus to act for his deceased son," on the part of the father, authorized a decision that a notice given after the decease of the son by the father, within thirty days after the injury, was sufficient, is not permissible after the Legislature has provided by whom and under what circumstances a notice shall be given when the party injured has deceased. The rule thus prescribed is the only one to be followed.

Exceptions overruled.

Quincy A. SEWARD

Gilbert W. ARMS *et al.*

1. To charge a corporation as trustee of a defendant, it must affirmatively appear that it has goods, effects, or credits of the defendant in its hands.
2. Where the trustee is sought to be charged by reason of alleged indebtedness to defendant for washing done by his wife, the answers of the trustee, upon information and belief, that the husband, in making the contract, acted as agent of his wife, must, in the absence of any other evidence, be taken as true, in a case where plaintiff rested his case against the trustee wholly upon its answers.
3. By Pub. Stat. chap. 147, § 4, work of doing washing by the wife for a person other than her husband and children must, "unless there is an express agreement on her part to the contrary, be presumed to be performed on her separate account."

(Hampshire—Filed October 21, 1887.)

ON plaintiff's appeal. *Judgment affirmed.*
Smith College, summoned as trustee of defendant, denied that it had funds of defendant in its hands; and alleged that it owed defendant's wife for washing done by her; that it was informed that she had filed a certificate of her intention to do business on her sole account; that the washing was done on her sole account, and the sum due therefor is not subject to defendant's debts.

The treasurer of the college answered, to interrogatories, that he understood the contract was between the college and defendant's wife; that he had understood more than a year that the college was holden to her personally for the work; he had heard that her certificate had been filed more than a year; that the balance due her was for last term's washing; that defendant was understood to be agent of his wife, who claims the balance due.

Plaintiff did not summon in the claimant, or file allegations, or offer evidence.

The trustee was discharged, and plaintiff appealed.

Mr. Charles G. Delano, for plaintiff:

The question whether the debt belongs to the defendant or to his wife is a conclusion of law, to be deduced only from the facts of the answer which legitimately tend to establish it.

Mortland v. Little, 187 Mass. 841; *Nutter v. Framingham & L. R. R. Co.* 181 Mass. 281.

It is admitted that the contract on which the indebtedness arises was made between the trustee and the defendant in his own right. The wife was never known as a party, nor has she asserted a right as principal.

Maine F. & M. Ins. Co. v. Weeks, 7 Mass. 498.

Facts alleged upon the information and belief of the affiant, not a contracting party, and of which the trustee had no notice, are inadmissible to vary its liability under the contract.

A certificate had not been filed at the time the contract was first entered into. The wife could not afterwards take an assignment of the defendant's right of action, or claim the benefit of it, except under a contract with him, which she is not authorized to make. See agency defined.

Woodward v. Spurr, 1 Mass. (L. ed.) 281, 1 New Eng. Rep. 729, 141 Mass. 287; 2 Kent, Com. 641.

Mr. William G. Bassett, for trustee:

The trustee was rightly discharged. It was not affirmatively proved by the answers of the alleged trustee that it is chargeable, which entitled it to be discharged.

Pub. Stat. chap. 183, § 17; *Porter v. Stevens*, 9 Cush. 530.

It answered fully as it was informed and believed.

Fay v. Sears, 111 Mass. 154, 156; *Bostwick v. Bass*, 99 Mass. 469; *Shaw v. Bunker*, 2 Met. 376; *Clinton First Nat. Bank v. Bright*, 126 Mass. 535.

The college was not liable to defendant in an action, which is the usual test whether the alleged trustee is chargeable.

Field v. Crawford, 6 Gray, 116, 117; *Casey v. Davis*, 100 Mass. 124; *Massachusetts Nat. Bank v. Bullock*, 120 Mass. 86, 88.

There is enough evidence to overcome any presumption that the wife was working for the husband in doing washing for the college.

It was for plaintiff, if he wished to charge the alleged trustee, to summon in the claimant and have the title settled.

Mortland v. Little, 137 Mass. 339. See *Sheehan v. Marston*, 132 Mass. 161.

Field, J., delivered the opinion of the court: To charge the corporation, which is the alleged trustee in this case, it must affirmatively appear from its answers that it has credits of the defendant in its hands. *Porter v. Stevens*, 9 Cush. 530.

It appears from these answers that the trustee is indebted for washing done by the wife of the defendant; that the contract for the washing was made by it with the defendant, but that it is informed and believes that the defendant, in making the contract, acted as the agent of his wife, and that it understands that the indebtedness is to the wife. By Pub. Stat. chap. 147, § 4, this work of doing washing by the wife for a person other than her husband and children must, "unless there is an express agreement on her part to the contrary, be presumed to be performed on her separate account." It may be that if the trustee and the defendant agreed together that the defendant should have this washing done, and the husband employed his wife to do it, this would tend to show that she was working for her husband, and that the trustee was indebted to the husband. But the answers of the trustee, upon information and belief, that the husband, in making the contract, acted as agent of the wife, must, in the absence of any other evidence, be taken to be true. *Fay v. Sears*, 111 Mass. 154, 156; *Clinton First Nat. Bank v. Bright*, 126 Mass. 535.

The question does not arise whether the plaintiff might not have alleged and proved that the defendant made the contract on his own

account (Pub. Stat. chap. 183, § 17), or whether the wife might not have been summoned in as a claimant, and this issue tried upon evidence produced by the plaintiff and the claimant. The plaintiff rested his case against the trustee wholly upon its answers. See *Mortland v. Little*, 137 Mass. 339; *Sheehan v. Marston*, 132 Mass. 161.

The judgment discharging the trustee, and for its costs, must be affirmed.

Henry L. BASSETT

v.

CONNECTICUT RIVER R. R. CO.

1. Under Pub. Stat. chap. 112, § 214, which provides that a railroad corporation shall be responsible for property injured by fire communicated by its locomotives, such corporation is not liable for the value of goods destroyed by fire while in its possession under a contract which fully covers the rights and liabilities of both parties regarding them, as a contract for carriage.
2. Such statute was not intended to prevent property owners and railroad corporations making contracts determining their respective rights and duties relating to particular property, or to apply to cases where such contracts have been made. Nor is there any difference in this regard between express and implied contracts.
3. Where plaintiff had employed defendant as a common carrier to transport his goods, the defendant was bound to carry the goods, and was an insurer of them until the transit ended, and was then liable only as a warehouseman for any want of ordinary care during such reasonable time as they should remain in its custody, awaiting the call of the consignee.
4. Such contract is an entire one; and although there is no separate charge for storage, yet the freight to be paid, fixed by the company as a compensation for the whole service, is paid as well for the temporary storage as for the carriage.
5. Where goods have been destroyed while in the possession of defendant under such a contract, the plaintiff must seek his remedy under it, and the statute referred to does not apply.

(Hampden—Filed October 20, 1887.)

ACTION under Pub. Stat. chap. 112, § 214, to recover damages for the destruction of goods by fire. Judgment for defendant. *Affirmed.*

At the trial in the superior court the following facts were agreed upon:

That the defendant owned and operated a railroad in this Commonwealth; and that, on March 30, 1887, its freight depot at Chicopee was destroyed by fire which originated at 12

m., and was caused by sparks from a locomotive which set fire to bales of cotton which stood on the platform of said depot; that the fire was communicated directly to the said building destroying it with its contents, including the goods of the plaintiff, which consisted of numerous articles of household furniture and clothing for himself and family, which goods were placed on board the cars at Providence, R. I., for transportation to Chicopee, where plaintiff had gone to live; that the goods were properly packed, and arrived in Chicopee in due course and time, on Saturday, March 28; were taken from the cars on the afternoon of that day and placed in the said freight depot, where they remained until the building and the goods were destroyed by said fire; that some time during the day on which the goods arrived at Chicopee, a teamster, not in the employ of the defendant, nor under the direction or control of its agent at Chicopee, nor at his request or suggestion, told the plaintiff that some goods had arrived directed to him, and solicited the job of teaming them, "whenever the plaintiff was ready to have them removed." All these goods were shipped and arrived at one time, and plaintiff had no other goods in course of transportation for Chicopee. The plaintiff had no other information of the arrival of the goods, and was not asked or notified to remove the same.

Judgment was entered for the defendant, and the plaintiff appealed.

Mr. Luther White, for plaintiff:

The statute reads as follows: Every railroad corporation and street railway company shall be responsible in damages to a person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, and shall have an insurable interest in the property upon its route for which it may so be held responsible, and may procure insurance thereon in its own behalf.

Pub. Stat. chap. 112, § 214.

The question raised by the case stated is whether goods which have arrived at their destination and are stored by the carrier to await removal by the owner, but who is not directly notified of their arrival, or requested to remove the same, are included in the indemnity furnished by the general and broad terms of the statute. The plaintiff so contends, and submits the following reasons:

1. The common law provides a remedy for those who suffer by the negligent use of locomotives. The remedy so provided extends to all who suffer from that cause, whether the damage falls on property for which the railroad are responsible as bailees, or on property beyond their control.

Story, Bailm. § 450 a.

The statute is remedial, and by the general rule of construction for such statutes should receive a liberal interpretation.

Gray v. Bennett, 3 Met. 527.

This rule has been recognized and applied in the decisions hereafter cited.

The evident intention of the statute, as drawn from the language used, is to make corporations responsible for all injuries from fire caused by their locomotives.

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Quigley v. Stockbridge & P. R. R. Co. 8 Allen, 440.

The reasons for granting indemnity for the property of the plaintiff, which was destroyed as stated, are as strong as in the case of property which was not within the control of the corporation, but in the same building and was destroyed by the same fire. Both claimants suffer from the same cause; and there is a manifest failure of justice if there is not the same remedy for both.

The language used in *Ross v. Boston & W. R. R. Co.* 6 Allen, 87, in reference to the distinction between responsibility for movable property, and for buildings, which was one of the points made by the defendant in that case, is applicable to the case at bar. "The claim for an indemnity is as strong, and the necessity and expediency of creating the liability are as great, whether the property injured or consumed is of a fixed and permanent nature, or of a kind to be moved or changed at the pleasure of the owner."

If the plaintiff had taken possession of his property and stored it in a part of the same building which was occupied as a private warehouse, and it had there been burned in the manner stated, the case would have been entirely covered by the decided cases.

Ross v. Boston & W. R. R. Co. supra; *Quigley v. Stockbridge & P. R. R. Co.* 8 Allen, 440; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454 (28 L. ed. 356).

It cannot be said there is any less necessity for indemnity for goods which are left in the depot of the defendant than for goods which might be deposited in a private warehouse in the same building, nor any argument for expediency or public policy that does not equally apply in the one case as well as in the other. The statute is broad and general, and affords a remedy for injuries by fire from locomotives, to all kinds of property, in all possible locations, in every variety of situation, where no remedy exists at the common law. As stated in *Ross v. Boston & W. R. R. Co. supra*, "the statute prescribes a clear, plain rule, arbitrary, it is true, but one which can be easily and intelligibly administered." To hold otherwise is to engraft an exception on the plain words of the statute. If the Legislature intended to have the statute applied in any restricted sense, it seems strange they did not add some qualifying word or clause.

Hart v. Western R. R. Corp. 13 Met. 99.

2. The judicial interpretation given to the statute has been continuously in the line of a liberal application of the remedy, and in accordance with the general rule for the interpretation of remedial statutes.

In the first case in this Commonwealth, it was applied to the case of a fire which was not communicated directly from the engine, but intermediately through a spark from a building set on fire by a locomotive. And the liberal doctrine in reference to *proxima causa* was adopted instead of the narrow one which is held in some States.

Hart v. Western R. R. Corp. supra.

In the next case, in point of time, the court declares that the statute was intended to cover

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damage to buildings standing on land a part of which had been conveyed to the corporation to use for railway purposes.

Lyman v. Boston & W. R. R. Corp. 4 Cush. 383.

Then it was declared that tools, patterns, and lumber in a shop, and a fence, were such property as the statute intended to provide indemnity for.

Trask v. Hartford & N. H. R. R. Co. 16 Gray, 71.

In *Ross v. Boston & W. R. R. Co.* 6 Allen, 87, it was applied to personal property in an open shed, and to trees growing on the land. In *Quigley v. Stockbridge & P. R. R. Co.* 8 Allen, 440, it was applied to buildings standing on land of the corporation by its consent. Subsequent cases have declared the same remedy applicable to grass and trees half a mile distant, and to a dwelling 1,600 feet distant; and trustees and lessees operating a railroad are liable as well as the corporation to which the franchise was granted.

Perley v. Eastern R. R. Co. 98 Mass. 414; *Safford v. Boston & Me. R. R.* 108 Mass. 583; *Daniels v. Hart*, 118 Mass. 543; *Davis v. Providence & W. R. R. Co.* 121 Mass. 184.

The same liberal principle of interpretation has been affirmed in *Pierce v. Worcester & N. R. R. Co.* 105 Mass. 199.

Similar statutes of other States have received a liberal interpretation.

Grand Trunk R. Co. v. Richardson, 91 U. S. 454 (23 L. ed. 356); *Hooksett v. Concord R. R.* 88 N. H. 242; *Roswell v. R. R.* 57 N. H. 182; *Pratt v. Atlantic & St. L. R. R. Co.* 42 Me. 580.

The language of Strong, J., in *Grand Trunk R. Co. v. Richardson*, *supra*, is especially applicable, and seems to cover completely the position of the plaintiff.

The only exception to be found is in *Chapman v. Atlantic & St. L. R. R. Co.* 37 Me. 92; and concerning this exceptional case, Bigelow, Ch. J., in *Ross v. Boston & W. R. R. Co.* 6 Allen, 87, says it "serves to show the embarrassment which would be occasioned if we departed from the plain and literal interpretation of the language of the statute."

The language of the Supreme Court of New Hampshire is still stronger: "The manifest intention of the Legislature was to cast upon the proprietors of railroads the substantial liability of insurers."

Roswell v. R. R. 57 N. H. 182; *Smith v. Boston & Me. R. R.* 63 N. H. 25.

8. If we consider the subject from another point of view we are brought to the same conclusion.

The enactment of the statute seems to be a return to the ancient doctrine, so far as railroads are concerned, in regard to the liability of the master of any premises on which fire is kindled, for damages caused by it, as the law stood prior to the Act of 6 Anne, chap. 31, §§ 6, 7.

An action on the case lies upon the general custom of the realm against the master of a house, if a fire be kindled there and consume the house or goods of another.

Com. Dig. *Action upon the Case for Negligence*, A, 6.

It was formerly holden that if a fire broke out accidentally in a man's house and raged to that degree as to burn his neighbor's, that he in 2 Mass.

whose house the fire first happened was liable to an action on the case on the general custom of the realm.

Bac. Abr. *Actions on the Case for Injury to Man's Person or Property*, F.

If my fire, by misfortune, burns the goods of another man, he shall have an action on the case against me.

Rolle, Abr. *Action sur Case*, B; Add. Torts; p. 365.

The rigor of the common-law rule was relaxed by the statute cited, and by the subsequent Statute 14 Geo. III. chap. 78, § 86; but these statutes respecting accidental fires do not apply to where the fire originated from locomotive engines which are run without parliamentary authority.

Jones v. Festiniog R. Co. L. R. 3 Q. B. 733.

When the Legislature grants authority to run locomotive engines,—dangerous machines,—the owners of which are responsible for all damages caused by them unless exempted by legislative Act, and at the same time couples with the grant the restriction that the proprietor "shall be responsible in damages to a person or corporation whose buildings or other property may be injured by fire communicated by the locomotive," the natural and irresistible inference is that the responsibility thus imposed must be as great as existed in case of those who ran without legislative authority.

The result of this consideration leads to the conclusion that the statute places on the defendant the liability for damage by fire which existed prior to the Statute of 6 Anne, chap. 31, §§ 6, 7. As there were no exceptions to that responsibility pertinent to this case, in the ancient doctrine, the statute should receive a like construction.

4. The reasons given in *Chapman v. Atlantic & St. L. R. R. Co.* 37 Me. 93, for not holding the railroad responsible for the loss of a pile of posts by fire communicated from the engine, whether sound or not, do not apply in the case at bar. It was entirely practicable for the defendant to protect itself by a policy of insurance on the contents of its station; and, aside from the provisions of the statute, it had an insurable interest in such contents.

5. The phrase "along its route," which is used in the Vermont statute, has been construed to cover property both personal and real in proximity to the rails upon which the engines run, both within and outside of the location of the road.

Grand Trunk R. Co. v. Richardson, 91 U. S. 454 (23 L. ed. 356).

The expression in the Massachusetts statute, "upon its route," is certainly as favorable to the plaintiff.

So in *Baron v. Eldredge*, 100 Mass. 455, the fire occurred in New York, where no such statute exists.

Grissell v. Housatonic R. R. Co. 1 Conn. (L. ed.) 391, 4 New Eng. Rep. 85, 54 Conn. 447, was cited in the superior court as tending to show that it was not the intention of the statute to provide indemnity for property in the custody of the railroad. Loomis, J., says: "The statute is clearly remedial, and ought to be construed liberally to effectuate the intention of the Legislature, which was to give the owners of property along the route of the railroad

indemnity for the loss of all property that might reasonably be said to be exposed to danger from the source referred to." This expression is certainly as strong as the case called for. The point before the court for decision was, Do the words "other property" embrace fences, growing trees, and herbage? It was decided they were included in the expression. And the argument was urged that the remark apparently excluded property in the stations of the company. Nothing of the kind was decided. The attention of the court was not called to such a distinction; there was no occasion for its consideration, and, besides, the language is broad enough to fairly embrace property stored in the stations of the railroad.

Messrs. George M. Stearns and Gideon Wells, for defendant:

1. Defendant contends that goods to which it holds the relation of common carrier or warehouseman are not within the protection of Pub. Stat. chap. 112, § 214.

General liability was first imposed by Acts 1840, chap. 85, § 1. The manifest reason for this legislation is given in many of the decisions. It is because the railroad companies have the right to take a strip of land from each owner and without his consent, and traverse the same day and night with locomotives which scatter fire along the margin of the land not taken, thereby subjecting property near the line to extraordinary hazard, in which all the benefit accrues to the railroad, without any advantage to the owner of the property.

Grissell v. Housatonic R. R. Co. 1 Conn. (L. ed.) 391, 4 New Eng. Rep. 85, 54 Conn. 447; *Hart v. Western R. R. Corp.* 18 Met. 99; *Hooksett v. Concord R. R.* 38 N. H. 242; *Lyman v. Boston & W. R. R. Corp.* 4 Cush. 288; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454 (23 L. ed. 356).

It is submitted that the statute does not give the owner of property destroyed the right to recover in every instance in which he can show that it was destroyed by fire communicated by a locomotive engine.

It is submitted that goods wrongfully upon the land of the company are not protected.

Quigley v. Stockbridge & P. R. R. Co. 8 Allen, 438; *Grand Trunk R. Co. v. Richardson*, *supra*.

Also, where owner has been guilty of negligence in the care of his property.

Ross v. Boston & W. R. R. Co. 6 Allen, 87.

This is analogous to the construction given to other remedial statutes of like nature, such as damages on highways, damages for dogs, damages for unguarded elevator-wells.

Taylor v. Carver Mfg. Co. 2 Mass. (L. ed.) 271, 3 New Eng. Rep. 875, 143 Mass. 470, and cases cited.

Aid in construing the first clause of the statute may be derived from the subsequent clause (*Hart v. Western R. R. Corp. supra*), which gives the corporation an insurable interest in property "along its route." The statute now reads "upon its route."

The decision by this court that a railroad company is liable under the statute for damages along its line by fires communicated by locomotives of lessees (*Ingersoll v. Stockbridge & P. R. R. Co.* 8 Allen, 438; *Daniels v. Hart*, 118 Mass. 543), would seem to be a reason for

holding that the law does not apply to goods in hands of carriers. Otherwise, a party might have two independent remedies; one against the owner of the road in tort, under the statute, and the other against the actual carrier, for breach of contract. Also, the lessee corporation might recover from the lessor for damages done by its own locomotives.

Unless this court is prepared to hold that all property, however situated, is under the protection of the statute,—which no court has yet done,—it would seem as if the property which the railroad has in its possession, as carrier, placed or left there voluntarily, and for his own benefit by its owner, under contracts and established rules of law carefully establishing and determining the relative rights, duties, and liabilities of each, ought to be considered as not under its protection.

2. The goods of plaintiff, which had been in the depot a reasonable length of time for their removal, were improperly, if not wrongfully, there.

In *Jones v. Festiniog R. Co.* L. R. 3 Q. B. 793, it was held to be actionable negligence to run a locomotive unless authorized by Parliament, as being manifestly and notoriously a dangerous instrument. It must therefore be considered negligence on the part of the plaintiffs unnecessarily to leave their property exposed to so obvious a danger.

Knowlton, J., delivered the opinion of the court:

The plaintiff lost his goods by fire in the defendant's freight house, and he seeks to recover their value, under Pub. Stat. chap. 112, § 214. The statute invoked is remedial, and has been liberally construed in favor of those for whose benefit it was enacted. The decisions indicate that it applies to property of every kind, and in every place where fire may be communicated by a locomotive engine. *Hart v. Western R. R. Corp.* 18 Met. 99; *Lyman v. Boston & W. R. R. Corp.* 4 Cush. 288; *Trask v. Hartford & N. H. R. R. Co.* 16 Gray, 71; *Ross v. Boston & W. R. R. Co.* 6 Allen, 87; *Quigley v. Stockbridge & P. R. R. Co.* 8 Allen, 440.

But it has never been held that it includes within its provisions articles placed in the possession of a railroad corporation, by their owner, under a contract which fully covers the rights and liabilities of both parties regarding them. When parties see fit to stipulate what their relations shall be touching any matter, their stipulations fix their rights and liabilities and exclude what is not fairly included in them. The statute referred to gives protection to owners of property who have made no arrangement with the railroad corporation about it. It was not intended to prevent property owners and railroad corporations making contracts determining their respective rights and duties relating to particular property, or to apply to cases where such contracts have been made. Nor is there any difference in this regard between express and implied contracts. If a railroad corporation and an owner of land or personal property make an arrangement about it from which the law implies a contract broad enough to cover the subject of liability for loss or injury, this contract, implied from their volun-

tary act, fixes their rights, and excludes the provisions of a statute intended for cases not covered by a contract.

The plaintiff had employed the defendant as a common carrier to transport his goods to Chiscopee. He voluntarily entered into an arrangement which involved the subject of the defendant's liability for loss of the property, or injury to it from any cause, and which determined his rights as definitely under the contract implied by law as if the parties had written out and signed stipulations in detail. The defendant was bound to carry the goods, and was an insurer of them until the transit ended, and was then liable as a warehouseman for any want of ordinary care during such reasonable time as they should remain in its custody awaiting the call of the consignee. This was the extent of its liability. In the language of Chief Justice Shaw, such an arrangement "we consider to be one entire contract for hire; and, although there is no separate charge for storage, yet the freight to be paid, fixed by the company as a compensation for the whole service, is paid as well for the temporary storage as for the carriage." *Norway Plains Co. v. Boston & Me. R. R.* 1 Gray, 272.

The goods having been destroyed while in the possession of the defendant, under this contract, the plaintiff must seek his remedy under it, and the statute referred to does not apply.

Judgment affirmed.

Samuel BLAISDELL, Jr., et al.

v.

CONNECTICUT RIVER R. R. CO.

1. A railroad corporation is not liable, under Pub. Stat. chap. 112, § 214, for goods destroyed by fire while in its possession under a contract for carriage (see the next preceding case); but goods which had come over defendant's road and had been received by plaintiffs, and goods received by plaintiffs for transportation and not delivered to defendant, so that the parties had not come into contract relation regarding them, and which were kept in a storehouse belonging to defendant, were not in defendant's possession under a contract for carriage, whether the relation of landlord and tenant existed between the parties, or whether the plaintiffs, after receiving the goods which had been transported over defendant's railroad, left them in defendant's building by sufferance.

2. Under the said statute, plaintiffs can recover of a railroad corporation, defendant, the value of property destroyed by fire communicated by its locomotives, which was not at the time in its possession under a contract fixing the rights and liabilities of the parties regarding it.

(Hampden—Filed October 20, 1887.)

APPEAL from a judgment for plaintiffs in an action to recover upon a claim arising under Pub. Stat. chap. 212, § 214. *Affirmed.*

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The facts are substantially the same as stated in the preceding case of *Bassett v. Connecticut River R. R. Co.*

Mr. George D. Robinson, for plaintiffs:
I. Every essential element of fact and law sustains the judgment rendered under the provisions of Pub. Stat. chap. 112, § 214.

The property of the plaintiffs was destroyed by fire communicated by the locomotive engine of the defendant, a railroad corporation.

Nothing in the whole course of judicial decisions upon this statute in this Commonwealth justifies the defendant's refusal to compensate the plaintiffs for their loss.

Hart v. Western R. R. Corp. 13 Met. 99; *Lyman v. Boston & W. R. R. Corp.* 4 Cush. 288; *Trask v. Hartford & N. H. R. R. Co.* 16 Gray, 71; *Same v. Same*, 2 Allen, 831; *Ross v. Boston & W. R. R. Co.* 6 Allen, 87; *Ingersoll v. Stockbridge & P. R. R. Co.* 8 Allen, 488; *Perley v. Eastern R. R. Co.* 98 Mass. 414; *Safford v. Boston & M. R. R.* 103 Mass. 588; *Pierce v. Worcester & N. R. R. Co.* 105 Mass. 199; *Daniels v. Hart*, 118 Mass. 543; *Davis v. Providence & W. R. R. Co.* 121 Mass. 184.

If it be asserted that the statute covers only buildings or other permanent structures, such position is wholly unsupported by authority and is in direct conflict with numerous decisions.

Trask v. Hartford & N. H. R. R. Co. and *Ross v. Boston & W. R. R. Co. supra*; *Pratt v. Atlantic & St. L. R. R. Co.* 42 Me. 579.

Or, if the claim be made that no property, real or personal, which is upon the land of the railroad company, is within the statute, it is undeniable that no court has ever so held. The contrary is abundantly sustained.

Quigley v. Stockbridge & P. R. R. Co. 8 Allen, 488, 440; *Grand Trunk R. v. Richardson*, 91 U. S. 459 (23 L. ed. 356).

II. The defendant is liable, though not to be charged with actual negligence.

See change in statute.

Acts 1887, chap. 226, § 9; Acts 1840, chap. 85; also *Perley v. Eastern R. R. Co.* 98 Mass. 414, 418; *Safford v. Boston & M. R. R.* 103 Mass. 588; *Shearm. & Redf. Neg.* 2d ed. § 335.

Railroad corporations are made insurers. "The Legislature have chosen to make it a condition of the right to run carriages impelled by the agency of fire, that the corporation employing them shall be responsible for all injuries which the fire may cause."

Ingersoll v. Stockbridge & P. R. R. Co. 8 Allen, 440; *Perley v. Eastern R. R. Co.* 98 Mass. 414, 418.

Having obtained from the People a grant of high value, they assume a liability to every property-holder on the route.

Hart v. Western R. R. Corp. 18 Met. 99; *Pierce, R. R.* 444-447; 2 Wood, R. R. Law, 1367.

They may effect insurance in their own behalf.

Eastern R. R. Co. v. Relief F. Ins. Co. 105 Mass. 570, 577.

This court has rightly sustained the justice of the statutory rule.

Ross v. Boston & W. R. R. Co. 6 Allen, 87, 91.

The earliest decisions, covering the whole question comprehensively, have been approved in this court again and again. So, too, in other courts.

Hooksett v. Concord R. R. 38 N. H. 242; *Rowell v. Railroad*, 57 N. H. 182; *Pratt v. Atlantic & St. L. R. Co.* 42 Me. 579; *Grissell v. Housatonic R. R. Co.* 54 Conn. 447; *Grand Trunk R. v. Richardson*, 91 U. S. 459 (23 L. ed. 356).

It may be safely asserted, in the absence of legislative action, that the interpretation of the statute given by this court expresses the general judgment of what the People intended, and still desire, the law to cover, and that no departure from principles so well recognized and settled is now called for.

Ross v. Boston & W. R. R. Co. 6 Allen, 87, 91, in comment upon *Chapman v. Atlantic & St. L. R. R. Co.* 37 Me. 92.

III. The question of negligence on the part of the owner of the property is not material under our statute, as in Connecticut and Vermont. *Ross v. Boston & W. R. R. Co.* 6 Allen, 87, 92, is not authority to the contrary. Verdict was for plaintiff. Question not before the court.

Rowell v. Railroad, 57 N. H. 182.

Were the rule otherwise, the case at bar gives no ground to impute contributory negligence to the plaintiffs. They rightfully occupied as tenants the defendant's storehouse. They were not trespassers. Defendant knew of their tenancy, and approved it as much as if payment had been continued.

Grand Trunk R. v. Richardson, 91 U. S. 459 (23 L. ed. 356).

Up to October 1, 1886, the plaintiffs paid rent. After that, they continued their occupancy as before, but claimed they ought not to be charged rent. With full knowledge the defendant assented. See letters of plaintiffs and Stebbins:

"The plaintiffs continued * * * to use and occupy the storehouse in the same manner and for the same purposes * * * without any objection on defendant's part, and no other person used the storehouse."

"The defendant had not notified or requested the plaintiffs to remove," etc.

The right of tenancy was complete.

No ground to infer storehouse was unsafe for storage. Property near railroad put on equality with other risks.

Hart v. Western R. R. Corp. 13 Met. 99; also, 8 Allen, 440; *Grand Trunk R. v. Richardson*, *supra*, approving *Bemis v. Connecticut & P. R. R. Co.* 42 Vt. 380.

IV. As a common carrier, defendant would be insurer. By force of statute, it is equally liable for goods destroyed by fire from its locomotives, notwithstanding that as to all other risks it might only be chargeable as warehouseman.

In either capacity defendant had insurable interest.

Eastern R. R. Co. v. Relief F. Ins. Co. 98 Mass. 420, 423.

Railroad corporations are liable for property over which they have no control, and of which they have no knowledge.

Ross v. Boston & W. R. R. Co. 6 Allen, 91.

The plaintiffs in *Baron v. Eldredge*, 100 Mass. 455, and *Nichols v. Smith*, 115 Mass. 382, sought to enforce the liability of the defendants as warehousemen, at common law, one loss having occurred in New York, the other in

Vermont, and did not make claims against defendants as insurers under the statute.

Le Forest v. Tolman, 117 Mass. 109.

Cases like *Richardson v. New York Cent. R. R. Co.* 98 Mass. 85; *Davis v. New York & N. E. R. R. Co.* 2 Mass. (L. ed.) 38, 3 New Eng. Rep. 408, 148 Mass. 801; and *Dennick v. New Jersey Cent. R. R. Co.* 108 U. S. 11 (26 L. ed. 439), so far as they touch the question of jurisdiction, are not in point.

Messrs. George M. Stearns and Gideon Wells, for defendant:

(Their brief is fully reported in the preceding case of *Bassett v. Conn. River R. R. Co.* except as to the following:)

The fact that Blaisdell had paid for the use of the storehouse did not, even while so paying, change the relations of the parties. Whatever goods he had there had been received by or for transportation. They were therefore in the custody of the defendant on account of their carriage. The payment of rent was only in the nature of a charge for warehousing received goods, ordinarily covered by transportation charges.

Norway Plains Co. v. Boston & Mo. R. R. 1 Gray, 263; *Miller v. Mansfield*, 112 Mass. 290.

Whatever analogy to tenancy the plaintiff, Blaisdell's, occupation had, was terminated by notice of September 21, 1886, and the subsequent action of the parties.

Knowlton, J., delivered the opinion of the court:

For the reasons set forth in *Bassett v. Conn. River R. R. Co.* ante, p. 208, a railroad corporation is not liable, under Pub. Stat. chap. 112, § 214, for goods destroyed by fire while in its possession under a contract for carriage. The question in this case is whether the plaintiffs' property at the time of the fire was in the defendant's possession under such a contract.

The plaintiffs were large shippers of merchandise over the defendant's road; and the defendant built for their use, as an addition to its depot, a storehouse separated from the general freight house by a brick wall. This they had occupied for two years in connection with their business, and up to October 1, 1886, they had paid an agreed price per month for it. It can hardly be claimed that during this period they were not the defendant's tenants in exclusive possession and control of all that the storehouse contained.

On the 21st day of September they notified the defendant that, by reason of the completion of a new building elsewhere, they should not need the storeroom after October 1. On the 1st day of the following November the station agent at Chicopee presented them a bill for the rent of the premises for the month of October, which had been sent him for collection by the defendant's auditor, in accordance with a usual practice and without special directions from the president or superintendent as to that bill. They declined to pay it, referring to their previous notification, and no bill was afterwards sent. The station agent informed the superintendent by letter of their refusal, and of their saying "they would pay no more rent for the storehouse, thinking they should have it free now and would keep the cars cleaned out." He also inquired if there was any error in sending

the bill, and asked the superintendent to advise the plaintiffs of the company's position. No reply was sent to the agent or communication to the plaintiffs, and they continued till the time of the fire, in March, 1887, "to use and occupy the storehouse in the same manner and for the same purposes as before, which use was known by the station agent, but the agent did not know whether or not any arrangement had been made with the president or superintendent for such use, but such use was without any objection on defendant's part, and no other persons used the storehouse." The property destroyed "had been received by the plaintiffs in the course of their said business, by or for transportation."

Upon these facts the plaintiffs were in possession and control of the property in the storehouse as well after as before the 1st day of October, 1886. The goods which had come over the defendant's road had been "received" by the plaintiffs and kept in the storehouse, some of them a day or two at the time of the fire, and some of them for months. There is nothing to indicate that the contract under which the defendant carried them had not been fully performed; and, so far as appears, the defendant did not seek to retain a lien upon them, but allowed the plaintiffs to take them into their absolute control. And the facts do not find that the goods in the storehouse, "received by the plaintiffs" for transportation, had ever been delivered to the defendant so that the parties had come into relations of contract regarding them. The defendant did not use the storehouse nor have the custody of anything in it. It is quite immaterial whether the relation of landlord and tenant continued to exist between the parties, or whether the plaintiffs, after receiving freight which had been transported over the defendant's railroad, left it in one of the defendant's buildings by sufferance. The test question is as to the goods which had been transported over the railroad, whether they had been given up to the owner, so that the contract for carriage, and incidentally for storage for a reasonable time or until delivery, no longer applied to them; and as to these which were intended for transportation, whether they had been delivered to the corporation so that the contemplated contract had taken effect.

If, as claimed by the defendant, contributory negligence of the plaintiffs would bar their recovery, which we do not decide, we find in their conduct no want of due care.

The property having been destroyed by fire communicated by the defendant's locomotive engine, and not having been at the time in the possession of the defendant under a contract fixing the rights and liabilities of the parties regarding it, the plaintiffs may recover the value of it, and the entry must be—

Judgment affirmed.

ORTHODOX CONGREGATIONAL SOCIETY

v.

Town of GREENWICH.

1. Under the statute providing that a person in possession of real property, etc.,

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may bring his petition against any person making an adverse claim, praying that he show cause why he should not bring an action to try his alleged title, the petitioner must have an exclusive and adverse possession which works a disseisin of the respondent. In cases where there is a joint or mixed possession, the petition cannot be maintained.

2. If the petition prevails, the title must be tried in an action at law. The court cannot, in proceedings upon the petition, express any opinion upon the question of title to the real property in controversy.

8. Where a meeting-house was built by a town upon the common belonging to it, and had been used as a town house and place for public worship until a new town house was built, and then for religious services, concerts, and lectures, by permission of the town; and the town kept up the custom of ringing the bell therein at noon and of tolling it for deaths, the religious society which occupies the audience room by such permission has not such an exclusive possession as entitles it to maintain such a petition.

(Hampshire—Filed October 20, 1887.)

PETITION by the Orthodox Congregational Society of Greenwich against the town of Greenwich, representing that it is in possession, holding the fee for its own use, and for the use of its successors and assigns, of a tract of land, with the building thereon, in the town of Greenwich; that the said town of Greenwich claims some title or right in said estate which is adverse to the estate of said society; and the prayer of the petition was that the said town of Greenwich be summoned to show cause why it should not bring an action in due form of law to try respondent's right, title, and interest in said estate. Hearing in the Supreme Judicial Court, before Holmes, J., who reserved the case for the consideration of the full court.

The facts material to the points decided sufficiently appear in the opinion.

Meers. F. P. Goulding, William G. Bassett, and Blackmer & Vaughan, for complainant:

I. The petitioner is entitled to a decree, unless the facts reported fail to show that it was in possession, claiming a freehold, or unless those facts show the title to be in the defendant.

Being in possession, its possessory title is entitled to protection against a stranger.

Title in a third person would not enable the respondent to maintain the writ, if required to bring it against the petitioner in possession.

Stearns, Real Actions, § 20; Wolcott v. Knight, 6 Mass. 418; Knox v. Kellock, 14 Mass. 200; Porter v. Perkins, 5 Mass. 283.

II. The facts reported show that the petitioner has been in possession since its incorporation, using the meeting-house exclusively for the purpose for which it was fitted, furnished, and designed.

Milford v. Godfrey, 1 Pick. 91, 97; Shrewsbury First Parish v. Smith, 14 Pick. 297; North

Bridgewater Cong. Soc. v. Waring, 24 Pick. 304.

III. The facts reported show the title to be in the petitioner.

The recital of the justice that the petition was by ten voters instead of nine is immaterial.

It will be presumed, in the absence of proof to the contrary, that there were ten qualified voters in the society. *Omnia præsumuntur rite et solemniter esse acta.*

1 Greenl. Ev. §§ 38-40.

Whatever property a town, acting in the double capacity as parish and town, has appropriated to parochial uses, and continued in such uses up to the time of the division of the municipal and parochial functions of the town, will belong to that parish which, under the laws, is the first parish.

Medford First Parish v. Pratt, 4 Pick. 222; *Sudbury First Parish v. Jones*, 8 Cush. 184; *Tobey v. Wareham Bank*, 13 Met. 440; *Ludlow v. Sikes*, 19 Pick. 317; *Milford v. Godfrey*, 1 Pick. 91; *Lakin v. Ames*, 10 Cush. 198; *Shrewsbury First Parish v. Smith*, 14 Pick. 297; *Milton v. Milton First Cong. Parish*, 10 Pick. 447.

The terms of Stat. 1834, chap. 183, § 6; Rev. Stat. chap. 20, §§ 26, 27, and Gen. Stat. chap. 30, §§ 4, 5, are broad enough to include all religious societies not incorporated, or unable to assemble in the usual manner.

In *Wood v. Cushing*, 6 Met. 448, it was held that this statute did not apply exclusively to new organizations.

In *Ludlow v. Sikes*, 19 Pick. 317, the first parish was organized under this statute substantially in the manner this petitioner was organized.

The position is not tenable that the first parish, as a corporate body, cannot exist except under the conditions named in Stat. 1786, chap. 10, § 5.

Jewett v. Burroughs, 15 Mass. 468, 467.

A liberal construction in favor of the intent will be put upon such proceedings.

Cognell v. Bullock, 18 Allen, 90.

The connection of the petitioner with the ancient church, whose records go back to 1760, establishes its identity with the old congregation or parish.

The following should be considered: Identity of form of religious worship and the continuous relation with the same church; and, from the implication of the name of the society, the substantial identity of doctrine with that of the old society.

Milford v. Godfrey, 1 Pick. 101; *Raynham Cong. Soc. v. Raynham*, 23 Pick. 148, 152; *Jewett v. Burroughs*, 15 Mass. 468, 468.

The church and society with which it associated are inseparably united.

There are numerous cases in this Commonwealth where the identity of the church has been established by its relation to the society or parish, on the principle of the indissoluble union between the two.

Baker v. Fales, 16 Mass. 488; *Sawyer v. Baldwin*, 11 Pick. 492; *Stebbins v. Jennings*, 10 Pick. 172; *Wood v. Cushing*, 6 Met. 448, 456; *Page v. Crosby*, 24 Pick. 211; *Weld v. May*, 9 Cush. 181, 187; Stat. 1834, 193, § 1; Rev. Stat. chap. 20, § 3; Gen. Stat. chap. 30, § 3; Pub. Stat. chap. 88, § 3.

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IV. The report shows a title by limitation in the petitioner.

Second Precinct in Rehoboth v. Carpenter, 23 Pick. 181.

The acts of the selectmen in supervising the work of repair in 1880, in connection with a committee of the society, are not particularly disclosed by the report; but it is obvious that those acts were not intended as any assertion of a right to possession, or any interruption of the petitioner's possession.

The acts of the town—ringing the bell and entering the vestibule—must be considered as merely permissive, and in subordination to general and exclusive right to use the meeting-house for the only purposes it has been devoted to for more than thirty years,—and that general and exclusive right the petitioner has never ceased to assert and exercise since its incorporation.

Mr. D. W. Bond, for respondent:

The tract of land described in the complaint, with the building thereon, is the meeting-house and horse-sheds, "with no more land than is necessary and reasonable for the convenient access to the building."

The respondent denies that the complainant is in possession holding the fee.

It is claimed by the town that the complainant ought to be dismissed if the society is not in possession of the premises, holding the fee.

Pub. Stat. chap. 176.

I. This house was built while the town and parish were united, and after the vote to do all parish business in the future in town meeting.

After the incorporation of the town of Enfield, the parish and town, being the same territorially, might unite as at first and transact all the municipal and parochial matters in one meeting.

Shrewsbury First Parish v. Smith, 14 Pick. 297, 299.

If this house had been built solely for a meeting-house while the town and parish were acting together, upon the legal separation of the parish and town the house, with sufficient land for a convenient use of it, would be the property of the parish.

Ludlow v. Sikes, 19 Pick. 317, 323; *Lakin v. Ames*, 10 Cush. 198.

The building was erected for a double purpose, viz., a town house and a place for worship. It is not a case where the meeting-house was used for a town house and meeting-house, as in *Medford* (see 4 Pick. 222), but the vote of the town was to build it for a town house and a place for public worship.

A building to be used as a "town house" includes all the business for which a town is authorized to erect a building. Such a building may be used for lectures and public meetings.

French v. Quincy, 3 Allen, 9.

II. There has never been any legal separation of the town and parish.

When the inhabitants of a parish are, by the Legislature, incorporated as a town, the parish is not extinguished. There are two corporations, which may act together or separately; and if they act together they may at any time separate.

Dillingham v. Snow, 3 Mass. 276; *Same v.*

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Same, 5 Mass. 547; *Milford v. Godfrey*, 1 Pick. 91, 93.

A meeting of the parish may be called, and the parish may act independently of the town. When, from lack of officers to call a meeting, a parish meeting cannot be called in the usual way, an application may be made to a justice of the peace to call a parish meeting.

Acts 1786, chap. 10; Acts 1811, chap. 6; Acts 1833, chap. 106, ¶ 1; Acts 1834, chap. 183, ¶ 6; Rev. Stat. chap. 20, ¶¶ 26-28; Gen. Stat. chap. 30, ¶¶ 4, 5.

The use of the meeting-house does not indicate that there had been any separation of town and parish.

There is nothing in the care and repairs of the meeting-house, or in the votes as to this, or the use of the house, to indicate that the parish had separated from the town and claimed the house as its own.

No vote appears on the records of the petitioner indicating any interest in the house. In 1880 there was a committee chosen to confer with the selectmen about repairing the meeting-house.

III. The complainant is not the Parish of Quabbin, or the First Parish of Greenwich.

The complainant was organized as a religious society in 1865. It was not a separation of the parish and town, but a method of avoiding all complications about membership, and the right to take part in such organization, and a new religious society was formed, called the Orthodox Congregational Society of Greenwich.

In cases reported, when it was the intention of the signers of a petition to a justice of the peace to call a meeting of the parish, it so appears in the petitions and call for the meeting.

See *Ludlow v. Sikes*, 19 Pick. 317-320; *Tobey v. Wareham Bank*, 13 Met. 440-445.

If it had been the intention of the signers of the petition to the justice of the peace to call a meeting of the parish, it would have been so stated in the petition, or in some way intimated in the proceedings.

The complainant therefore has no right in the premises described in the complaint.

Morton, Ch. J., delivered the opinion of the court:

Under Pub. Stat. chap. 176, any person in possession of real property, claiming an estate of freehold or an unexpired term of not less than ten years, may file a petition against any person making an adverse claim, praying that such person may be summoned to show cause why he should not bring an action to try his alleged title. The object of the proceeding is not to try the title to the real property; the court cannot make any decree, unless the respondent makes default, which will operate as a conclusive adjudication of the title of either party.

If the petitioner prevails, the question of title must be tried in an action at law brought and prosecuted under such conditions as this court may decide equitable and just. We therefore cannot, in this case, express any opinion upon the question of the title to the real property in controversy. The only question properly before us is whether the petitioner has shown that it is in possession of the land, claiming an estate of freehold, so as to be within the statute.

It has always been held that in the provision

that "any person in possession of real property, claiming an estate of freehold" may bring his petition, the statute contemplates an exclusive and adverse possession which works a disseisin of the respondent; and that in cases where there is a joint or mixed possession the petition cannot be maintained. *Tompkins v. Wyman*, 116 Mass. 558; *India Wharf v. Central Wharf*, 117 Mass. 504; *Leary v. Duff*, 137 Mass. 147.

In the case before us, most of the facts stated in the elaborate and interesting report of the master bear only upon the question of title. These we need not consider. But upon such of the facts as touch the question of possession, we are of opinion that the petitioner has not shown a case which entitles it to maintain this petition.

The meeting-house in question was built in 1828, by the town, upon a portion of the common belonging to the town. By the vote of the town it was "to be used as a town house, and place for public worship," and the town held its meetings in it up to 1855, when a new town house was built. During this period several religious societies occupied the building on Sundays, by permission of the town. Since 1855 the building has not been used for the general purposes of a town house; the audience room has been used for religious services solely, except that since 1880 it has been used for "a juvenile concert, one or two public readings, Decoration Day services on two occasions, and two public lectures." The town has, from time to time, expended money for repairs of the meeting-house both inside and outside, and the evidence shows that after 1855, as before, the petitioner, since its incorporation in 1865, and the religious society which preceded it, occupied the audience room by the permission and license of the town. No claim of title adverse to the town appears to have been made by the petitioners until October, 1885, when it voted to contest any claim made to the meeting-house, adverse to the petitioner.

It further appears that the town kept up the old custom of ringing the bell at noon, and of tolling it when deaths occur, and that it has always had access to the vestibule of the meeting-house for these purposes. There is no evidence that this was by the permission of the petitioner. On the contrary, it was an adverse possession, and a daily use of a part of the premises by the town claiming to be the owner. There is no evidence of any ouster of the town by the petitioner.

Upon these facts we are of opinion that there was a mixed possession, and that the petitioner has not such an exclusive possession as entitles it to maintain this petition. There is no reason why the respondent, rather than the petitioner, should be ousted and compelled to bring an action at law to try the title.

Petition dismissed.

COMMONWEALTH of Massachusetts

v.

William C. CHRISTIE.

Where, on the trial of a complaint for keeping intoxicating liquors with intent to sell the same unlawfully, there

was a conflict between a witness for the government and the defendant, as to declarations made by the latter; and the district attorney argued to the jury that if they acquitted the defendant they would be branding the government's witness as a perjurer; and the court instructed the jury that the government must prove all its material allegations beyond reasonable doubt, and that the jury were to consider the intelligence, memory, and accuracy of the government's witness,—*Held*, that the court was not required to give additional instructions, requested by defendant, to the effect that it was not necessary for the jury to disbelieve the government's witness in order to acquit; and that, if all the evidence left their minds in doubt as to what was said, the defendant was entitled to the benefit of it.

(Essex—Filed November 5, 1887.)

ON defendant's exceptions. *Overruled*. Complaint against the defendant, alleging that on September 10, 1887, at Haverhill, he did keep intoxicating liquors with intent to sell the same unlawfully in this Commonwealth.

At the trial in the Superior Court for Essex County, before Sherman, J., the only issue was that of "proprietorship." As bearing upon this issue, the government introduced the evidence of Austin C. Sprague, a police officer, who testified that on said day he saw the defendant at a certain saloon, being at No. 10 Locust Street, in said Haverhill, in the basement thereof; that he, Sprague, was about to open a door into an adjoining basement, when defendant said, "If you find anything in there, don't lay it to me. This is all I hire." The defendant introduced, among other testimony, the testimony of two other witnesses besides himself, as to his declarations to Sprague, differing essentially from the version given by Sprague; the latter testifying that no one was present during the conversation except the defendant.

The district attorney, in arguing the case for the Commonwealth, submitted to the jury, in substance, that if they acquitted the defendant they would, in doing so, be branding officer Sprague as a perjurer. The defendant's counsel had not claimed during the trial that Sprague had perjured himself, but had urged upon the jury that he must be mistaken in his version, and confounded it with the facts in some other case, and that the testimony introduced in behalf of the defendant ought to create a doubt in their minds as to the correctness of the officer's version.

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The defendant's counsel, in view of the fact that the district attorney had argued as aforesaid to the jury, asked the court, by way of written prayer, before the charge was begun to the jury, to instruct the jury as follows: "It is not necessary for the jury to disbelieve Sprague in order to acquit. If all the evidence leaves their minds in doubt as to what was said, the defendant is entitled to the benefit of it."

The court gave instructions that all the material allegations of the complaint were to be proven beyond a reasonable doubt, and gave general instructions not excepted to; and, as to this feature of the case, that they were to consider the intelligence of the officer, and whether he understood and interpreted the conversation correctly, and that they were not responsible for the effect, if any, of their verdict upon witnesses; but did not instruct the jury as prayed for. The jury returned a verdict of guilty, and the defendant alleged exceptions.

Messrs. Brickett & Poor, for defendant:

The instructions should have been given. A single issue was being tried, excepting the fact that Sprague saw him in the basement of the place in question at the time; but that he was doing or had done anything to indicate "keep-ership" up stairs does not appear. It was appropriate and necessary to the first decision of the case, in the position of the cause, that the defendant's prayer should have been given.

Wells v. Prince, 15 Gray, 562.

The omission was prejudicial to the defendant, and it was not cured by the other instructions not excepted to. From the bill of exceptions it does not appear that the instructions given embraced substantially, though in different language, the instructions requested.

Commonwealth v. Cobb, 120 Mass. 356.

Mr. Andrew J. Waterman, for the Commonwealth:

The ruling of the court was clearly correct. The court is never called upon to give instructions in the language requested. In the present case, the instructions given embraced substantially, though in different language, all the material instructions requested by the defendant, and he has no ground of exception.

Commonwealth v. Cobb, 120 Mass. 356; *Commonwealth v. Brown*, 121 Mass. 70.

Per Curiam:

The court was not required by law to give the instructions requested by the defendant. The instructions given, that the government must prove all its material allegations beyond reasonable doubt, and that the jury were to consider the intelligence, memory, and accuracy of the witness Sprague, were sufficient and appropriate.

Exceptions overruled.

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VERMONT.

SUPREME COURT.

A. & J. T. STEVENS

r.

L. M. FULLINGTON and Y. E. Bradley,
Trustee; Lydia A. Fullington, Claimant.

1. The defendant husband assisted C in the sale of his farm to the trustee. In the sale, with the agreement of all parties in interest, the trustee had the right to take wood for five years from the claimant wife's premises; and, in consideration of the husband's services, which were nominal, and the right to take wood, C gave to him two \$50 notes executed by the trustee; and the husband, who acted as broker for C, and at the same time as agent for his wife in the sale of the wood, delivered both notes to her, as her property, without intent to defraud his creditors. Held, that the wife, as claimant under the trustee process, was the owner of both notes.
2. An objection to the admission of evidence before a commissioner is not available in the supreme court, unless made to and passed upon by the court below.

(Lamolle—Filed November 5, 1887.)

TRUSTEE PROCESS. Heard on the report of a commissioner, April Term, 1887, Lamolle County, Taft, J., presiding. Judgment that the trustee was chargeable for \$50 and interest, being the amount of a promissory note. *Reversed.*

The commissioner found, in part:

"Said Coddington and Fullington, the defendant, agreed that, if Fullington would help effect the sale with Bradley, and put in the right to take wood for five years from his wife's land, he would give \$100; and he did deliver to the said L. M. Fullington two of Bradley's notes for \$50 each; one of which is the note in question. Said Coddington was to pay nothing for Fullington's services, except so far as he was compensated by these two notes, which were to be full pay for all such services, and the right to take the wood from his wife's land. It did not appear how much the services thus rendered were worth, nor how much the right to take said wood was worth. The time spent by Fullington could not have exceeded two days, and the value of the services, so far as they had any, must have consisted in the skill of said Fullington as a land broker. In the deed to Mrs. Fullington the right reserved by Coddington to take wood was to be forfeited if he moved away,—was personal,—and was confined to dead wood cut only for three years; but the right with which Mrs. Fullington parted was to take green wood for five years, as much as said Bradley might want to use for firewood."

And in a supplemental report:

"These two items induced Coddington to transfer the two notes to Mr. Fullington as stated in the report; but the exact and separate value of either was not then in the mind of Coddington or

Fullington. In Fullington's mind the wood was of much more value than the services, while in Coddington's mind the help of Fullington in securing a customer and getting off a trade was thought to be quite valuable. But if the case is to be disposed of by the fair value of the two items, without reference to the trade made by the parties, then I find that the right to take wood for the five years, paid for at the time as it was, was worth \$50; and that the actual services rendered by Fullington in making the trade were not worth more than \$5; and yet the parties called them both \$100. And I find that the \$45 with which Coddington parted was the result of his valuation of Fullington's assistance in selling his farm."

The other facts sufficiently appear in the opinion.

Mr. Edward B. Sawyer, for claimant:

The claimant had a good title to this fund.

Sibley v. Johnson, 43 Vt. 67.

It was the wife's chose in action. The consideration for the note was her property.

Richardson v. Daggett, 4 Vt. 336; *Stearns v. Stearns*, 30 Vt. 213; *Bartlett v. Boyd*, 34 Vt. 260; *Ridout v. Burton*, 2 Vt. 883; *Waldo v. Peck*, 7 Vt. 434; *White v. Owen*, 12 Vt. 361; *Day v. Ridley*, 16 Vt. 48; *Prentiss v. Blake*, 34 Vt. 460; *Squires v. Barber*, 37 Vt. 538.

Fraud in law is not applicable.

Stewart, Husb. & W., 84, 97.

The husband may labor gratuitously for his wife in the management of her property, and his creditors do not acquire any right against her property.

Stewart, Husb. & W. p. 195; *Webster v. Hildreth*, 33 Vt. 457; *Partridge v. Stocker*, 36 Vt. 108.

Mr. B. A. Hunt, for plaintiff:

The transfer of the note to the wife was void. A husband must retain property enough to pay his debts before conveying to his wife.

Church v. Chapin, 35 Vt. 223; 25 Vt. 496; *Barker v. French*, 18 Vt. 460; *Jones v. Spear*, 21 Vt. 426; *Crane v. Stickels*, 15 Vt. 252; 23 Vt. 549; *Rev. Laws*, § 4155.

The claimant never had any interest in the fund.

25 Vt. 496.

Powers, J., delivered the opinion of the court:

The objections taken before the commissioners to evidence offered and admitted are not available in this court, as they were not made to and passed upon by the court below.

If the salient facts disclosed in the commissioner's report are kept in the foreground, the legal aspects of the case are easily discernible.

The claimant is the wife of the defendant Fullington, and at the time of the transaction in question was the owner of a farm in her own right.

Coddington, with the help of the defendant Fullington, effected a sale of some land to the trustee, Bradley.

Coddington agreed to pay Fullington \$100 if he "would help effect the sale with Bradley, and put in the right to take wood for five years from his wife's land."

Fullington fulfilled the agreement; the sale, with the right to take this wood, was effected

and Coddington delivered to Fullington two of Bradley's notes for \$50 each, given for the purchase money in fulfillment of his agreement.

In this transaction there was no intent on the part of anybody to defraud Fullington's creditors. Fullington gave his services and the right to take wood from his wife's land, acting in good faith, for the benefit of his wife; and at once delivered the two notes received in payment, to his wife as her property; and she has continued to hold them as such since.

The right to take wood by Bradley was the substantial consideration for which Coddington was to pay the \$100 to Fullington. The latter's services as a broker were nominal in character and in value, and he acted merely in the capacity of an agent for his wife.

If a stranger had assisted Coddington in this sale, and secured the right to take wood from Mrs. Fullington's land, precisely as the defendant did, and had returned the whole consideration to Mrs. Fullington, claiming nothing for his personal services, no one would question Mrs. Fullington's title to the funds held by her.

In the eye of the law, in the absence of an intent to defraud creditors, her husband may do the same thing as freely as a stranger could.

The plaintiff's argument proceeds upon the theory that this transaction was a fraudulent device to cover Fullington's property, but the report expressly negatives this assumption; and, this element wanting, Mrs. Fullington's title to the notes in question is absolute against the world. *Albee v. Cole*, 39 Vt. 319, and cases *passim* in our Reports.

The judgment is reversed, and judgment that the claimant is entitled to the funds in the hands of the trustee, and that she recover her costs.

TOWN OF WOODBURY

r.

Edwin BRUCE.

A town's trustee of the United States surplus revenue money purchased a farm on which was a mortgage to secure a note payable to its trustee of the said surplus, or his successor, and **discharged** the mortgage **without payment** of the note; and, without a record of the discharge being made, sold the farm to the defendant, who had knowledge of all the facts. *Held*, that the act of the trustee was a **gross breach of trust**; that the information given to the defendant was sufficient to put him upon inquiry; and, as between him and the town, the latter has the superior equity, and is **not estopped**, as it did not influence the defendant in making the purchase.

(Washington—Filed November 9, 1887.)

BILL to foreclose a mortgage. Heard on the pleadings and a special master's report, September Term, 1886, Washington County, Powers, *Chancellor*. The decree was that the petitioner have a foreclosure, as prayed for, with the usual time of redemption. *Affirmed*.

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The master found that one Geo. H. Wells, on February 9, 1874, gave the note in question to the trustee of the United States surplus revenue money, and, on July 10, 1874, executed the mortgage in question to secure it; that said Wells died in 1876, and that A. W. Nelson was appointed administrator of his estate; that said Nelson was sole trustee of the United States surplus money; that he procured said Wells to give the mortgage; that Nelson continued to be said trustee till March, 1877; that said Nelson, on December 3, 1876, conveyed by an administrator's deed the farm on which the mortgage was given to R. W. Bruce, and at the same time said Bruce conveyed by quitclaim deed the farm back to said Nelson, and he wrote on the mortgage the discharge, as stated in the opinion; that the sale of the farm to Bruce was a fictitious one, and that it was a mere arrangement by which Nelson was to have the farm; that the defendant acted in good faith, and that he and Nelson considered the mortgage as legally discharged, although they both knew that the note had not been paid; that Nelson never paid the note, but claimed that the property to pay said note was received by him by his taking the Wells' farm into his own hands, and that it was due from him to the town; and that the town looked to him to pay it until he failed, some time in 1878 or 1879.

The other facts are sufficiently stated in the opinion.

Mr. S. C. Shurtleff, for orator:

It was a breach of trust in Nelson to attempt to discharge the mortgage without payment of the note. He could not discharge it without payment, and the defendant is in no better position to defend than Nelson.

Messrs. Heath & Willard, for defendant:

The mortgage was discharged. The discharge was made by one having full authority to do it.

Rev. Laws, § 642.

The acquiescence of the town in the discharge operates as a ratification.

Potential v. Meyers, 16 Vt. 408.

The conveyances from Nelson to Bruce, and from him back, constituted a discharge of the mortgage.

Welsh v. Phillips, 54 Ala. 309.

The town is estopped.

Herm. Estop. § 939; *Montpelier & W. R. R. Co. v. Langdon*, 45 Vt. 137; *Strong v. Ellsworth*, 26 Vt. 373; *Holloran v. Whitcomb*, 43 Vt. 307.

Royce, Ch. J., delivered the opinion of the court:

While A. W. Nelson was trustee of the United States surplus revenue money for the town of Woodbury, he procured a mortgage executed by George H. Wells, of the land described in the bill, securing a note which said Wells had given, payable to the trustee of said revenue money, or his successor in office, of said town of Woodbury, and two other notes that said Nelson then held against said Wells. The land described in the mortgage was subsequently conveyed to Nelson; and, on the day of its conveyance to him, he made the following indorsement on the mortgage:

Having received the contents of the notes specified in this mortgage according to the tenor and effect of the same, I hereby discharge this mortgage in full.

A. W. Nelson.

The indorsement was not recorded, and it is found that the note given to the town of Woodbury had not then, and has not since, been paid. That note and the mortgage remained in Nelson's possession until March, 1877, when he handed the note to his successor in office, and retained the mortgage. On the 10th of March, 1877, he sold the land described in the mortgage to the defendant; and, before he executed the deed, he informed the defendant how he considered the Wells mortgage to be discharged, and what he had done to discharge it and to clear the title; so that the defendant purchased the property with full knowledge that Nelson, while acting as trustee of the town of Woodbury, attempted to discharge the mortgage without the note secured by it having been paid, and that it had not then been paid.

The attempt of Nelson to deprive the town of the security it held for the payment of the note, and which he had obtained while acting as trustee, was, as between himself and the town, a gross breach of trust. The question presented is: Will the indorsement so made upon the mortgage bind the town, so that the deed from Nelson to the defendant will be operative to defeat the right of the town to the security given by the mortgage?

It was an attempt to discharge the mortgage without payment of the note secured by it, and the statement that he had received payment of the note was false in fact, and must have been known by the defendant to be false at the time he purchased the property.

The right of the town to the security given by the mortgage was not prejudiced by the attempted discharge. The information given to the defendant when he purchased the property was, in our judgment, amply sufficient to put him upon inquiry. *Blaisdell v. Stevens*, 16 Vt. 179; *Lorejoy v. Raymond*, 58 Vt. 509. And if he, with such knowledge, purchased and paid for the property without making provision for the payment of the note, he did so at his peril; and, as between him and the town, the town has the superior equity.

Neither do we find any fact that in law estops the town. The town did not participate in the purchase of the property by Nelson, nor in its sale to the defendant, and had no knowledge of the indorsement made upon the mortgage; and there is no act or conduct of the town shown that influenced the defendant in making the purchase. He purchased the property equitably charged with the payment of the note, and has in no way been released from that obligation.

The decree of the Court of Chancery is affirmed, and cause remanded.

H. H. WALLING

r.

R. H. NEWTON.

In an action of **trover** for the conversion of personal **property**, where the de-

fendant claimed to derive title to it as legatee under his father's will, the **plaintiff, claiming** to have bought it of another party and left it with the testator merely for his use, is a witness in this respect in **his own behalf**.

(Washington—Filed November 1, 1887.)

TROVER for a vulcanizer and pair of flasks, an office chair, and a lathe. Heard on a referee's report, March Term, 1886, Washington County, Powers, J., presiding. Judgment for the defendant, the court holding that the plaintiff was not a witness. *Reversed*.

It appeared that Marcellus Newton, the father of the defendant, was a dentist; that defendant studied dentistry with him, and afterwards went into business with him; and that they continued in the business for several years and then separated. It was claimed by the plaintiff that he purchased the articles in contention when new, and that they had remained his property ever since; and that he left them with the said Marcellus when he, plaintiff, went to the West Indies.

The referee found:

Marcellus Newton died, leaving by will all the things pertaining to his business and practice as a dentist to his son, the defendant. A few days after his father's death, and about January 1, 1878, the defendant took the articles mentioned in items 1, 2, and 3, which had been in his father's possession and use from 1870 until his death, and which he supposed his father owned, and moved them to Montpelier, and has since treated them as his own. These articles were not inventoried or appraised as the property of, or belonging to, the estate; but the personal representative of Marcellus Newton knew when the defendant took them away, and made no objection.

I find, upon his [plaintiff's] testimony only, that said articles were purchased when new by the plaintiff, and that he has never disposed of them; also that the values carried out opposite those items are fair cash values of those articles at the time the defendant took them. I also find, upon the plaintiff's testimony only, the agreement hereinbefore stated under which those articles, with others, went into Marcellus Newton's possession when the plaintiff returned to the West Indies in 1870.

Messrs. James N. Johnson and George M. Fisk, for plaintiff:

This is not an action against the estate of Marcellus Newton, and does not come within Rev. Laws, §§ 1002, 1003.

Lytle v. Bond, 40 Vt. 618; *Cole v. Shurtleff*, 41 Vt. 311; *Manufacturers Bank v. Scofield*, 39 Vt. 590; *Thrall v. Seacard*, 37 Vt. 578; *Morse v. Low*, 44 Vt. 561; *Kimball v. Baxter*, 27 Vt. 628; *Benior v. Paguin*, 40 Vt. 199; *Downs v. Belden*, 46 Vt. 674.

Mr. George W. Wing, for defendant:

The plaintiff was not a competent witness. The defendant claims the property under his father's will.

The cases show that the words "contract in issue," as used in the statute, mean the same as contract in dispute or in question, and relate as well to the substantial issues made by

the evidence as to the mere formal issues made by the pleadings.

Hollister v. Young, 42 Vt. 408; *Merrill v. Pinney*, 43 Vt. 605; *Davis v. Windsor Sav. Bank*, 48 Vt. 532; *Fitzsimmons v. Southwick*, 38 Vt. 509; *Roberts v. Lund*, 45 Vt. 82; *Ford v. Cheney*, 40 Vt. 153; *Hall v. Hamblett*, 51 Vt. 590; *Farmers Mut. F. Ins. Co. v. Wells*, 53 Vt. 14; *Hollister v. Young*, 41 Vt. 156; *Hollister v. Young*, 42 Vt. 403.

The cases allowing the party to testify are where the estate of the deceased party is not affected or interested, and where the matter is collateral.

Cole v. Shurtleff, 41 Vt. 311; *Downs v. Belden*, 46 Vt. 674; *Manufacturers Bank v. Scofield*, 39 Vt. 590; *Morse v. Low*, 44 Vt. 561.

Taft, J., delivered the opinion of the court:

The question in this case is, Was the plaintiff a competent witness? He was unless made incompetent by Rev. Laws, § 1002 or § 1003; and this depends upon whether "the contract or cause of action in issue" was made with Marcellus Newton. The action is trover for the unlawful conversion of the property by the defendant. The plaintiff's title in an action of trover is not necessarily the question in issue. Where both parties claim from the same source it evidently is. Did the plaintiff claim the property by virtue of a purchase from Marcellus, it might, under some of our reported cases, be held that such contract of purchase was the matter in issue, and the plaintiff incompetent to testify; although we think the decisions upon that point conflicting. But the plaintiff does not claim title through him; his claim is that he bought the articles when new, before they came into the possession of Marcellus, from another party, and that he left them with Marcellus when he, the plaintiff, went to the West Indies in 1870. He claims under no contract with him, and shows by his testimony title derived from another source. If the plaintiff obtained the property by purchase from some other than Marcellus, any arrangement he might have made with the latter, as to its use or possession, would be collateral to the cause of action in issue. Where the parties claim title from different sources, the plaintiff's title in an action of trover can in no sense be the cause of action in issue. While it is impossible to reconcile the decisions of our own courts upon questions arising under the sections referred to, we do not think the disposition of this case conflicts with any of them. We think the plaintiff was a competent witness, and, under the report, entitled to judgment.

Judgment reversed, and judgment for plaintiff.

H. B. BUNDY *et al.*

v.

TOWN OF WOLCOTT.

When the personal list required by Rev. Laws, § 331, to be arranged in alphabetical order and lodged in the town clerk's office on or before the 25th day of April, for the inspection of taxpayers, is neither signed nor certified by the listers, and no minute is made by the town clerk of the time

when it was thus lodged, it is invalid; and taxes paid under protest are recoverable, although one of the plaintiffs saw and examined the list on April 25.

(Lamoille.—Filed October 22, 1887.)

A SSUMPSIT brought by the plaintiffs, the executors of the will of P. S. Benjamin, deceased. Trial by jury, December Term, 1886, Lamoille County, Powers, J., presiding. The court ruled that the list was not such as the law required, and that the plaintiffs were entitled to recover the amount of the town tax and interest,—but not in this action, the amount of the State and State school and highway taxes,—and directed a verdict for the plaintiffs for \$297.27. *Affirmed.*

Mr. P. R. Gleed, for plaintiffs.

Messrs. Hendee & Fisk, for defendant.

Royce, Ch. J., delivered the opinion of the court:

This was an action brought to recover of the town certain taxes that had been paid under protest. It was claimed that the taxes were illegally assessed.

It appeared that the personal list of all taxpayers, that the listers, under Rev. Laws, § 331, were required to arrange in alphabetical order, and lodge in the town clerk's office on or before the 25th day of April in each year, for the inspection of taxpayers, was in no way certified or signed by the listers; and there was no minute or record of the time when the same was lodged, made by the town clerk.

The supreme court at the last general term, in the cases of *Smith v. Hard*, 1 Vt. (L. ed.) 267, 4 New Eng. Rep. 113, and *Bartlett v. Wilson*, 1 Vt. (L. ed.) 270, 4 New Eng. Rep. 116, considered the construction to be given to that section; and, after full argument, decided that, such abstract being a judicial determination of the amount of each taxpayer's personal estate liable to taxation, and being lodged in the town clerk's office as the basis of complaint by taxpayers dissatisfied, it should be verified and authenticated by the listers in such unmistakable manner as to carry on its face fair evidence of its character. It should be signed by the listers and certified as the personal list of taxpayers for the current year, or bear otherwise equivalent evidence of authenticity.

That holding is alone sufficient to show that the list upon which the taxes were assessed that are sought to be recovered back was invalid; and establishes the plaintiff's right of recovery, unless the fact that one of the plaintiffs saw and examined the paper which was lodged in the town clerk's office on the 25th day of April discharged the town from liability.

As we have seen, that paper was not such a one as the listers were required to make; there was nothing upon it to indicate that it was the official work of the listers, or that it was even made by them. The legal rights of the plaintiffs were in no way affected by the information they thus obtained. They were entitled to an inspection of such a list as the law required the listers to make, in order that they might act understandingly, and regulate their future conduct accordingly.

The objection we have considered being fatal to the list, we have not considered the others.

The plaintiffs have not claimed in this court that they were entitled to recover any more than they recovered in the county court, and therefore *the judgment is affirmed.*

T. H. P. ROWELL

v.

Warren FULLER'S ESTATE.

1. When a **signature is disputed**, and another signature is offered in proof as a standard, the court should first find, as a fact, that the latter is **genuine**, and then submit it to the jury in **comparison** with the one in contention.
2. While great care should be taken in determining whether the **standard of comparison is genuine**, the usual rule as to a **fair balance of testimony** applies.
3. **Photographs of the different signatures were admissible** as evidence.
4. It cannot be said to be error for the court to express its **opinion on the weight and character of evidence.**
5. An **exception to an entire charge** upon one branch of a case is too general and not available. The **error** should be **specified** at the close of the charge.
6. In an **action on a receipt** whereby the intestate promised "**to collect and account for, or return on demand,**" certain promissory notes, the burden is on the defense to **show that the notes were returned on demand, or, if not, why they have not been, rather than on the plaintiff to prove negligence.**
7. In an **action by the survivor of two partners**, on a receipt given to them agreeing "**to collect and account for, or return on demand,**" certain promissory notes, there was no error in the charge that there could be **no recovery if the defendant had accounted to the deceased partner**, and the plaintiff had collected his share of his estate.
8. In such action **evidence is admissible, under the general issue**, which tended to show that the notes had been returned.

(Orleans—Filed October 15, 1887.)

GENERAL and special assumpsit by the plaintiff as surviving partner of the late firm of J. & H. Rowell with a count in favor of the plaintiff upon a promissory note owned by him in his own right. Appeal from the disallowance of commissioners. Pleas, general issue, payment, Statute of Limitations, and offset, with notice denying the signature to paper "A." Trial by jury, February Term, 1887, Orleans County, Royce, Ch. J., presiding. Verdict and judgment for the defendant. *Reversed.*

The following is a copy of the paper marked "A":

1 Vt.

Montpelier, Vt., June 5, 1884.

I hereby acknowledge that my promissory note for the sum of \$97.74, dated November 2, 1857, and payable to J. & H. Rowell or bearer, one day from date, and interest annually, is not paid, and promise to pay the same on demand. And I also acknowledge that the promissory notes taken by me from J. & H. Rowell for collection, and described in my receipt given for the same, and dated July 16, A. D. 1857, have not been accounted for, except as shown by indorsements on the back of said receipt; and promise to pay on demand the amount due from me on account of said promissory notes, with annual interest.

Warren Fuller.

The signing of said paper by intestate was denied by defendant estate. The note and receipt mentioned in said paper "A" are the note and receipt declared upon.

The evidence of the plaintiff tended to show that Warren Fuller signed the said paper marked "A," and the testimony of the defendant, that he did not.

The defendant presented a paper upon which was written the name "Warren Fuller," and nothing else, which was marked "Defendant's Exhibit No. 1;" also a note purporting to be signed by Warren Fuller, which was marked "Defendant's Exhibit No. 2," with evidence tending to show that the name "Warren Fuller" on each was written by the intestate; but no testimony of any witness who saw the intestate write either of said names.

The defendant also offered in evidence photographs of the name "Warren Fuller," as written on papers No. 1 and No. 2 and A (being a disputed signature), and of one signature, "Warren Fuller," admitted to be genuine.

This evidence was received against the plaintiff's objection.

Messrs. Edwards, Dickerman, & Young, for plaintiff:

By the common-law rule, written documents or signatures were never admitted solely to be used as comparison.

Lawson, Exp. Ev. 229; Rog. Exp. Ev. 192; 1 Best, Ev. § 238; 1 Greenl. Ev. § 580; *Moore v. United States*, 91 U. S. 270 (23 L. ed. 346); *Strother v. Lucas*, 31 U. S. 6 Pet. 763 (8 L. ed. 573); 27 Md. 36; 96 Pa. 489.

But whenever a comparison has been permitted, the genuineness of the paper introduced as a standard must, first, be determined by the court before it is allowed to go to the jury.

Bennett, J., in *Adams v. Field*, 21 Vt. 256; *State v. Ward*, 39 Vt. 225; *Sanderson v. Osgood*, 52 Vt. 309; Lawson Exp. Ev. 371, 407; 115 Mass. 481; *Costello v. Crowell*, 133 Mass. 354; *Bragg v. Colwell*, 19 Ohio St. 412.

It was error in admitting exhibits Nos. 1 and 2. Lawson, Exp. Ev. 408, 410; *Martin v. McGuire*, 7 Gray, 178; *Commonwealth v. Eastman*, 1 Cush. 217; *Moody v. Rowell*, 17 Pick. 490; *Richardson v. Newcomb*, 21 Pick. 317; 22 Kan. 250; 1 Greenl. Ev. § 581; *King v. Donahue*, 110 Mass. 156.

The paper with which comparison is to be made must be unquestionably a genuine paper, and that must be shown beyond a doubt.

McKeone v. Barnes, 108 Mass. 344; *Bacon v. Williams*, 13 Gray, 527; *Povey v. Povey*, 30 Ohio St. 603; 5 Binn. 340.

Was there any evidence to warrant the finding, by either the court or jury, that the signatures were genuine? Notwithstanding the remarks of Wilson, J., in *State v. Ward*, we do not consider the question settled. If the question of the genuineness of a signature to be used as a comparison is one for the jury, the party should have the right to submit it to them, for the purpose of determining its genuineness, as soon as he gave evidence tending to show its genuine character. There would be no propriety in the court first trying the question and deciding it, and then, if the court decided the signature genuine, submitting the same question to the jury. The better rule is to treat the question as one for the court. Let the court determine whether the signature is a genuine one or not; if genuine, let it be used by it in comparison with the disputed one. It is a better rule that the court should determine the question as a preliminary one, and not perplex the jury with so many questions as would arise where a party wished to use a great many signatures by way of comparison. From an examination of the cases in 21 and 39 Vt., we think the question of the genuineness of the signatures used as comparisons was in those cases determined by the court. In the first case the question was, Were genuine signatures admissible for the purposes of comparison? Nothing is said in the statement of the case, nor in the opinion, as to whether the question was tried by the court or submitted to the jury; but, from the fact that the counsel for the appellee argued (see brief) that it was proper in corroboration of the other testimony to admit the genuine signatures to go to the jury, I would infer that their genuineness had already been established at the time of their admission. In *State v. Ward*, 39 Vt. 225, the exceptions show that the prosecution established by proof the letters used as comparisons before the letters were submitted to the experts; and in the opinion it is stated that "the court having adjudged the papers genuine, and having permitted them to go to the jury," etc. This plainly indicates that the court determined the question, and nothing in the case shows that it was referred to afterwards. The case did not call for any opinion upon the question now under consideration; the remarks of the judge thereon were *obiter dicta*. We think the usual practice in this State, as shown by the cases, has been for the court to find, as a fact, that the signature was genuine, and then submit it to the jury as a standard of comparison with the one in dispute. The court below should have passed upon the question, and, if as a fact it found the signatures false, excluded them as standards; but, if found genuine, have submitted them for comparison with the signature in dispute. For its neglect so to do there was error.

2. The plaintiff insists that the evidence admitted by the court upon the trial was legally insufficient to warrant either the court or jury finding that any of the disputed signatures were written by the intestate. The same questions may not arise upon another trial. While great care should be taken that the standard of comparison should be genuine, and found so, as Bennett, J., says in 21 Vt. 256, by "clear, direct, and positive testimony," we are not aware

of any different rule to guide the court, from that which obtains in the disposition of any other question which the court or jury are called to pass upon, either in the admission of testimony or in the amount of testimony required. The court should be satisfied, by a fair balance of testimony,—the usual rule in civil causes,—that the signature is a genuine one, before it permits it to be used as such. Any evidence pertinent to the issue is admissible. The question should be tried as any other issue between the parties is, and by the same rules of evidence.

3. There was no error in the use made of the photographs of the different signatures. Enlarged copies of a disputed signature or writing, and of those used as comparisons, may be of great aid to a jury in comparing and examining different specimens of one's handwriting. Characteristics of it may be brought out and made clear, by the aid of a photograph or magnifying glass, which would not be discernible by the naked eye. As well object to the use of an eyeglass by one whose vision is defective.

4. We are not inclined to criticise adversely the expression, in the charge, that the test of the genuineness of a signature "is probably regarded as usually of the most satisfactory character." There was no legal error in so doing. The learned judge was not called upon to say aught upon the subject. As applied to one case it might be true, and not so in another. It was merely an expression as to the weight and character of evidence, which the court was at liberty to make, without error being predicable thereon, if the question was, in the end, submitted to the jury. Rob. Dig. 705, § 133.

5. The court charged at length upon the subject of the testimony of experts. The exception taken to the charge was general. Counsel do not now complain that the charge given was erroneous, but that it ignored two vital points; *i. e.*, the genuineness of the standards, and the honesty or truthfulness of the witness. The first point, not being a question for the jury, becomes immaterial; and, without deciding whether the latter would avail the plaintiff, if well taken, we think he should have specified the error at the close of the charge, in order to raise the question here. The exception was too general; it was to the entire charge upon one branch of the case, and as such should not be entertained,—at least, when correct so far as it was given. *Goodwin v. Perkins*, 39 Vt. 598.

6. The intestate, Fuller, in 1857, received from the firm, composed of the plaintiff and Joseph Rowell, twenty-six promissory notes against divers persons, to collect and account for, or return on demand; and the declaration alleges that Fuller has "never returned said several promissory notes or any one thereof," with certain specified exceptions. The testimony of Joseph Poland tended to show that the notes had been returned by Fuller to the plaintiff as early, at least, as the 21st day of October, 1862. Upon that day the plaintiff was making a claim upon the estate of his late copartner, in respect to the notes, which he claimed the latter had received from Fuller; and evidence was given upon trial that the notes were the same as those mentioned in the receipt. The evidence tended to show that

Fuller had returned the notes. The objection made to the testimony, as we understand the exceptions, was that it was not admissible under the general issue. The evidence, if true, tended to show that the notes had been returned, and therefore no right of action had ever accrued to the plaintiff. It was therefore admissible under the general issue. *Harlow v. Dyer*, 43 Vt. 357. As to the evidence of Poland in respect to the individual note of Fuller, that was admissible under the plea of payment.

7. Was there error in the charge in respect to the claimed settlement between the plaintiff and the estate of Joseph Rowell? The defense claimed that the intestate had accounted to Joseph Rowell for the notes mentioned in the receipt, and paid him his individual note; and that Joseph's estate had accounted to the plaintiff. The latter could not recover of the estate of Joseph any sum in respect to said notes, unless Joseph had collected the same from Fuller; and so the court correctly charged that, if Fuller accounted to Joseph, and the plaintiff had collected of the latter's estate his (the plaintiff's) share, the plaintiff could not collect anything in respect to them of the defendant's estate. The charge that, if the claim had once been collected by the plaintiff, it could not again be collected of the defendant's estate, was correct; for the plaintiff could collect of his partner only upon the ground that Fuller had paid his partner. There was no error in this part of the case.

8. The court below was called upon to instruct the jury as to the rule of damages, in case they should find the plaintiff entitled to recover. The action was based upon a receipt for certain promissory notes delivered by the plaintiff and his partner to Fuller, which Fuller agreed "to collect and account for, or return on demand." The declaration contains a special count upon this receipt, and evidence was given upon trial tending to show a demand upon Fuller and a noncompliance with it. In respect to this branch of the case the court instructed the jury, if they found the plaintiff entitled to recover upon the receipt for the notes, in the following words:

"It is claimed by counsel that, under that agreement, he (the intestate) must account for all the notes, with annual interest. I do not so understand the law. Those notes were passed over to Warren Fuller to collect or account for. Now, if he would recover anything more than what Warren Fuller actually collected, I think it is incumbent upon the plaintiff to show that those notes were lost in consequence of his neglect. He does account for them when he has paid all that he has received, unless he has been guilty of some negligence in the matter of their collection."

Irrespective of the question of neglect on the part of Mr. Fuller, was his duty discharged when he paid to the plaintiff, or his partner, all that he had collected upon the notes? He was under the obligation, by force of the receipt, to collect and account for the notes, or return them on demand. It was his duty to return them on demand if uncollected. If he did not so return them, was not the burden cast upon him to show why he had not, rather than upon the plaintiff to show that the notes had been

lost in consequence of Fuller's neglect? The notes might not have been lost in consequence of such neglect, and still Fuller have been liable for his failure to return them on demand. The case, we think, required suitable instructions upon this point, holding Fuller liable, in case of his failure to return the notes in accordance with the terms of his receipt or to show a legal reason for not so doing. The court having failed to give instructions in this respect, there was error.

Judgment reversed, and cause remanded.

Erastus N. SPAULDING

v.

Melissa WARNER.

1. In the absence of any common-law or statutory proceedings relating to partition of personal property owned by tenants in common, or when the legal remedy is inadequate, a court of equity has jurisdiction thereof; but the court must first ascertain, by a reference to a master, whether a partition is practicable; and if so, a division will be ordered, but if not, a sale and an accounting will be decreed.
2. Under the statute (Rev. Laws, § 2127), if an administrator neglects to present claims of the estate to commissioners in offset to claims of a creditor, he is estopped from pleading them in offset in a subsequent suit between the same parties.
3. When mortgaged property passes to the mortgagee on foreclosure, and the value thereof is less than the amount of the debt, the difference is an entire claim, and not divisible; and it cannot be first presented in offset in one court, and then, if there is a balance, in a subsequent suit in another court.

(Filed — —, 1887.)

BILL in Chancery. Heard on the pleadings and a special master's report, March Term, 1887, Veazey, Chancellor. Decree that the orator recover \$195.80, it being for the value of one undivided half of the hotel furniture at the time it was purchased by the orator, and for the use of the same at the rate of \$50 per year, and interest.

The case appears in the opinion.

Messrs. James N. Johnson and S. C. Shurtleff, for defendant:

A sale will not be ordered if the property can be divided.

Marshall v. Crow, 29 Ala. 278; *Crapeter v. Griffith*, 2 Bland, 5; *Tinney v. Stebbins*, 28 Barb. 290; *Kerley v. Clay*, 4 Bibb, 241.

Formerly equity would not order a sale against the will of the party.

Pom. Eq. § 1390.

A party is never compelled to take real estate against his will.

Barlow v. Scott, 24 N. Y. 40; *Peabody v. Tarbell*, 2 Cush. 226; *Andrew v. Brown*, 3 Cush. 130.

The defendant's plea in offset should be sus-

tained, and the difference between the value of the security and the amount of the decree be allowed.

Rev. Laws, § 1002; *Farmers Mut. F. Ins. Co. v. Wells*, 53 Vt. 14; *Hollister v. Young*, 41 Vt. 156; *S. C. 43 Vt. 408*; *Davis v. Windsor Sav. Bank*, 48 Vt. 582; *Roberts v. Lund*, 45 Vt. 82; 40 Vt. 153; 51 Vt. 590; 52 Vt. 857.

Messrs. Zed S. Stanton and George W. Wing, for orator:

The former adjudication of this claim in offset by the county court is conclusive that no balance exists. It is barred.

Rev. Laws, § 2127; *Probate Court v. Kent*, 49 Vt. 380; *Sabin v. Kelton*, 54 Vt. 284; *Soule v. Benton*, 44 Vt. 809; *Probate Court v. Gale*, 47 Vt. 478.

Taking possession by foreclosure operated as a purchase in satisfaction of the debt if the value of the security was equal to the amount of the decree; and if less in value, then in satisfaction *pro tanto*.

Locell v. Leland, 3 Vt. 581; *Paris v. Hulett*, 26 Vt. 308; *Thomas v. Warner*, 15 Vt. 110.

The decree was correct. The refusal of the defendant to divide was a conversion, and warranted the court in decreeing the value of the property. The defendant refused to divide unless certain conditions which she had no right to demand were complied with.

Royce, Ch. J., delivered the opinion of the court:

The parties are tenants in common of a lot of furniture situate in the Summit House at Roxbury; and the bill is brought to procure a division of it, or for a decree that the defendant pay the orator for his half and the use of the same, and for that part that has been lost and destroyed by the defendant; and for general relief.

It is found by the master that on May 19, 1874, James P. Warner owned the Summit House and the furniture therein, and that on that day he sold the same to Lucie Wilson, and in part payment for it took her and her husband's (Thomas Wilson's) notes for the sum of \$6,136.87, secured by mortgage on the real estate then sold. On the 7th of February, 1876, the Wilsons sold said real estate and furniture to the orator, who, as a part of the consideration for his purchase, assumed and agreed to pay to Warner the amount then due on the notes given by the Wilsons to him, and secured by the mortgage given by them on the 19th of May, 1874. On the 2d of October, 1876, the orator, having paid nothing on the debt due to Warner, sold and conveyed the property, real and personal, to Doras L. Spaulding and John E. D. Colby, they agreeing to assume and pay the aforesaid debt to Warner. Warner instituted proceedings to foreclose his mortgage, and obtained a decree which expired on the 2d of April, 1878. Warner died about the 1st of May, 1877, and his wife, the defendant, was appointed administratrix; and, as heir and purchaser, became owner of the entire estate. The defendant acquired title to an undivided half of the furniture in controversy, on the 11th of December, 1878, and has ever since had the exclusive possession of the whole of it; the orator acquired the title to the other half in March, 1884. Commissioners were appointed upon Warner's estate, and the orator presented before them a large

claim, consisting of notes and accounts, and the administratrix presented in offset a claim against him consisting of notes and accounts. The commissioners found and reported a balance due to the orator of \$346.30. An appeal was taken from that allowance.

Upon the hearing before the referees by whom the case was heard, the administratrix, in addition to the claims presented by her before the commissioners, presented a claim that the Summit House property received by her upon the decree was less in value than the debt that the orator assumed and agreed to pay; and the referees found that the property so obtained was worth less than the mortgage debt assumed by the plaintiff, by a much larger sum than \$346.30; and that, if the difference in the value of the property obtained under the decree and the debt assumed by the plaintiff could be offset against the plaintiff's claim, there was nothing due from the defendant. Judgment was rendered on the report for the defendant. The case passed to the supreme court, and is reported in 52 Vt. 29; and the judgment was affirmed. It was there settled that the claim made by the administratrix was of such a character that it could properly be offset against any claim made by the plaintiff, and that the probate court had jurisdiction over the subject; so that a judgment might have been rendered in favor of the estate for any balance that might have been found due. Rev. Laws, § 2127, requires that, when a creditor against whom the deceased had claims presents a claim to the commissioners, the executor or administrator shall exhibit the claims of the deceased in offset to the claims of the creditor, and the commissioners shall ascertain and allow the balance for or against the estate, as they find the same to be. In *Probate Court v. Gale*, 47 Vt. 478, it is said that it seems to have been the intention of the statutes to require all claims between estates and claimants to be adjusted by the commissioners, and claims not presented to and acted upon by the commissioners are, by the omission, barred from being claims that are enforceable for or against the estate afterwards. The claim set out in the defendant's pleas has once before been before a court of competent jurisdiction, where it might and should have been adjudicated; and it appears that the claim made in those pleas has been in part satisfied by the previous judgment. The defendant is estopped by her neglect from insisting that the claim described in the pleas can be set up as an offset in this suit. It is never allowable to thus divide up an entire claim to suit the convenience or necessity of the party asking it.

The case was heard by the chancellor upon the pleadings and report, and an order was made that the orator recover of the defendant one half of the value of the furniture at the time it was purchased by him, and a certain sum for the use of the same; and a question is made as to the propriety of the order.

The rules and proceedings which obtain at common law, and which are provided by statute on the subject of partition, relate exclusively to real estate. But where there is an inadequacy of legal remedy, or there is an absence of it, a court of equity has jurisdiction, and, where a partition is not practicable, will order a sale. 3 Pom. Eq. Jur. § 1891.

It is by reason of the want of legal remedy that the orator has sought the aid of a court of equity. The first question to be determined in this court is to ascertain if the property is of such a character and so situated that it can be divided, and, if it can be, to order a division to be made, and that an account be taken to ascertain what should be paid for the use of the same; and, if the property cannot be divided, to order a sale and the proceeds equitably divided.

We cannot find any warrant in the law to justify a decree that one cotenant of property owned in common should pay his cotenant for his interest in the common property, until it is

ascertained that it is impracticable to divide. In the view we have taken of the case it is necessary to consider the question of the admissibility of the evidence of Colby.

The decree of the Court of Chancery is reversed and cause remanded, with mandate that it be referred to a master to ascertain and report the character and situation of the furniture described in the bill, and if it is practicable to make a division of the same; and, if so, how it should be divided, and what sum the defendant should pay for the use of the orator's portion of it during the time it has been in the possession of the defendant, for any loss or destruction of the same.

NEW HAMPSHIRE.
SUPREME COURT.

George W. SANBORN, Exr.,
v.

Le Roy S. CLOUGH *et al.*

Where a will contained the following clause: "*Fifth.* After the payment of all my just debts and funeral charges and the expense of a proper set of gravestones, I order and direct the rest and residue of all my money in banks, stocks, and bonds to be paid to Arthur W. Evans, * * * for his own; but not until said Arthur W. Evans shall become of age (twenty-one years of age), prior to which time, should occasion demand, I order this bequest to be held by my executor for said Arthur W. Evans at his maturity. *Sixth.* I give and bequeath to my nephew, Le Roy S. Clough, all my personal property (not including money in banks, stocks, and bonds) and the income of my farm and all my real estate, by his paying the taxes and keeping up suitable repairs thereon, for his during his life."—*Held:*

(a) That by "rest and residue of all my money in banks," etc., the testator meant all his money deposited in banks and invested in stock and bonds after payment of his debts, funeral charges, and the expense of gravestones, or subject to such payment; coupons detached from the bonds are included in the legacy.

(b) The legacy to Evans vested in him at the death of the testator, and the income thereof belongs to him, and is payable during his minority to his guardian; although the principal is not payable until he arrives at maturity.

(c) Clough is a residuary legatee of the testator's personal estate, and is charged with the payment of the money legacies and with the expense of administration.

(Rockingham—Decided July 15, 1887.)

BILL in equity for construction of a will containing the clause stated above. The testator died in June, 1886. The legatee, Evans, is a minor. There were several coupons detached from the bonds mentioned in the will. The following questions were submitted: 1. From what funds shall debts, legacies, funeral charges, expense of administration and gravestones, be paid? 2. How and to whom shall the income of the fund first mentioned be paid during the minority of Arthur W. Evans, or shall the income be allowed to accumulate during that period?

Mr. Arthur O. Fuller, for defendant Evans:

Pecuniary legacies should be paid from property not specifically bequeathed (G. L. chap. 203, § 13); so also expenses of administration.

As to debts, funeral charges, and the expense of erecting gravestones,—these, too, must

be paid from property not specifically disposed of by the will, unless the will itself contains clear directions to the contrary.

Id.; 2 Redf. Wills, 873.

The bequest to Arthur W. Evans in the fifth clause is specific (2 Redf. Wills, 459, and note), and the bequest to Clough in the sixth clause is residuary.

The coupons are to be treated as part of the bonds from which they were cut.

The income of the fund mentioned in clause 5, should be paid, during Evans' minority, to his guardian. The legacy is vested.

1 Roberts, Wills, 3d ed. 209; *Pinney v. Fancher*, 3 Bradf. Sur. 198; *Furness v. Fox*, 1 Cush. 184; Preston, Legacies, *66, 73, 99; *Woodman v. Madigan*, 58 N. H. 6.

The interest accruing on this fund until the divesting contingency happens belongs to the minor and should be expended for his benefit.

Pinney v. Fancher; *Woodman v. Madigan*; and *Furness v. Fox*, *supra*; *Howland v. Howland*, 100 Mass. 222.

Messrs. Marston & Eastman, for defendant Clough:

A will is to be construed according to testator's intention as ascertained from the context.

1 Jarm. Wills, 83, note; *Hall v. Chaffee*, 14 N. H. 215.

A testator is not supposed to be ignorant of the condition of his estate; he is also to be considered as intending a benefit to the object of his gift.

Wallace v. Wallace, 23 N. H. 149.

The legacy to Clough in clause 6 is specific.

Ibid.; 2 Wms. Exrs. 992, 996.

The legacy to Evans is contingent.

2 Wms. Exrs. 1035, note; *Clapp v. Stoughton*, 10 Pick. 463; *Goss v. Nelson*, 1 Burr. 226; *Doe v. Moore*, 14 East, 604; *Shattuck v. Stedman*, 2 Pick. 468; *Brown v. Brown*, 41 N. H. 287.

Testator did not intend the legacy to vest.

Messrs. Wiggins & Knight, for executor.

Smith, J., delivered the opinion of the court:

It is contended that the words in the fifth clause of the will,—“after the payment of all my just debts and funeral charges, and the expense of a proper set of gravestones,”—are a mere repetition of the direction in the first clause, to perform a duty which the law would enforce without such direction; and, being only verbiage, that the fifth clause may be read as if the words had not been repeated. One objection to this is that the direction as to gravestones is not in the first clause; and a more serious objection is that the construction contended for gives no force to the words “rest and residue.” The testator's language is: “After the payment of all my just debts and funeral charges, and the expense of a proper set of gravestones, I order and direct the rest and residue of all my money in banks, stocks, and bonds to be paid to Arthur W. Evans, son of Charles A. Evans, of Kensington, N. H., for his own.” The words “for his own” show the testator's intention was to bequeath the property mentioned to the person to whom he directs it to be paid. It is as if he had said: “I give and bequeath the rest and residue of all my money,” etc. By “rest and residue of all my money in banks,” etc., he meant all his

money deposited in banks, and invested in stocks and bonds, after payment of his debts, funeral charges, and the expense of grave-stones, or subject to such payment. No other construction of this clause is consistent with the natural and ordinary meaning of the language used. The several coupons are included in the legacy to Evans. They are, in legal effect, equivalent to separate bonds for the different installments of interest. *Clark v. Iowa City*, 87 U. S. 20 Wall. 583, 589 (22 L. ed. 427, 429); *Knox County v. Aspinwall*, 62 U. S. 21 How. 539, 546 (16 L. ed. 208, 211); *Kenosha v. Lamson*, 76 U. S. 9 Wall. 477, 483 (19 L. ed. 725, 729); *Amy v. Dubuque*, 98 U. S. 470 (25 L. ed. 238).

By the sixth clause he gives to Clough all his personal property except money in banks, stocks, and bonds, which he had already bequeathed to Evans. Clough is residuary legatee of his personal estate, and is charged with the payment of the three money legacies in the second, third, and fourth clauses, and with the expense of administration. G. L. chap. 203, § 13.

The legacy to Evans vested in him at the death of the testator. The provision as to his reaching the age of twenty-one years is not a limitation annexed to the substance of the gift, but relates to the time of payment. In keeping with this construction is the further provision that, if necessary, the legacy is to be held in the hands of the executor, as trustee for him, until he reaches that age. *Brown v. Brown*, 44 N. H. 233; *Ordway v. Dow*, 55 N. H. 11.

As the legacy vested in the legatee at the death of the testator, the income belongs to him, although the principal may not be payable till he arrives at the age of twenty-one. If the testator's intention was that the fund should accumulate till the legatee should arrive at that age, we should expect to find it expressed in the will. The absence of any language to that effect is evidence from which a contrary intention may be inferred. No motive appears for permitting so large a sum to accumulate during the minority of the legatee,—a period in his life when the income can be more profitably expended upon his education and support. The income is payable to his guardian.

Case discharged.

Bingham, J., did not sit; the others concurred.

WILBUR'S PETITION.

In fixing the **bail of a defendant confined in jail on mesne process**, such reasonable bail will be required by the court as should be required by the jailer under Gen. Laws, chap. 225, § 14.

(Hillsborough—Decided —, 1887.)

PETITION that a reasonable sum be fixed by the court as bail in each of two suits at law whereupon defendant was arrested, and, having been surrendered by his original bail, is now detained in jail. Facts found by the court.

Messrs. D. Cross and Briggs & Huse, for the petitioner.

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Messrs. Sulloway & Topliff and J. H. Andrews, plaintiffs in the suits.

Bingham, J., delivered the opinion of the court:

If it appears that a person is imprisoned on mesne process for want of bail, and that excessive bail is required, the court may decide what bail is reasonable, and he shall, on giving it, be discharged. Gen. Laws, chap. 243, §§ 6, 24.

The applicant in this case is imprisoned on mesne process, and the question arises whether the bail required is excessive, and that proposed by him sufficient. The statute is that an officer on making an arrest on mesne process shall commit the party to jail, unless one or more persons of sufficient ability, to the officer's satisfaction, shall become his bail, and, if such bail before judgment shall surrender the principal in court, he shall be detained in jail, unless one or more persons of sufficient ability, to the satisfaction of the jailer, shall rebail him. Gen. Laws, chap. 225, §§ 13, 14. The bail taken in this form does not fix an absolute liability, but a dependent one. Gen. Laws, chap. 225, § 16; chap. 242, §§ 1, 2, 5. The officer or jailer has not only a right, but it is a duty, in the cases supposed, to require reasonable bail. *Gerrish v. Edison*, 1 N. H. 82; *Evans v. Foster*, Id. 374; *Gordon v. Edison*, 2 N. H. 152; *Ather-ton v. Gilmore*, 9 N. H. 185, 187.

The bail offered by the applicant is not that of one or more persons of sufficient ability, to the reasonable satisfaction of the keeper of the jail, but that of a few persons of limited means, provided the court will fix it at a comparatively small sum. This does not bring the applicant within the statute. The bail the court can fix is the reasonable bail which the jailer should take.

Petition dismissed.

Doe, Ch. J., and **Allen, J.**, did not sit; the others concurred.

ABBOTT

v.

SMITH and Trustee; Sawyer *et al.*, Claimants.

One indebted to a defendant for labor in a sum less than \$20 is not chargeable under **trustee process**, where it does not appear that the claim on which suit is founded is for necessities.

(Hillsborough—Decided —, 1887.)

ON exceptions. *Overruled.*

Messrs. Osgood & Prescott, for plaintiff.

Mr. J. H. Andrews, for claimants.

Bingham, J., delivered the opinion of the court:

The sum due the defendant for his labor at the date of the service of the writ was less than twenty dollars. It does not appear that the claim on which the suit is founded is for necessities. The trustees are not chargeable, regardless of the question of the validity of the assignment. Gen. Laws, chap. 249, § 40.

Exceptions overruled.

Doe, Ch. J., and **Smith, J.**, did not sit; the others concurred.

CONNECTICUT.

SUPREME COURT OF ERRORS.

Henry C. JUDD *et al.*

George A. WEBER.

1. **Actual or positive fraud** consists in deception intentionally practiced to induce another to part with property or surrender some legal right, and which accomplishes the end designed.
2. **Where one, by false assertions** as to specific facts, induces the sale and delivery of goods to him on credit, the fraud is complete, and it is immaterial that, at the time, such person did not have a preconceived design not to pay for the goods.
3. **Evidence of false representations** made by a purchaser on obtaining goods on credit, for which he subsequently paid, is admissible on the issue of fraud in thereafter obtaining goods for which he did not pay, where the purpose of such representations was to obtain a general credit, and the subsequent transaction was connected with and referred back to the first.

(Hartford—Filed September, 1887.)

A PPEAL by defendant from a judgment of the Superior Court for Hartford County in favor of plaintiffs in an action for damages for fraud in the purchase of goods on credit. *Affirmed.*

The court, ANDREWS, *J.*, made the following finding of facts:

The plaintiffs are dealers in wool, residing and doing business in the city of Hartford. This suit is brought to recover damages for a fraud which they claim was practiced upon them, whereby they were induced to sell certain wool upon credit.

The defendant at the time of the sale was a resident of New York. Frank S. Smith was a resident of Hampden, in the State of Massachusetts. The plaintiffs had known Smith for a number of years as the agent and manager of the Lacousic Woolen Company, and knew that he had had experience in running a woolen factory, and in the manufacture of woolen cloth. That company had shortly before become bankrupt, and the plaintiffs understood and believed that Smith was not a man of much pecuniary means; of Weber, the defendant, they had no previous knowledge.

On the 15th day of November, 1883, Smith and Weber called at the store of the plaintiffs, when Smith introduced Weber to them and stated that he and Weber had formed a partnership; had purchased a woolen factory at Hampden, Massachusetts, formerly known as the Lacousic Woolen Mill; and that they proposed to go into the business of manufacturing woolen goods; and that they desired to purchase wool, and wished to open an account with and obtain a line of credit from the plaintiffs. The plaintiffs, believing that Smith was not possessed of much means, inquired of the de-

fendant as to the capital and means which he possessed; and in response the defendant stated that they, Smith & Weber, had purchased the mill and the machinery in it for \$25,000, and that there was no incumbrance on it; that he was himself worth from \$25,000 to \$30,000; that he had put into the firm \$25,000 of his own money, and which was not borrowed; and that the firm of Smith & Weber had a capital of \$50,000, which would be at the risk of their business. By these statements the defendant and Smith intended to have the plaintiffs believe, and they did believe, that the copartnership of Smith & Weber had a capital of \$50,000 that would be at the risk of the business in which they were about to engage, and at the risk of nothing else; in other words, that they had a capital of \$50,000, which would be liable for such debts as they should make in their business, and that there were no other debts, individual or otherwise, for which such capital could or would be made liable.

Relying upon these statements the plaintiffs granted to Smith & Weber a line of credit, and sold them wool on credit on that day, and on sundry other days thereafter, and received payments from them from time to time on account.

On the 22d day of February, 1884, the defendant and Smith were again at the store of the plaintiffs, and desired to make a large purchase of wool upon credit. They were then indebted to the plaintiffs about \$3,000. In answer to inquiries, the defendant then stated that the firm of Smith & Weber was at that time in as good condition financially as it was when they commenced business in the November previous; that there was no incumbrance on their mill, and that they then had a cash capital of from \$22,000 to \$23,000, not borrowed, all at the risk of their business. By this statement the defendant designed to have the plaintiffs believe, and the plaintiffs did believe, that the capital of Smith & Weber was of the amount so stated, and that there were no debts, other than the debts which they had made in the transaction of their firm business, for which their capital could be made liable. Relying on this statement the plaintiffs sold wool to the firm on that day to the amount of \$7,304 83, on credit.

Prior to the 15th day of November, 1883, the defendant had been engaged in the storage business in the city of New York, which business was on that day in process of liquidation. He had no property or means of his own, of any kind, except his interest in that business. The cash account of Smith & Weber showed only \$1,600 coming into the assets of that firm from the storage business. The defendant had on that day standing to his credit in the Pacific Bank of New York the sum of \$15,000, which was money that he had borrowed of one Fairweather. The Lacousic Woolen Mill had been deeded to the defendant, and the defendant had deeded an undivided one half of it to Smith. Both the deeds were left for record on the afternoon of that day. Neither Smith nor the defendant had paid anything on the purchase price.

All the sales of wool by the plaintiffs to Smith & Weber, and to the defendant, and all payments made to the plaintiffs on account, appear by the bill of particulars in the case.

On April 1, 1884, Smith & Weber dissolved partnership; Weber taking the business and the assets, including the mill, and assuming all the debts and undertaking to pay for the mill, for which, up to that time, nothing had been paid. The firm debts at that time, including the indebtedness for the mill, amounted to \$42,500. Smith conveyed his interest in the mill to Weber. While the partnership was in existence the defendant had paid in the sum of \$16,600, of which \$15,000 was the money borrowed of Fairweather, and \$1,600 from the storage business.

The defendant continued the business alone to the 3d day of September, 1884, when he made an assignment in insolvency, and conveyed the mill and all his other assets to his assignee. During the time that the defendant was in the business alone he borrowed money of his mother and others to the amount of \$13,000. He made new debts in the business and made payments on the old one. Of the firm debt he paid about \$12,500. He paid toward the mill \$2,000. At the time of his assignment he was indebted on account of the business, including the unpaid price of the mill, \$47,500; and for money borrowed \$28,000. In his deed of assignment, which was made in New York, he made preferences to those persons of whom he had borrowed money. Not including the mill, these preferences more than exhausted all his assets.

The court finds that the defendant made representations to the plaintiffs, in substance, as set forth in the complaint, that such representations were made to induce the plaintiffs to sell wool to Smith & Weber on credit; and that the plaintiffs, believing such representations to be true, and relying upon them, did sell wool to Smith & Weber as hereinbefore stated, and that they would not have done so except for their belief that the representations were true.

The representations were not true, and the defendant knew that they were not true, except so far as the facts herein set forth show them to have been true; and the defendant knew at the time he made the representations that the plaintiffs would not have sold wool to the firm on credit except they believed his story to be true.

It does not appear that, in contracting the debt in question, the defendant had any definitely formed plan or settled design to defraud the plaintiffs or to defraud anybody. He had had no especial business training. He was not an accountant. He was wholly ignorant of the trade in wool. He had never had any experience in running or managing a factory, and knew nothing of the woolen manufacture. He had an exaggerated idea of the profits that could be made in that business, and had very much greater confidence in himself as a business man than the subsequent events would seem to justify. He was hopeful and trusting, and was actuated by that easy credulousness which comes from inexperience. He hoped and expected to pay all the debts that should be incurred from the profits which he hoped and expected to make. The facts, however, disclosed at the trial, show that there was never any reasonable ground for such expectation.

Any person of reasonable prudence, and with a reasonable knowledge of business, who knew all the facts exactly as the defendant knew them, would have foreseen that failure was inevitable, and that somebody would have to be cheated.

The plaintiffs have suffered damage to the amount of \$2,760 by reason of the premises.

The defendant objected to the admission in evidence of the statement made on the 15th day of November, 1883, for the reason that the debt contracted on that day had been paid, as appeared by the plaintiffs' bill of particulars, and because the question of a fraudulent obtaining of a general credit was not in issue. The plaintiffs claimed the evidence to be admissible, for the reason that it did tend to prove a fraud in obtaining a general credit, and for the further reason that the statements made on the 15th day of November, 1883, were expressly referred to in the statement made on the 22d of February, 1884, and so were a part of the latter statement. The court admitted the evidence.

Among other evidence offered by the plaintiffs was the following letter from Smith & Weber, which was in the handwriting of the defendant:

Hampden, Mass., February 28, 1884.
Messrs. H. C. Judd & Root:

Gents,—Your favor of the 23d inst. received in regard to a statement from us. The property we purchased from Mr. Hinsdale Smith, under foreclosure, for \$25,000, for which Mr. Frank Smith gave his individual note, which was not a time note. Mr. Weber put in \$25,000 in cash. The property has no incumbrances upon it except \$1,000 for looms, which the firm assumed. We presumed we had made a clear statement when we made our first purchase in November, and sincerely hope you will not use this letter any further than for your own information. Trusting this is satisfactory, we are yours truly,
Smith & Weber.

The defendant objected to the letter for the reason that it was written after the contracting of the indebtedness in question, and explained only the statements of November 15, 1883, which latter statements themselves were not admissible. The court admitted the evidence.

Upon these facts the court rendered judgment for the plaintiffs for \$2,760 damages, and defendant appealed.

Mr. W. Hamersley for defendant, appellant:

1. Under the Act of 1842, which provides for such an action as this, it is essential, to support a judgment for the plaintiffs, that actual, as distinguished from constructive, fraud be proved. Fraud in contracting a debt means actual, as distinguished from constructive, fraud.

The following are the only decisions of this court upon the construction of the clause of the statute under discussion. The language of the statute is spoken of as uncertain:

Armstrong v. Ayres, 19 Conn. 540; *Cowles v. Day*, 30 Conn. 406.

The statute creates not merely a new remedy, but a new form of action.

Cowles v. Day, *supra*.

The object of the statute is to except from

the statutes for the exemption of the body debts in the contracting of which the debtor has been guilty of fraud, and to create an action, sounding in tort, for the collection of such debt as a debt.

Ibid.

Such a debt means a debt arising out of express contract.

Lynch v. Hall, 41 Conn. 288.

The fraud in contracting such a debt must be actual, as distinguished from constructive, fraud.

Day v. Webb, 28 Conn. 145.

The debt is the rule of damages.

Cocles v. Day, *supra*.

A similar construction has been given to a like statute in New York.

Morris v. Talcott, 96 N. Y. 100.

2. Actual fraud was not proved upon the trial, and was not found by the court. It is difficult to infer fraud from the facts found. The misrepresentations were a small part only of the representations relied upon, and in themselves not essential. A willful false statement is only evidence of fraud.

Salisbury v. Howe, 87 N. Y. 135.

The firm property was ample for all unpaid firm debts, and there was no damage unless through laches on the part of creditors. But to infer actual fraud is impossible. The statute requiring actual fraud to be proved and found, and the record showing that actual fraud was in fact neither proved nor found, the judgment is clearly erroneous, and the defendant entitled to a new trial. And even if the record showed that the facts would sustain an action at common law, the error is of substance. The defendant has tried his case on the statute, and evidence which would be admissible in an action at common law has been shut out. It is sufficient only to mention the matter of damages. Under the statute they are liquidated; at common law they are unliquidated. Under the statute the debt measures the damage; at common law the debt is abandoned and actual damage must be proved.

Whitende v. Hyman, 10 Hun, 218.

In this case the plaintiffs charge some \$18,000 for the wool sold. The defendant has paid them over \$15,000. The wool received by the defendant may not be worth \$12,000. In an action for obtaining the wool by fraud this question is in issue. Under the statute such issue is excluded.

3. The court was confined to the issue raised by the pleadings; namely, was the defendant guilty of fraud in contracting the particular debt alleged and admitted.

Graves v. Waite, 59 N. Y. 156; *Barnes v. Quigley*, Id. 265; *Austin v. Barrows*, 41 Conn. 287, 301.

But in this case the record does not even disclose the facts necessary to support a judgment in an action for fraud at common law. The facts essential to such an action are fully stated in *Atwood v. Small*, 6 Cl. & F. 232. The great number of cases on this subject only confirm the authority of this case.

The misrepresentation found must be material to the issue.

Merrin v. Arbuckle, 81 Ill. 502; *Taylor v. Sewille*, 54 Barb. 35.

1 Conn.

The plaintiff cannot resort to his action in tort if he does anything affirmatory of the contract.

Kellogg v. Turpie, 2 Bradw. 55; *Chitty*, Cont. 680.

Mr. A. P. Hyde, for the appellees.

Loomis, J., delivered the opinion of the court:

The complaint in this case alleges in substance that the defendant, in order to obtain on credit, from time to time, large quantities of wool of the plaintiffs, for the firm of Smith & Weber, of which he was at the time a member, stated to the plaintiffs that the firm had a capital of \$50,000, solely at the risk of the business; that the defendant individually was worth from \$25,000, to \$31,000, and had contributed in cash from his own money, not borrowed, \$25,000 towards the capital of the firm; and that all these statements were false and known to be so by the defendant when he made them; and that the plaintiffs, believing the statements true, sold and delivered the goods asked for on credit, and thereby suffered loss to the amount of \$2,760.

The court finds that the defendant did make the false statements as charged; that he knew them to be false; that he made them for the purpose of inducing the plaintiffs to sell to the defendant's firm on credit; and that he knew the plaintiffs would not have given the credit except for their belief that the representations were true; and that the plaintiffs, believing the statements true and relying upon them, did sell on credit wool to the defendant's firm, as claimed by them, and that the plaintiffs suffered damage by reason of the premises to the amount of \$2,760. The court rendered judgment for the plaintiffs for this amount, and the defendant appealed.

The reasons for appeal, as stated on the record, are quite numerous, but they may all be disposed of by the answers we may give to the following questions: Does the finding of the court show that the defendant was guilty of actual fraud; and, if so, did the plaintiffs suffer any injury in consequence, and did the court err in admitting evidence?

The finding, as we have stated its substance above, gives a most emphatic answer to the first question in the affirmative. But the defendant's counsel base their claim that there was no actual fraud upon an additional clause in the finding, which is as follows: "It does not appear that in contracting the debt in question the defendant had any definitely formed plan or settled design to defraud the plaintiffs or to defraud anybody. He had had no especial business training. He was not an accountant. He was wholly ignorant of the trade in wool. He had never had any experience in running or managing a factory, and knew nothing of the woolen manufacture. He had an exaggerated idea of the profits that could be made in that business, and had a very much greater confidence in himself as a business man than the subsequent events would seem to justify. He was hopeful and trusting, and was actuated by that easy credulousness which comes from inexperience. He hoped and expected to pay all the debts that should be incurred from the prof-

its which he hoped and expected to make. The facts, however, disclosed at the trial, show that there was never any reasonable ground for such expectation. Any person of reasonable prudence, and with a reasonable knowledge of business, who knew all the facts exactly as the defendant knew them, would have foreseen that failure was inevitable, and that somebody would have to be cheated."

This may have lessened the moral turpitude of his act, but it will not suffice to antidote and neutralize an intentionally false statement which had already accomplished its object of benefiting himself and of misleading the plaintiffs to their injury.

Actual or positive fraud consists in deception, intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed.

All that this additional finding shows, is that the defendant's fraud did not consist in a preconceived design not to pay for the wool, but the fraud was directed to the obtaining of the plaintiffs' wool on credit, by statements known to be false, which he knew could not be obtained if he told the truth; and the fraud was complete when the end was accomplished and damage resulted. It is a mistake to suppose that it is essential to a fraudulent intent that it should reach forward and actually contemplate the resulting damage to the other party. There is a fraudulent intent if one, with a view of benefiting himself by intentional falsehood, misleads another in a course of action which may be injurious to him. The ulterior hopes and expectations of the defendant, so much relied upon, were utterly immaterial. It is true that the motive to pay at some future time was innocent, but the motive to obtain present possession and title to another's property by the use of falsehood and false pretenses, throwing all the risk of loss on another, was corrupt. As well might the embezzler of another's funds plead his innocent purpose of ultimate restitution, or the forger of another's name as indorser of a note plead his purpose to pay the note himself at maturity. It is conceivable, even, that one might be guilty of larceny, by taking another's money to meet some present exigency of his own, while pleading in the forum of conscience his purpose to make it all right at some future day. Such pernicious reasoning can be accepted neither in the forum of conscience nor in that of law.

There are some decisions in other jurisdictions which, we think, misled the counsel for the defendant into the erroneous position we have endeavored to controvert. The case of *Morris v. Talcott*, 96 N. Y. 100, was cited. There the court of appeals found error in the court below in denying a motion to vacate an order for the arrest of the body, but it was placed on the ground that "there was no evidence in the case to support the charge of fraudulent representations, except the fact that the defendant, upon being requested by the plaintiffs to give them an indorser upon a note for the balance of an existing account, refused to do so, saying he was 'perfectly good and solvent without an indorser.'" So in *Dyer v. Tilton*, 23 Vt. 313, and *Jude v. Woodburn*, 27 Vt. 415 (cases not cited by the defendant), we find the general proposition, that an action for dam-

age will not lie for false and fraudulent representations made by the defendant in reference to his own pecuniary responsibility and circumstances, whereby the plaintiff was induced to sell property upon credit. But these cases were expressly placed on the ground that the representations were expressions of opinion and not false assertions of fact, and this is the important distinction which controls the case at bar. Here there was false assertion as to specific facts which induced the delivery of the wool on credit.

The next question, whether the finding shows that damage to the plaintiffs resulted from the fraud, may be summarily disposed of by reference to the record. The finding is that "the plaintiffs have suffered damage to the amount of \$2,760 by reason of the premises." It is to be presumed, in the absence of anything to the contrary, that there was appropriate evidence to justify the finding, and this answer is conclusive. But the precise point which the defendant makes in this connection is that the subordinate facts as detailed in the finding do not show that the plaintiffs' debt might not have been collected out of Smith, the other partner of the defendant. The court finds that Smith was connected with a company that previously owned the premises purchased by the firm of Smith & Weber, and that this company had become insolvent, and that when the defendant bought the wool the plaintiffs understood and believed that Smith was a man of no pecuniary means, and it is pretty obvious that the fact of Smith's insolvency was tacitly, at least, conceded by the defendant during the trial. At any rate no question whatever was raised in the court below in regard to this matter, and we may accept the finding of the court in regard to the damage as conclusive, with full assurance that no injustice was done the defendant in this regard.

There remain to be considered only two questions respecting the admission of evidence, and these are of such a nature as to require little discussion. The court finds certain fraudulent representations made on the 15th of November, 1883, and again on the 22d day of February, 1884. The defendant objected to the statements made on the 15th of November, because it appeared by the plaintiffs' bill of particulars that the debt contracted on that day was afterwards paid, and because the question of a fraudulent obtaining of a general credit was not in issue. We think the evidence was admissible. On that day the defendant applied to the plaintiffs to purchase wool of them, not simply at that time, but from time to time in the future, to supply the mill of Smith & Weber. The finding is that he "wished to open an account with and obtain a line of credit from the plaintiffs;" so that the representations on that day were the first and continuing moving cause to induce the plaintiffs to sell the defendant goods on credit in the future, and did tend to prove fraud in obtaining a general credit; and then the representations which followed on the 22d day of February were made to induce the plaintiffs to continue the credit, and expressly referred to and reaffirmed the truth of the false statements of the November previous, so that the statements were so interlocked as to become virtually one.

The letter of February 28, 1884, which was objected to, expressly referred to the original statements in November previous, admitting that they were made, and reaffirming that they were true. It was therefore clearly admissible.

Another question of evidence is referred to in the last error assigned, but as no objection on that account was made in the court below, it need not be considered.

There was no error in the judgment complained of.

In this opinion the other Judges concurred.

Roswell H. PHELPS, Err.,

v.

Julia E. PHELPS et al.

1. A testator, after providing an annuity for his widow, gave all the rest of his property, real and personal, equally to his three children, "Roswell, William, and Alline; or, in the event of the decease of either of them without leaving issue at his or her decease, the portion of said deceased is to be shared equally by the survivors or their issue." *Held*, that the death of the devisees spoken of in the will meant death during the lifetime of the testator, and that the children surviving the death of the testator took an absolute estate. *White v. White*, 52 Conn. 518; *Coe v. James*, 1 Conn. (L. ed.) 435, 4 New Eng. Rep. 591.
2. By subsequent clause the testator provided that "my daughter, Alline, is to keep her share in her own sole and separate right, or until her children shall marry or become of age; and should she die without living issue, her portion is to revert to her brothers, Roswell and William, or either of them, or their heirs, as survivors." *Held*, that, as his daughter lived to come into possession of her share, she took an absolute fee, as sole and separate estate.
3. At the time of the testator's death, he owned certain real estate in Maryland upon which his son William resided. The will provided that, in the event of William's death before his youngest child arrived at full age, said real estate was to be sold and the executors were to invest the proceeds together with the rest of William's portion, support the widow, support and educate the children until the youngest become twenty-one, and then divide the property among the children. *Held*, that inasmuch as William survived the testator, the trust failed, and the widow and children of William took nothing under the will.

(Hartford—Argued March, Filed November, 1887.)

SUIT brought to Superior Court, Hartford County, for construction of will of Richard H. Phelps. Case reserved for advice of this court.

The opinion gives the facts.

Mr. Lewis Sperry, for the grandchildren:

1 Conn.

It is to be observed that the bequest to the three children is given to them personally, without words of limitation or inheritance; but it has long been the law in this State that a fee to realty may be conveyed by will without words of inheritance.

Hungerford v. Anderson, 4 Day, 871.

It may be conceded that the immediate children would take an absolute fee under the grant if it were not for the proviso. But it must be conceded that the proviso qualifies the grant. It is part and parcel of it. It goes without saying, therefore, that the immediate children do not take an absolute fee. If they take any fee at all, it is a qualified fee.

The only real point of difference between the parties would seem to be as to whether the immediate children take a qualified fee which may become absolute, or merely a life estate. In attempting to answer that inquiry it is less a question of authorities than it is a choice of authorities.

It is no objection to the doctrine of life estate in this case that the bequest embraces both real and personal estate.

It is now too well settled to admit of dispute, that a remainder in personal chattels, dependent on an estate for life, may be created by grant or devise; and it is equally well settled that the interest so created would be protected in chancery.

Langworthy v. Chadwick, 13 Conn. 46.

Language very similar to that under discussion is found in *Richardson v. Noyes*, 2 Mass. 56. In this case it was held that the first devisee took a defeasible fee which was ultimately vested in the devisee in remainder by way of executory devise.

That case was afterward cited approvingly in *Codwin v. Perry*, 11 Pick. 508, and *Brightman v. Brightman*, 100 Mass. 289. It is also selected by the late Chief Justice Sharswood, of Pennsylvania, as the leading case on the subject of executory devises. (2 Lead. Cas. Real Prop. p. 422). The subject of executory devises is fully considered by that celebrated author, with numerous references, and it is not necessary to duplicate here the authorities there referred to. Most of the cases referred to upon this intricate subject are cases involving the title to real estate only, and under the common-law rule an executory devise was confined exclusively to that species of property.

There was then a distinction between the bequest of the use of a chattel interest and of the thing itself; but that distinction was afterwards exploded; and the doctrine is now settled that such limitations over of chattels, real or personal, in a will, or by way of trust, are good.

4 Kent, Com. 12th ed. p. 270.

Under the principle of executory devises it became easy for the first devisee, having a defeasible fee, to convey title to the prejudice of the devisee in remainder.

This form of defeating the intent of the testator has assisted in bringing the doctrine of executory devises into disfavor, and courts will never allow them to operate when the devise can possibly take effect as a contingent remainder.

Judge Swift, in *Morgan v. Morgan*, 5 Day, 525, states the doctrine very pointedly: "To

guard against this, a principle has been adopted that the words 'heirs,' 'issue,' and 'children' have the same legal import; and that dying without issue, or without leaving issue, means an indefinite failure of issue, unless some expressions are used which limit it to the time of the death of the devisor; that a devise to one and his heirs, and if he die without issue, or without leaving issue, then to another, is an estate tail in the first devisee, with contingent remainder over to the second; and that whenever an estate can take effect as a remainder, it shall never be construed to vest the estate by way of executory devise."

The language of the devise in *Morgan v. Morgan*, *supra*, is not to be distinguished from that used in this will. Under the opinion of the court, the remainder passed by way of executory devise; in the opinion of Judge Swift, it passed as a contingent remainder. But no color whatever was given by anybody to the claim made in this case that the first devisee took an absolute fee.

In *Clarke v. Terry*, 34 Conn. 177, the language of the will was to all intents and purposes the same as that used here. Mrs. Clark took a bequest to herself and heirs, with a limitation over to her children; and, upon failure of children, then to her brothers and sisters. The court held that she took a life estate only, and passed the fee over to her brothers and sisters by way of executory devise.

A devise of real and personal estate with a proviso that, if the devisee die without heirs of his body, the bequest shall be divided equally among other children of the testator, creates in the first devisee an estate tail by implication.

In such case the other children take the realty by way of contingent remainder, and the personality by way of executory devise.

Hudson v. Wadsworth, 8 Conn. 348.

In England it has been decided in a great number of cases that, if an estate be devised to a man and his heirs, and if he die without leaving heirs, then to his brother, or any person who may be an heir, the word 'heirs' shall be construed to mean heirs of the body, and the devise shall operate to convey an estate tail. The same doctrine has been recognized by this court.

Williams v. McCall, 12 Conn. 330.

That such language creates an estate tail, or life estate only, in the first devisee, is not open to discussion in this State.

Comstock v. Comstock, 23 Conn. 352.

In *Bullock v. Seymour*, 33 Conn. 289, the court held that the son took a defeasible estate in fee simple, which became indefeasible upon the birth of a child, reaching that conclusion by the expressed intent of the testator, as appeared in other parts of the will.

When a bequest is made with a remainder over, in the event that the first devisee die "without issue who can inherit," that expression is equivalent to "heirs of the body," and the first devisee takes an estate tail by implication.

Turrill v. Northrop, 51 Conn. 35.

This case reviews and reaffirms many of the authorities in this State upon the subject, and explains *Bullock v. Seymour*. All the claims which the grandchildren here make would

seem to be fully sustained by the principles governing *Turrill v. Northrop*.

In this case the testator has devised the remainder over, "in the event of the decease of either of them without leaving issue at his or her decease," which is equivalent to saying "without issue who can inherit."

If it should be held that the immediate children take a qualified fee, then it will be observed that it is of a quality which death alone can render absolute. It matures and terminates at the same instant and by the same event. The value of such a fee, as distinguished from a life estate, it is difficult to discern, unless, as suggested by Judge Swift, it be made use of to defeat the devise in remainder, contrary to the wishes of the testator.

If the above argument is well founded, it follows that, under no authority, can the immediate children take an absolute fee; that under some of the older and conflicting authorities they might take a defeasible fee; that under the more recent and settled authorities of this State they take a fee tail or life estate only.

In the event of William's death before his youngest child arrives at full age, the testator directs his remaining executors to have charge of the children and "their property," and distribute it when the youngest arrives at full age.

So far as that provision relates to "their property," it does not affect its character as a vested remainder. It refers merely to the time of distribution.

Newberry v. Hinman, 49 Conn. 132.

So far as it relates to the care of the children, it may be inoperative. A father may appoint a testamentary guardian for his minor children. Gen. Stat. 192, § 11.

Whether a testator can appoint a testamentary guardian for his grandchildren may well be doubted.

Jarm. Wills, 7th ed. p. 66, note a; Schoull. Dom. Rel. 3d ed. §§ 287, 290.

The courts in modern times pay less attention than formerly to the technical quality of the estate granted as a matter of nomenclature. If the intent of the testator is clear, the devise will be given effect in some way, without regard to the name or the form of the devise.

The earlier decisions spend much time in discussing the difference between an executory devise and contingent remainder, and other fine-drawn distinctions. It seems to have been thought necessary to first establish the distinction, and then measure the rights of the parties accordingly.

Morgan v. Morgan, 5 Day, 525, discusses the reasons *pro* and *con*, and specifies the form in which the devise shall take effect.

Turrill v. Northrop, 51 Conn. 35, simply says that the language in question creates an estate tail as a well-settled principle of law under the decisions in this State, and that is the end of it.

At the time of the death of the testator there were two families of grandchildren *in esse*, in whom, as a class, a remainder could immediately vest. Should Roswell die without issue, he never having been married, the grandchildren *in esse* at the death of the testator, and such as might be thereafter born (*Farnam v. Farnam*, 53 Conn. 261), would take the re-

remainder of his share also, subject to the intervening life estate. That proposition follows naturally from the original entailment of the entire estate.

It is true that, in the construction of wills, former cases, unless *ad idem*, are of small account; but, in respect to clauses of frequent occurrence in wills, it is important that there should be uniformity of construction; and we do not feel at liberty to adopt a rule as applicable to this case different from that which has received the sanction of the highest courts in Great Britain, unless we can see strong reasons for such departure.

Austin v. Bristol, 40 Conn. 132.

The clauses of this will upon which the construction depends are of frequent occurrence; and the application of the same principles which govern *Turrill v. Northrop*, *supra*, and cases there cited, will secure to the children an income for life, and to the grandchildren, as a class, a vested fee in remainder in the entire estate.

Mr. J. W. Johnson, for William G. and Edith Phelps, his wife:

The clause, "all my estate, real and personal, of which I may die possessed (the aforesaid annuity and reservations excepted), I give equally to my children, Roswell, William, and Alline," if there were no limitation after it, would give the testator's three children an indefeasible fee simple in the remainder as tenants in common; for the word "heirs" is not required to create a fee.

White v. White, 52 Conn. 520.

If the limitation over in this clause can be construed to mean anything, it gives a title by survivorship to the tenants in common, and brings into force the principles of an ancient rule which was never law in Connecticut, and which we cannot believe the testator intended to do.

Whitlessy v. Fuller, 11 Conn. 340; *Phelps v. Jepson*, 1 Root, 49.

By interpolating the words "before my decease" after the words "of either of them," we believe the true interest of the testator would be expressed.

White v. White, 52 Conn. 518.

Heirs at law are not to be disinherited without a clear intention to do so, and that intention must be carried out by actually vesting the estate elsewhere. If there is a doubt as to the real intention of the testator, the heir is to have the benefit of the doubt.

Hughes v. Knowlton, 37 Conn. 429.

When a particular estate is devised, we cannot, by a subsequent clause, collect a contrary intent by implication.

Campbell v. Beaumont, 91 N. Y. 464.

In the construction of wills, where language and purpose will permit, courts favor the rules of inheritance.

Hamilton v. Downs, 33 Conn. 213.

When a fee is first given in a will, and a lesser estate is claimed to be carved out of it afterwards, the court will require that the gift of the lesser estate should be clearly expressed.

McKenzie's App. 41 Conn. 607; *Lewis v. Palmer*, 48 Conn. 454.

As to the appointment of trustees, there is no

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provision requiring, and no occasion for, their appointment. Courts will not raise a trust from expressions importing recommendation, hope, confidence, desire, etc.

Harper v. Phelps, 21 Conn. 257.

Mr. Charles E. Gross, for Roswell H. Phelps and Alline Hoff:

Several questions arise under the strict and ambiguous phraseology of the will, which are set forth in the record, but all depend upon the first one therein stated. Do the children, Roswell, William, and Alline, severally take an absolute and indefeasible estate in fee simple in the estate given to each in the residuary clause of the will; and, if not, what estate does each of said children take?

I claim: (1) that the will, when its provisions are studied and compared, shows an intention on the part of the testator to give an absolute estate to each of his three children, if they survive him; if not, that their issue shall take the parent's share (as the statute provides) with this exception, that, in the case of the issue of one son, William, the testator attaches certain conditions to their taking; (2) that the second clause shows a bequest to the children absolutely, with cross-gifts over in case of the death of any of said children without issue, during the lifetime of the testator; (3) that the intent of the testator, and therefore the correct interpretation of the will, is obtained by inserting in the will the words "during my lifetime," whenever the testator speaks of the death of the first devisees without issue.

Thus read, the will becomes certain, the apparent wishes of the testator executed, and no rule of law or construction violated.

In such a construction we are but following three recent decisions of this court:

Phelps v. Robins, 40 Conn. 25; *White v. White*, 52 Conn. 518; *Phelps v. Bates*, 1 Conn. (L. ed.) 133, 2 New Eng. Rep. 129, 54 Conn. 11.

The second clause of the will now under consideration closely resembles the clause construed in *White v. White*, *supra*.

That clause in the *White* will was construed by this court to carry an absolute estate of inheritance to the children of the testator.

This construction was held to be the intention of the testator, as gathered from the whole will; and the court held that the gift to the nephews and nieces was to be taken to refer only to a gift in case his own children died without issue before his own decease.

The clause in this will is identical in meaning with that in the *White* will, and a similar construction can and should be given to it.

This court held the clause in question in the *White* will to be ambiguous, and went to the whole will to gather the intention of the testator. The argument of the court is given at length in that case.

52 Conn. 520, 521.

We here, also, have the same provision as in the *White* will (commented on by the court), that none of the executors are required to give bonds.

If the testator's desire and intent was to give only life estates to his children, and the fee to his grandchildren, he certainly would not have provided that, in case of the death of either of his children without issue surviving, that the

one third of his estate should revert to his other two children absolutely,—not for life,—with remainder to his grandchildren.

If practically an estate tail was intended, in the second clause of the will, to William for life, and the fee to his issue surviving him, then the statute will execute the gift, and make it an absolute estate in the issue of the first donee in tail, to wit, in the children of William who may survive him. How, then, can the testator provide that the avails of their property shall be invested by his executors and held until the youngest child of William, now unborn, perhaps, arrives at twenty-one years of age, and the income used for their support, and the support of their mother, at the discretion of said executors.

If an estate tail was intended, the testator has attempted what our statute will not permit, for he attempts to limit the estate of William for life, remainder to his children (some of whom may be yet unborn), provided they live to be twenty-one; if not, then to their issue, if any; if not, back to their uncle Roswell and aunt Alline; or, in case of their decease, to their issue.

These suggestions show that any other construction than that which we have claimed above at once brings us into a labyrinth of puzzles too difficult to solve.

We therefore submit that this case is only one of that large class which has recently furnished three examples in this court; that, where a devise or bequest is made to a person absolutely, with a remainder over in case of his death, the true construction of what is meant is the death of the devisee or legatee during the lifetime of the testator.

Carpenter, J., delivered the opinion of the court:

This suit is brought to obtain a judicial construction of the will of Richard H. Phelps. In the first clause he gives to his wife an annuity and the use of certain real estate for life, or so long as she remains his widow and on the premises.

Under that clause no question arises.

The second clause is as follows: "All my estate, real and personal, of which I may die possessed (the aforesaid annuity and reservations excepted), I give equally to my children. Roswell, William, and Alline; or, in the event of the decease of either of them without leaving issue at his or her decease, the portion of said deceased is to be shared equally by the survivors or their issue."

The first and most important question is, What estate do the children take?—is it a fee or a life estate?

It is difficult to distinguish this case from *White v. White*, 52 Conn. 518; and still more difficult to distinguish it from *Coe v. James*, 1 Conn. (L. ed.) 435, 4 New Eng. Rep. 591, 54 Conn. 511. In each of those cases it was held that the death of the devisees, spoken of in the will, meant death during the lifetime of the testator. We are inclined to follow those cases and adopt the same construction in this case. We find that view strongly supported by several considerations suggested by other portions of the will. The leading thought in the mind of the testator was to give all his property to his

family,—his wife and children. He first provides for his wife and then for his children. There is no primary gift to the grandchildren. The gifts to them, so far as they may be called gifts, are secondary, incidental, and contingent. We see nothing in the case indicating a preference for grandchildren. There is no lack of confidence in his sons, for they are made executors; nor in his daughter or her husband, for he is made a coexecutor, and, in one contingency, a trustee. If we compare the first and second clauses we shall see that the testator knew the difference between a life estate and a fee; and he had in mind the appropriate language for creating the former; for, in giving a life estate in the first clause, he did so expressly, leaving nothing to implication. There is a marked difference in the language of the two clauses. It is inconceivable that he should desire to give but a life estate, and should use language so much unlike that in the first clause, and so apt to convey a fee. If he had stopped after naming his children, and omitted the rest of that clause, no doubt could be entertained as to his meaning. We think that clause was added, not for the purpose of providing for his grandchildren, upon the death of his children after a possible long life, but in view of the possibility that they might die young, or at least before he did; so that, if we read the will as intending death during his own lifetime, we shall harmonize those two clauses, and give effect to his real intention; not only so, but that construction aids us materially in understanding and harmonizing other portions of the will.

The third clause is as follows: "My daughter, Alline, is to keep her share in her own sole and separate right, or until her children shall marry or become of age; and, should she die without living issue, her portion is to revert to her brothers, Roswell and William, or either of them, or their heirs, as survivors." We remark, parenthetically, that the words "her share" and "her portion" are more applicable to a fee than to a life estate. They seem to imply that she has an interest in the principal, as such, and not merely a right to the income. But to return: Precisely what is meant by this language it is not easy to see. There is a slight implication that he intended that her children, on marrying or becoming of age, should have her portion of his estate; but he does not say that, and his language does not necessarily imply it. Therefore we cannot say legally that he meant it. In providing that his daughter should enjoy her portion as her separate property, it seems to have occurred to him that that might not always be necessary; and so he adds, "or until her children shall marry or become of age."

The rest of that clause is plain enough, provided we assume, as we do, that he intended death during his lifetime. Hence, all that is expressed in this clause with sufficient certainty is that, if his daughter dies before he does, leaving no issue, her portion shall go to her brothers; and if she lives to come into possession of her share, she shall enjoy it as her sole and separate property.

We may add that the word "portion," used in the second clause of the will, is much more applicable to a share of an estate in view of a prospective division of it under a will, than to

the same share after it has passed to the distributee, and is being enjoyed by him. It is then almost invariably spoken of as his property, or his estate, and no longer as his share of an estate. It is therefore a word that the testator would more naturally have used with reference to shares of his estate that would at once, upon his death, become fixed, and to facts which would then operate at once upon the distribution of his estate, than with reference to the ultimate disposal of the shares at the end of the lives of the legatees.

A further consideration in favor of the view that the "dying without issue," in the second clause of the will, means a dying in the lifetime of the testator, is that, while the contrary view would give his children severally only life estates in the portions given them, yet the gift over to the survivors, on the death of either without children, has no such limitation attached to it, and passes to the survivors in fee. No reason can be conceived why the children should take only life estates in the primary bequests, and yet fees in the secondary or contingent ones.

The fourth clause of the will is as follows: In case of the decease of my son William before his youngest child becomes twenty-one years of age, my real estate in Maryland, occupied by him, is to be sold, and the avails thereof, with the rest of his share, are to be invested in the State of Connecticut, by my executors; and his children are to reside in said State, in order to receive the benefit of the avails of this portion; and the general care and supervision of them and their property and its income and expenditure are to be under the care and supervision and control of my executor, according to their best judgment, for their education and support, and the support of their mother, if living, until the youngest surviving child becomes twenty-one years of age; and then their portion is to be given to said children or the survivors of them. In case of the decease of said children and of their father before they are twenty-one years of age, leaving no issue, their portion is to revert to my children Roswell and Alline; and, in case of their decease, then to their issue."

If we bear in mind that the testator is speaking of William's death during his own lifetime, it is not difficult to discover his meaning. He contemplates such death in one of two contingencies,—leaving children, the youngest child being under twenty-one years of age, or leaving no children or the issue of children. In the former contingency, the share that would otherwise have gone to William is placed in trust until the youngest child comes of age, for the support and education of the children, and the support of the mother, if living, when the principal is to be distributed to the children.

In the latter contingency, William's portion is to go to his brother and sister, or their issue.

Inasmuch as William survived the testator, the trust fails; the widow and children of William take nothing under the will, and the whole fourth clause becomes inoperative, as neither contingency on which it depends has happened, or ever can happen.

A question is made whether the provision that the children shall provide for the widow, in case the provision for her support proves to

be insufficient, is a charge upon the estate. That question has not been discussed by counsel; and, as no one appears in behalf of the widow, who, perhaps, has more interest in that question than anyone else, we have deemed it inexpedient to decide it.

The Superior Court is advised that the children take their respective shares in fee simple; that the daughter takes her share to her sole and separate use; and that her children, and the children and widow of William take nothing under the will.

In this opinion the other Judges concurred.

TOWN OF CLINTON

v.

Mortimer BUELL.

1. The statute of 1878, which provides that no person shall stake out, for the cultivation of oysters, any natural clam bed, was enacted solely for the protection of the public right of fishing; and as there is no specific permission of the town to sue for a violation of such statute, the State is the only party to enforce the remedy, if any exists, for its violation.
2. A proceeding under Gen. Stat. p. 215, § 11, to throw open, to the public, ground claimed to be a natural oyster bed, which had been designated to defendant and enclosed for planting oysters, cannot be maintained where the ground in question, when thus designated and staked out to defendant, was not a natural oyster bed, but was a natural clam bed.

(Middlesex—Filed September, 1887.)

PROCEEDING in the Superior Court of Middlesex County, for an order under Gen. Stat. p. 215, § 11, for the removal of stakes enclosing ground claimed to be a natural oyster bed. *Complaint dismissed.*

The facts were found by a committee; the defendant filed a remonstrance against the report, and the court made a finding of facts and reserved the case for the advice of this court.

The facts and questions presented are sufficiently stated in the opinion.

Messrs. W. F. Wilcox and W. C. Robinson, for plaintiff.

Messrs. L. Harrison and J. W. Alling, for defendant.

Beardsley, J., delivered the opinion of the court:

This is a proceeding under a statute passed in 1870, to throw open, to the public, ground claimed to be a natural oyster bed, which has been designated to the defendant, and enclosed for planting oysters. The material part of the statute is as follows:

"When any natural oyster bed or any part thereof is designated, enclosed, or staked out contrary to the provisions of this chapter, the superior court as a court of equity, in the county court in which said oyster bed is situ-

ated, upon the petition of any individual aggrieved, or of the town in which said oyster bed is situated, against the person claiming the same, and the chairman of the oyster committee appointed by the town, where such petition is brought by an individual, shall appoint a committee, who, having been sworn and having given notice to the parties, shall hear said petition, and report the facts thereon to such court; and if it shall appear that such oyster bed has been improperly staked out, the court may order said committee to remove the stakes enclosing the same; costs to be paid at the discretion of the court." Gen. Stat. p. 215, § 11.

The case was referred to Robert G. Pike, Esq., as a committee, who reported the facts to the court. The defendant remonstrated against the acceptance of the report, claiming that the committee had erred in admitting certain evidence, and that Mr. Pike was disqualified to act as committee by reason of interest and bias, and that he had improperly conversed regarding the case while it was pending. The view which we have taken of the case renders it unnecessary to decide these questions.

It is proper, however, to say that, upon the finding of the court, no reason appears to question the fitness of the appointment of Mr. Pike as committee, or the regularity and propriety of his conduct while so acting.

The committee have not found in terms that the ground in question, when it was designated and staked out to the defendant, was not a natural oyster bed, but such is the necessary conclusion from the facts found.

It is found that it was formerly a natural oyster bed, but that owing to a change of the current in Clinton Harbor, produced by a new channel which has been formed by the action of the water, deposits of mud and other materials were made upon it, so that for the last twenty-five years there have not been more than five or six years, at irregular intervals, when oysters have been taken from it in paying quantities. It does not appear from the finding that for many years there has been any accumulation of oysters upon it. The finding that, since the ground was staked out to the defendant, the new channel has been closed by a breakwater which has had the effect of removing the muddy deposit from the old channel, is obviously immaterial.

The committee also finds that the ground in question, when it was set out to the defendant, was a natural clam bed. In 1878 the Legislature enacted that "no committee or selectmen of any town shall designate, and no person shall mark, stake out, or enclose for the cultivation of oysters, clams, or mussels, any natural clam bed." Acts 1878, chap. 24.

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The plaintiff claims, inasmuch as no specific penalty or mode of redress is provided for a violation of this statute, that, upon the principle that statutes, made in relation to the same subject-matter, are to be construed together, the provisions of the statute of 1870 are impliedly applicable for the protection of natural clam beds. There would be force in this claim if clams and oysters were substantially identical; but they are not, each being a distinct species of shellfish, and it is apparent that the Legislature has discriminated between them, in the provision which it has made for their protection. The statute regulating the bedding of clams was made in 1874, by amending certain sections of the oyster law then in force, so that they should include clams and mussels. The sections thus amended provided merely for the designation of ground for planting oysters, by a committee to be appointed by the towns, but imposed no penalties except for staking out natural oyster beds. Acts 1874, chap. 41.

The two sections in the oyster law immediately following those so amended made it highly penal to carry away planted oysters. In 1878 the Legislature, in "An Act Relating to Oyster Grounds and Fisheries," in the first and second sections, made provisions in the interest of persons to whom lots had been designated for planting clams, oysters, and mussels, and in the fifth section imposed a severe penalty upon persons who should unlawfully carry away planted oysters. Acts 1878, chap. 24.

A person planting clams in conformity with the statute is declared to be the owner of them, and has, of course, all the rights incident to such ownership; but we know of no specific statutory penalty for the unlawful removal of them. The Legislature might have thought that no penalty in addition to the forfeiture, to the public, of the oysters, which would result from a violation of the statute of 1878, was necessary to effectuate its provisions. The committee find that placing oysters upon the clams would not injure the clams, and the clam-digger might be quite willing to submit to the inconvenience of removing the oysters, in view of the fact that he could appropriate them to his own use.

The claim that this proceeding can be maintained, and relief afforded, without reference to the statute of 1870, is not well founded. The statute of 1878 was enacted solely for the protection of the public right of fishery, and, in the absence of any legislative permission to the town to sue, the State is the only party to enforce the remedy, if any exists, for its violation. *Rowe v. Smith*, 48 Conn. 447-449.

The Superior Court is advised to dismiss the complaint.

In this opinion the other Judges concurred.

1 CONX.

MAINE.
SUPREME JUDICIAL COURT.

STATE of Maine

v.

Reuben C. HALL.

1. An indictment for maintaining a liquor nuisance described the building as "a certain building occupied by the said Reuben C. Hall as a saloon, situated at the corner of Depot Square in said Gardiner."—*Held, sufficient.*

2. Exceptions do not lie for the defendant to the order of the court committing a witness for the prosecution, for contempt.

3. A copy of the record of the collector of internal revenue, when sworn to in court by a competent witness, is admissible in evidence.

4. At the trial of an indictment for maintaining a nuisance, the record of a former conviction for a like offense is admissible in evidence only when the building described in the record is the same as that described in the indictment.

(Kennebec—Decided October 27, 1887.)

ON defendant's exceptions. *Sustained.*
Indictment charging that the defendant "a certain building occupied by the said Reuben C. Hall as a saloon, situated at the corner of Depot Square in said Gardiner, unlawfully did use for the illegal keeping and sale of intoxicating liquors."

At the trial a witness was called by the government, who testified that he was a deputy collector of internal revenue, and he refused to produce certain records or memoranda called for. His last answer was: "I think it is possible that if Mr. Hall has paid the United States tax as a retail liquor-dealer his name would appear on the memorandum I keep. I refuse to produce that, under instructions of my superior officer. I do not desire an opportunity to refer to my memoranda to refresh my recollection."

The witness was committed for contempt, and the defendant excepted to that order of the court,—“that fact having occurred during trial.”

Other points and material facts stated in the opinion.

Messrs. H. M. Heath and G. W. Heseltun, for defendant:

The witness was called to prove the truth of an examined copy. He sends out to the jury a written communication stating the facts connected with his examination of the original record.

By Const. art. 1, § 6, the accused had a right to be confronted by the witnesses against him.

Record of former conviction was not admissible.

In *Commonwealth v. Austin*, 97 Mass. 595, a similar case was tried, the time being from March 1, 1867, to September 1, 1867. The State introduced the record of a conviction, on a plea 1 Mr.

of guilty, for keeping liquors with intent to sell, July 1, 1867. The complaint and record did not show the building where liquors were so kept. In the nuisance trial no evidence was offered to show that the complaint had any reference to the place on trial. The court held it was necessary to prove the place to be the same.

State v. Plunkett, 64 Me. 534, was a search and seizure made September 25, 1873. A record of a conviction of same offense July 8, 1873, on a plea of *nolo contendere*, was admitted. Judge Appleton said (p. 539): "The record introduced showed that to a complaint similar to the one under consideration the defendant had by plea admitted his guilt. It was admissible on the question of intent."

The offense being local, the building must be described definitely.

The allegation, being a matter of description, cannot be rejected as surplusage.

State v. Noble, 15 Me. 476.

Mr. L. T. Carleton, County Attorney, for the State:

The indictment is sufficient.

13 Pick. 859; Chitty, Cr. L. 294; 48 Me. 237; 63 Me. 552; 1 Bish. Cr. L. § 810, and cases there cited; 13 Pick. 363; 3 Starkie, Ev. 1527.

As to the admission of the "examined copy" from the Internal Revenue Department, I cite—65 Me. 270; 1 Me. (L. ed.) 16, 1 New Eng. Rep. 290, 77 Me. 561.

Danforth, J., delivered the opinion of the court:

The motion in arrest of judgment in this case was properly overruled. The building is sufficiently described in the indictment, and whether in fact it corresponded with that description was a question for the jury.

The controversy with the collector and his deputy, with the proceedings against the latter for contempt, affords the respondent no ground for exception.

The copy of the collector's record, having been taken and sworn to by a competent witness, was admissible. *State v. Lynde*, 1 Me. (L. ed.) 16, 1 New Eng. Rep. 290, 77 Me. 561. The fact that the building is not described in the same language as in the indictment, if material, could only make it necessary to show that it was the same, by other testimony. *Commonwealth v. Austin*, 97 Mass. 597. The certificate of the witness, attached to the record, was not sufficient to authorize its admission, and might have been objectionable but for the oral testimony in court; with that it became immaterial.

The record of the former conviction was admissible for certain purposes. The situation of the building is more particularly described in the present indictment than in the former; but the two descriptions are not inconsistent. It was there permissible to show by other testimony that both referred to the same building.

But we think the instruction to the jury in regard to the use to be made of this evidence was erroneous. After giving the correct instruction, the justice added: "And I say to you further that, if you find that he (the defendant) maintained another place in the city of Gardiner for the illegal keeping or illegal sale of intoxicating liquors, although it was not located in this precise place, you have a right to con-

sider that in determining with what intent he maintained the premises in the condition in which the officer described them in this case." The jury must have understood that if they found that the building referred to in the record was not the same as that in the indictment, still they might consider the record of the former conviction as having some tendency to show the intent of the defendant in maintaining the building described in the indictment. This was evidently giving the record much too broad an application. It is very much like admitting the proof of one crime to sustain the charge of another. This would be in violation of a rule to which, though there may be an apparent, there is no real, exception. It is not unlike proving a defendant's bad character before he has opened the door by offering evidence to prove his good.

There was no prior conviction alleged in the indictment; so there was no occasion to offer the record to prove such an allegation. It could only be competent so far as it tended to prove any fact material to the issue in the case at bar; and for that purpose it derives no efficacy from the fact that it was the record of a conviction, except it may be more reliable testimony. It is conclusive between the parties, like the judgment in a civil suit, as to the facts in issue; and this is true whether the judgment is founded upon a plea of guilty or is the result of a trial and verdict. *State v. Lang*, 63 Me. 220. Hence no facts can properly be proved by such a record except such as, from their relevancy to the issues involved in the case on trial, might well be proved by any other competent testimony.

The indictment in this case is for maintaining a certain building and using it for the illegal keeping and illegal sale of intoxicating liquors, whereby it became a nuisance. The facts in issue, and which the defendant was called upon to answer, were the keeping and use of that particular building. It was competent for the government, as tending to sustain this charge, to show a similar maintaining and illegal use of this building prior to the time alleged in the indictment. *Commonwealth v. Kelley*, 116 Mass. 341; *Commonwealth v. M'Pike*, 3 Cush. 184; *State v. Plunkett*, 64 Me. 534. If the building described in the record were the same as that in issue in the case at bar, the facts then involved would, under these authorities, be pertinent to the present case. But if the building were not the same, it is evident that the facts there settled would not be competent, and the record should have been so restricted in the instructions. The application and limitation of this kind of testimony is more fully illustrated in *Commonwealth v. Tuckerman*, 10 Gray, 197, and in a note to *King v. Wythe*, 2 Heard, Cr. Cas. 32.

For this error only must the exceptions be sustained.

Exceptions sustained.

Peters, Ch. J., Walton, Virgin, Emery,
and **Foster JJ.**, concurred.

Henry N. FOSTER et al.

SEARSPORT SPOOL & BLOCK CO.

1. The owners of milldams on floatable

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streams in Maine are required to furnish reasonably convenient facilities for the passage of logs.

2. They are not required to furnish the same facilities as existed before the erection of the dam.

8. Nor would it be reasonable to require of them to construct such expensive locks or sluices as would enable large and loosely constructed rafts of logs to pass without being broken up.

(Penobscot—Decided November 12, 1887.)

ON exceptions, and motion to set aside the verdict and for new trial. *Motion allowed.*

An action on the case for damages caused by the breaking up of rafts of logs owned by the plaintiffs, while passing through the sluice in defendant's dam across the Piscataquis River at Howland.

The verdict was for plaintiffs for \$847.99.

Messrs. William H. McCrillis and Charles P. Stetson, for defendant.

Messrs. John Varney and John A. Blanchard, for plaintiffs:

The court will not disturb the verdict of the jury in cases of conflicting testimony, unless the result is so manifestly erroneous as to make it appear that it was produced by prejudice, bias, or some improper influence, or by mistake of the facts or law of the case.

36 Me. 252; 40 Me. 28; 59 Me. 418; 58 Me. 454; 67 Me. 314.

Defendant, in erecting that dam, was bound to give the public as good a channel for running rafts as there had been in its natural condition.

Parks v. Morse, 52 Me. 260; *Rolfe v. Pearson*, 76 Me. 383; *Gould, Waters*, 138, 196, 765, and cases there cited.

Walton, J., delivered the opinion of the court:

We regard this as a very important case; for, if the law is as claimed by the plaintiff, it imposes upon millowners a duty which it will be very difficult indeed, if not impossible, for them to perform.

It is claimed that the owner of a milldam upon a floatable stream is obliged to provide a sluice through which large and loosely constructed rafts of logs may be run without being broken up.

We doubt whether the construction of such a sluice is practicable. The evidence shows that, when one of these rafts enters a sluice, the more rapid current of the water in the sluice draws the front logs away from the rear logs; and that, when the front logs reach the less rapid current at the outlet of the sluice, their speed is suddenly checked, and the rear logs, which are then passing through the more rapid current of the sluice above, are driven against the front logs with such force that they will either go under or over them, and the raft be thus doubled up and broken to pieces. We doubt whether it is practicable to construct a sluice that will avoid these results. Unquestionably a lock may be so constructed. But how an ordinary sluice, open at both ends, can be constructed that will avoid them, we are unable to understand. The water in the sluice must inevitably flow more rapidly than the water in

the pond above. And when the front end of a long raft enters this more rapid current, what can prevent its being pulled away from that portion of the raft which still remains in the more sluggish water of the pond above? And when the front end of the raft strikes the more sluggish current at the outlet of the sluice, and its speed is thereby suddenly checked, what can prevent the more rapidly moving logs behind from being driven under or over the logs in front? We fail to see. Certainly such a sluice can be constructed, if constructed at all, only at very great expense,—an expense, we believe, out of all reasonable proportion to any benefit that would be conferred upon the logdriver.

It has never been decided in this State that such a responsibility rests upon the millowner. It has been decided that he must furnish the logdriver with reasonably convenient facilities for running his logs. But it has never been decided that he is obliged to furnish locks or sluices through which large and loosely constructed rafts of logs can be run without being broken up or the logs displaced. And we decline to place such an obligation upon him. We believe it would be unreasonable to do so,—that to do so would place upon the millowner a burden out of all proportion to any benefit that would be conferred upon the logdriver.

The proof in this case is that, for the express purpose of accommodating logdrivers, the defendant had constructed in its dam a good and substantial sluice, 30 feet and 4 inches wide, and 61 feet and 9 inches long, the descent in its whole length being only 3 feet and 8 inches. And it is admitted that the facilities thus provided are legally sufficient for running unrafted logs. But the plaintiff undertook to run his logs in rafts. These rafts were from 20 to 22 feet wide, and from 100 to 115 feet long. And they were loosely constructed. Some of the logs had no fastenings, and were held in place only by the logs by which they were surrounded. The result was that in their passage the rafts were more or less broken up. The witnesses say that when the front logs entered the sluice they would be pulled away from the hind logs, and that when the front logs reached the outlet of the sluice they would be driven to the bottom of the river, and their speed being thus suddenly checked, the hind logs would be forced on top of them; and in this way the fastenings would be loosened, and the rafts more or less broken up. And it is for the delay and the cost of reconstructing the rafts that the plaintiffs claim compensation from the defendant.

In support of this claim it is contended that a logdriver is entitled to the same facilities for running his logs after the erection of a dam as he had before; that if, before the erection of a dam, he could run rafts of logs without their being broken up, he is entitled to the same facilities after the dam is erected.

We cannot sustain this proposition to its full extent. The right to erect a dam upon a non-tidal stream (and we are speaking of no others) is a clear statutory right. The Legislature, in creating it, must have foreseen that its exercise would to some extent necessarily interfere with the use of such streams as highways. It is impossible to believe that the Legislature intended that this newly created right should be

burdened with the expensive—if not the impossible—obligation of providing for logdrivers the same facilities for running their logs as they had before. If the Legislature had so intended, it would have said so. The statute imposes no such obligation. It is silent upon the subject. The court has, by judicial construction, engrafted upon the statute a condition in favor of logdrivers, to the extent of requiring millowners to furnish reasonable facilities for the passage of logs; but it has never determined that it would be reasonable to require them to furnish locks or sluices through which large and loosely constructed rafts of logs may be floated without being broken up. We do not mean to say that it was not the duty of the defendant to prepare a sluice through which the plaintiffs' rafts of logs could be run. What we mean to say is that, in the opinion of the court, the sluice prepared by the defendant was all that could reasonably be required of it, and that it was not responsible for the breaking up of the rafts; and that the verdict against it, which holds otherwise, is clearly wrong.

In support of this conclusion, and for a more full discussion of the relative rights and duties of millowners and logdrivers, and the rules by which they are to be measured and adjusted, see *Pearson v. Rolfe*, 76 Me. 380.

Motion sustained, verdict set aside, and a new trial granted.

Peters, Ch. J., Danforth, Virgin, Foster, and Haskell, JJ., concurred.

STATE of Maine

v.

Levi LASHUS.

1. To show a former conviction, as common seller of intoxicating liquors, a record is admissible, which says: "Indictment for being common seller of intoxicating liquors," instead of copying the indictment itself.
2. It is for the jury to say whether the defendant is the same person named in the record.

(Kennebec—Decided October 27, 1887.)

ON exceptions by the defendant. *Sustained*, unless a *not. pros.* is entered as to prior conviction.

Indictment as a common seller of intoxicating liquors, alleging a former conviction.

To show a former conviction the following record was introduced in evidence:

State of Maine, } ss.
Kennebec, }

At the Supreme Judicial Court, begun and holden at Augusta, within and for the County of Kennebec, on the first Tuesday of August, being the first day of said month, A. D. 1871.

By the Honorable Charles Danforth, a justice of said court.

State v. Levi Lashus.

Indictment for being a common seller of intoxicating liquors, found at the March Term, 1871, when and where the defendant, being arraigned, pleads not guilty; thereupon, the issue being presented to a jury duly impaneled, they find a verdict of guilty; thence the action was

continued to this term for sentence. Sentence first day of this term: fine \$100, and costs.

Monday, August 7, 1871, committed for non-payment.

Other facts are stated in the opinion.

Mr. S. S. Brown, for defendant:

In the record which was introduced into this case at bar there is nothing but a mere unauthorized statement of the clerk that the alleged previous conviction was for being a common seller of intoxicating liquors.

We refer to the following authorities bearing upon the validity and effect of such statements by a recording officer:

McGuire v. Sayward, 22 Me. 230; *Owen v. Boyle*, 15 Me. 147; *Oakes v. Hill*, 14 Pick. 442.

In the case of *State v. Hines*, 68 Me. 202, the county attorney put in the docket entries as in this case, and also the indictment in the former case. By means of said indictment, it was made plain what the previous charge was; but nothing of the sort was done here; hence all the record introduced proves nothing, and should have been disregarded by the jury, and a general verdict of guilty under this indictment was unwarranted by the evidence.

Wedgwood v. Case, 8 Me. 75; *Commonwealth v. Briggs*, 5 Pick. 429. Also see *Commonwealth v. Norcross*, 9 Mass. 498; also 1 Bish. Crim. Proc. § 816.

Mr. L. T. Carleton, County Attorney, for the State:

The allegation of a prior conviction was properly set out in the indictment,—Rev. Stat. chap. 27, § 68, where the prescribed form is given for alleging in an indictment a former conviction, which form the indictment in this case follows.

Also Rev. Stat. chap. 27, § 57, says: "It is not necessary to set forth particularly the record of a former conviction; but it is sufficient to allege briefly that such person has been convicted of a violation of any particular provision, or as a common seller." There is no limit as to time either,—whether one year before the indictment or twenty years,—and Rev. Stat. chap. 27, § 52, makes it imperative, under a heavy penalty, to thus allege the prior conviction, whether the prior conviction was had six months or sixteen years ago.

65 Me. 234, 270.

Docket entries may be read to a jury when a more extended record has not been made.

State v. Neagle, 65 Me. 468; *Leathers v. Cooley*, 49 Me. 387; *Pierce v. Goodrich*, 47 Me. 173; *Longley v. Vose*, 27 Me. 179; *Read v. Sutton*, 2 Cush. 115; *Pruden v. Alden*, 23 Pick. 184.

Danforth, J., delivered the opinion of the court:

The record of the prior conviction alleged in the indictment was properly admitted. None more extended had been or is usually made. The addition of the indictment would have given no more information as to the nature of the offense charged than is obtained from the record. In each it is described in the same language, using the words of the statute, viz.: "a common seller of intoxicating liquors." The issue tried, and the conviction following, is so clearly set out as to leave no room for mistake.

The error is in the instruction to the jury, in

which they were told "that, if they were satisfied beyond a reasonable doubt, from all the evidence introduced before them, the defendant had, during any portion of the time named in the indictment, been engaged in selling intoxicating liquors as a business, they should return a verdict of guilty." Thus the jury were required to, and did, render a verdict of guilty of the higher offense charged, upon testimony sufficient only to convict of the lower.

It may be true that, so far as the sufficiency and legal effect of the record are involved, a question of law only is presented. But the identity of the defendant on trial with the person named in the record is a question of fact. The identity of name is some evidence of identity of person, more or less potent according to the connecting circumstances; but it is not, certainly in this case, sufficiently conclusive to authorize the court to take it from the jury and treat it as a question of law.

But neither of the rulings objected to in any way affects the verdict so far as it relates to the lower offense charged. Upon that it rests on evidence and instructions not objected to.

The prosecuting officer may therefore enter a nol. pros. as to the allegation in the indictment of a prior conviction, and let there be judgment for the State; otherwise the exceptions must be sustained.

Peters, Ch. J., Walton, Virgin, Emery and Foster, JJ. concurred.

Frederick G. MESSER *et al.*

Horace P. STORER *et al.*

1. **After composition papers are filed in a court of insolvency, a creditor may examine the debtor in relation to the agreement—whether signed by a requisite proportion, and in relation to the payment or security therefor of the percentage; but he can not then examine the debtor upon all matters relating to his insolvency.**
2. **It is not sufficient for the complainant in a bill in equity to allege that he has been informed and believes the facts set out; he must allege the facts, and when necessary he may add that the allegation is upon information and belief.**
3. **When an insolvent debtor makes a false statement in his affidavit filed in composition proceedings, an aggrieved creditor has a plain and adequate remedy at law.**

(Cumberland—Decided November 21, 1887.)

ON report of a bill in equity. *Bill dismissed.* The bill, after setting out the proceedings in the court of insolvency, contained the following allegation:

"Tenth. That your orators are informed and believe that the affidavit filed by said insolvents applying for said composition, under said proceedings for composition, as provided by Rev. Stat. chap. 70, § 62, of this State, are not true; but that they had, and ever since have, concealed and secreted money, securities, effects, and property, real and personal, belonging to them

individually, and to said firm, with intent, purpose, and expectation to receive, directly and indirectly, the benefit or advantage thereof to themselves; that they have changed and falsified the books of said firm; that they had sold, pledged, conveyed, and transferred property and estate belonging to them individually and to said firm, in anticipation of insolvency, and had made conveyances, mortgages, pledges, and transfers, and payments, to sundry of their creditors for the purpose of preferring said creditors; that they had given to sundry of their creditors and other persons compensation and promise or reward, besides reasonable counsel fees for services in effecting a compromise with their creditors; and that the assets and liabilities of said Storer Brothers & Co., and the individual members thereof, were not correctly stated in the schedules annexed to said affidavits and signed by them; that in said schedules large amounts of property were omitted, and the material statements contained in said affidavits and schedules were false, to the knowledge of the debtors making the same; that the signatures of a large number of the creditors who signed the composition agreements therein were obtained by fraud; that in obtaining said agreements, and in their said schedule, the said insolvents knowingly misstated and understated the value and amount of their property; but the particulars thereof are not so known to your orators that they can state them more specifically, and the examinations proposed by your orators in the proceedings in said court of insolvency were necessary for the purpose of ascertaining such particulars, and to show thereby that the discharge ought not to be granted by the court, and to show that, if granted, it was not valid, and your orators have no other means, than by such examinations, of ascertaining the particulars aforesaid."

The opinion states the case and material facts.

Messrs. Holmes & Payson, for plaintiffs:

The case of *Bisbee v. Ham*, 47 Me. 543, has no application to this case, where there was no voluntary agreement. This was not an accord and satisfaction entered into by the parties, like the one in that case. Even that decision, were it a question *de novo*, might be found hardly satisfactory, where only money was paid; for to pay back the part, only to recover it again in the whole, does not seem necessary. One can maintain trover, and the amount of money already paid will go in mitigation of damages, but, in replevin for the whole property, it must be returned.

Warner v. Vailly, 26 Alb. L. J. 254; 18 R. I. 483.

The distinction between a voluntary agreement to settle, and an attempt at compulsion, as in this case, should be carefully noted, as it is only in the former case that there is a rescinding which requires the one making a rescission to place the other *in statu quo*.

This is said to be an estoppel,—not an estoppel to maintain generally the prayers which are set forth in the bill, but to deny that we have ceased to be creditors.

Chafes v. Fourth Nat. Bank, 71 Me. 514, is relied upon; but it will be observed that the point in question there was the title to property, and whether an assignment of certain property to an assignee would pass the title as

against a creditor residing out of the State, who had received a portion of the proceeds of property conveyed by the same assignment, under an attachment made by the creditor, claiming that the assignment was void, under which a levy was about to be made. The rights of other creditors, third parties, were affected.

Equity cases are ordinarily decided by a single justice. There is one case in which they are not decided by a single justice, and that is the precise one at bar. Such cases are reported to the law court instead, for their decision of all questions.

Springer v. Austin, 75 Me. 417.

Unless this was so, the whole proceeding in making up the defense, and putting in the large amount of documentary evidence to support the several allegations of the pleadings, as well as the law itself providing for such method, would be a perfect farce. The case would go upon bill and answer with unsettled questions of fact. The respondents' answer and supplemental answer, if rightly allowed, are not evidence in the case, although sworn to, because the complainants' bill does not ask for an answer upon oath; and "in such case it has no effect as evidence, except to cast the burden of proof upon the plaintiff."

Rev. Stat. chap. 77, § 15; *Clay v. Towle*, 1 Me. (L. ed.) 63, 1 New Eng. Rep. 669, 78 Me. 86.

The learned counsel has cited the case of *Ex parte Morgan*, 1 Me. (L. ed.) 36, 1 New Eng. Rep. 340, 78 Me. 86, in support of his position that the judge of the insolvent court was justified in excluding the examination asked for. It has no application to this case, because that case was one upon appeal, as distinguished from the exercise of the supervisory powers of this court upon a bill in equity. That case decided two questions which were necessary for the purpose of disposing of the case: (1) that an appeal does not lie from the allowance of a discharge of an insolvent who makes a composition settlement with his creditors,—equity proceedings were the proper remedy in such case; (2) that the refusal by the judge of an examination gives no cause of appeal.

These propositions of law are obviously correct, and are well established by the decision in that case. No appeal in insolvency lies in any case arising under this chapter, unless specifically provided for therein (Rev. Stat. chap. 70, § 12), and no provision is made for an appeal from the ruling of the insolvent court refusing an examination.

If these complainants were satisfied that a full, frank, and complete statement had been made by the respondents in the insolvency proceedings, or that no further information was necessary or important in the proceedings, they could not come with very good grace to ask for permission to examine about matters which had been fully stated; and the allegation that they were informed and believed shows that they understood that matters had been concealed which required further investigation, and puts them in the position of parties who, not having the details, and therefore not able to allege the particulars which go to make up the fraud, yet have sufficient reason to believe, to justify a reasonable and prudent man in prosecuting the investigation. The demurrer admits such information and belief.

Walton v. Westwood, 73 Ill. 125.

The case of *Ex parte Haines*, 76 Me. 394, has reference only to an appeal as distinguished from these proceedings, and specifically states that, "besides the remedy by action, each creditor acting by himself, the equitable jurisdiction of the court can be invoked in proper cases, the court having under the insolvency law ample powers in that respect."

Insolvent and bankrupt laws proceed upon principles generally uniform, though differing in details. If a composition is subject to the rule laid down by respondents and the judge of the insolvent court, it is a startling innovation.

2 Kent, Com. 389 *et seq.*

The examination could be had only before discharge was granted,—during the proceedings. Rev. Stat. chap. 70, § 42.

This court has full power to annul a discharge under a composition.

Twitchell v. Blaney, 75 Me. 577; *Ex parte Haines*, 76 Me. 394–396.

Mr. William L. Putnam, for defendants: Bouvier's Law Dictionary says: "Composition is an agreement made upon a sufficient consideration between a debtor and creditor, by which the creditor accepts part of the debt due to him in satisfaction of the whole."

Rev. Stat. chap. 82, § 45, provides: "No action shall be maintained on a demand settled by a creditor, in full discharge thereof, by the receipt of money or other valuable consideration, however small."

Looking, then, at this transaction simply as a voluntary one, here was an offer of 42 per cent in composition and in full discharge, received by the creditor with the understanding of the terms on which it was offered; and therefore, in accordance with the statute last cited, it constituted a full discharge.

Bisbee v. Ham, 47 Me. 543, illustrates and enforces the principles above contended for.

The principle which we seek to avail ourselves of is well stated in *Chafee v. Fourth Nat. Bank*, 71 Me. 514; the court saying (p. 526): "It is a general rule that those who assent to an assignment cannot repudiate it; and knowingly receiving payments or dividends thereby secured to them is conclusive evidence of assent. These creditors have done both. We think they are thereby estopped to treat the assignment as invalid. * * * If not absolutely void—if it is only void at the election of such creditors as choose to avoid it—and they assent to it, or afterwards ratify it by accepting payments or dividends thereby secured to them, then, as to such assenting or ratifying creditors, the assignment will be sustained."

The sum and substance of our position about this is the proposition of the supreme court in *Ex parte Morgan*, 1 Me. (L. ed.) 36, 1 New Eng. Rep. 340, 78 Me. 36, to the effect that the probate judge "could see no expediency in an examination of the debtor after the composition agreement was entered into; and we see none."

As to the balance of mischiefs, we have already made some suggestions, and all we need further do is to cite the opinion of the supreme court in *Ex parte Haines*, 76 Me. 394, where the court said: "The debtor must make pay-

ment of the percentage or secure it before his discharge is obtainable. He needs the use and possession of his estate, to enable him to do so. * * * In the majority of cases, it would put difficulties in the way of composition proceedings if the debtor might be sent to an appellate court before a discharge is finally granted him."

The general terms of the Bankrupt Act of the United States, providing for examinations of debtors, were apparently broader than the corresponding provisions of our statute. This latter is expressly limited to an examination of the debtor "as to his insolvency," while U. S. Rev. Stat. § 5086, provided that he might be examined as to all debts due to or claimed from him; and yet, even under that phraseology, Judge Blatchford, in *Wright's Case*, 2 Ben. 504, refused to permit an examination, whether a certain debt was contracted by fraud, on the ground that such debt was not discharged by a discharge in bankruptcy, and that all such inquiry was irrelevant.

Libbey, J., delivered the opinion of the court:

This is a bill in equity brought to set aside and annul the discharges granted to the defendants, who were insolvent debtors, as co-partners and in their individual capacity, by the court of insolvency. Two grounds are relied upon in support of the bill: (1) that the court of insolvency denied the petitioners, on their application therefor, the right to examine the insolvent debtors upon all matters relating to their insolvency, as provided in Rev. Stat. chap. 70, § 42; (2) that the respondents committed acts in fraud of the insolvency statute, which render their discharges invalid.

The first ground involves the construction of the Insolvency Act in cases of composition. The insolvent debtors produced to a meeting of the creditors the affidavit required by chap. 70, § 62, and at the same time produced an agreement signed by a majority in number of their creditors, each of whose debts exceeded \$50, and by creditors holding three fourths of all their indebtedness, as required by said section; and the affidavit and agreement were duly filed in the court of insolvency. The debtors had been decreed insolvent, but their estate remained in the hands of the messenger, no proceedings for the choice and appointment of an assignee having been had. After these proceedings were had, the plaintiffs in this bill, who were not parties to said agreement, claimed the right to examine the debtors generally, upon all matters relating to their insolvency, under said § 42. This claim of right was denied them by the judge of the court of insolvency; but they were permitted to examine them upon all matters embraced in the issue whether the "agreement was signed by said proportion of the creditors of the debtors, and that they had paid or secured to all the creditors whose names appeared in the schedules annexed to their affidavit the percentage named in said composition agreement, and according to the terms thereof." The contention on the part of the plaintiffs is that the judge of the court of insolvency, having denied them their right of general examination, had no power to proceed and discharge the debtors; and that, as they

no right of appeal from his decree, they have the right to maintain this bill and have the charges annulled. And this raises directly for the first time in this court the question whether, after composition papers are filed in court, a creditor has the right to examine the debtor generally as to his insolvency, as ordered here.

Upon a careful examination of all the provisions of Rev. Stat. chap. 70, relating to insolvency, we are of opinion that he has not the right, and that the ruling of the judge of the court of insolvency complained of is correct. Sections 1 to 61, inclusive, of said chapter, define the jurisdiction of the court of insolvency, and prescribe and regulate the proceedings in insolvency where the estate of the insolvent debtor is settled and distributed by the court of insolvency. Section 42, before referred to, gives to the creditor the right of a general examination of the debtor upon all matters relating to his insolvency, before a certificate of discharge shall be granted him. This relates to cases settled in insolvency. Section 43 gives to the debtors and the requisite number of creditors, after the decree of insolvency has been made, by an agreement of composition or discharge of their debts, the right to take the benefit of the general provisions for the settlement of the estate in insolvency; and, when that is accomplished, the debtor is entitled to his discharge, and his estate is to be restored to him upon the payment of all expenses incurred during the proceedings. This mode of the settlement of their estate appears to be independent of the general provisions before referred to, and rests upon contract between the debtor and his creditors. Under it, when "the judge is satisfied that such agreement is signed by said proportion of the creditors of such debtor; and that he has either paid or secured, or all the creditors whose names appear in the schedules annexed to his affidavit, the percentage named in such composition agreement, and according to the terms thereof,—he shall give to the debtor, under his hand and the seal of the court, a full discharge of all his debts and liabilities contracted prior to the commencement of the insolvency proceedings and named in the schedule annexed to said affidavit." These provisions raise no issue before the judge as to the truth of the facts stated in the debtor's affidavit; but the only questions presented to the judge are whether the agreement is really executed by the requisite number of creditors, and whether the percentage has been paid or secured as required by this section. The statute contemplates that the proceedings shall be summary and speedy, so that the creditors may receive, without delay, their percentage, and the debtor's estate shall be restored to him that he may use of it as he pleases, and prevent loss by delay and deterioration. Hence no appeal from the decree of the judge is given, but in the decree "a special and stringent remedy of another sort is provided. An action to recover his debt is allowed to any creditor who has himself defrauded. This privilege is accorded to creditors under any other provision of the insolvency law." *Ex parte Haines*, 1 Me. 804.

If the general proceedings to be had where the estate of the debtor is settled in insolvency should be held to be applicable to composition proceedings, the great object to be accomplished by composition would be defeated by the protracted litigation which might follow. Then, to show more clearly that it was the intention of the Legislature that the general provisions of the statute before referred to should not apply to composition proceedings, the facts which, if established, will prevent the granting of a discharge to an insolvent debtor under § 46, are not the same as are required to be set forth in the affidavit in composition proceedings, which, if not true, will invalidate the discharge in composition.

Inasmuch as there was no question before the judge involving acts of the debtors which would deprive them of their right to a discharge of their estates when settled in insolvency, the only effect of a general, prolonged examination would have been to delay the proceedings in composition. This question was incidentally, but not directly, before this court in *Ex parte Morgan*, 1 Me. (L. ed.) 86, 1 New Eng. Rep. 840, 78 Me. 86, where the chief justice, in the opinion of the court, says: "He (the judge) could see no expediency in the examination of the debtor after the composition agreement was entered into, and we see none." This, though a *dictum* in that case, we think well supported by the laws. The reasons for the rule are well stated in that opinion.

Upon the second ground upon which the plaintiffs claim to maintain their bill, we think the bill is fatally defective. It alleges merely that the plaintiffs are informed and believe the facts set out in that clause of the bill. It does not allege the facts upon information and belief. It alleges information and belief of the facts only. Such an allegation in equity is insufficient to raise the issue sought to be raised.

Again, while it alleges generally certain things in fraud of the Insolvency Act, it alleges no specific act or fact by which the fraud was committed.

It should specify the acts, means, or omissions of the defendants by which the fraud was committed. It should at least be as specific as required, by § 49, in an application to the court to annul a discharge granted under § 44. It seeks to excuse this defect on the ground that the plaintiffs have no specific knowledge or information. But it is not framed as a bill of discovery. It prays that the discharges may be annulled, and that the debtors be required to submit to a full examination in the court of insolvency. We have already held that the plaintiffs have no legal right to such examination.

But, passing these objections, the plaintiffs have a clear, adequate, and complete remedy at law, under the provisions of § 62. It is, at least, doubtful if in this case they are entitled to relief in equity, if the bill contained the necessary allegations.

Bill dismissed, with single costs.

Peters, Ch. J., Walton, Virgin, Emery, and Haskell, JJ., concurred.

STATE of Maine

v.

Alanson M. PHILLIPS.*

After an assessor has been elected by ballot by a board of aldermen, and the election declared and recorded, the board cannot, the next day, at an adjourned session, reconsider the election of such assessor and elect another person to that office.

(Hancock—Decided June 29, 1887.)

ON exceptions by the defendant. *Overruled.* An information by the attorney-general in the nature of *quo warranto*.

The facts are stated in the opinion.

Mr. John B. Redman, for defendant.

Mr. A. P. Wiswell, for the State:

By Rev. Stat. chap. 3, § 12, towns are required to elect, among other officers, assessors. And by § 13 of same chapter assessors must be elected by ballot. Election by other means than by ballot is not sufficient.

Mussey v. White, 3 Me. 290.

The election having been completed and declared and recorded, the right of election vested in the board as aforesaid had been exhausted, and they had no power to elect another person to the office of second assessor until a vacancy in the office should occur, either by the death of the person legally elected, or by his resignation, failure to accept and qualify, or by his legal removal.

That an officer once lawfully elected cannot be arbitrarily removed is assumed by the court in *Putnam v. Langley*, 133 Mass. 204.

A board of this kind is governed by the rules and regulations of legislative bodies, so far as the same are applicable.

Dill. Mun. Corp. § 288.

The case of *Baker v. Cushman*, 127 Mass. 105, decides that a convention of two branches of a city council, after taking and counting a ballot for a municipal officer, may, at the same meeting and before the result of the election has been declared, treat the election as irregular and invalid, and vote anew. And it seems as if this case decides, by implication at least, that, when the election has been completed and the result declared, the board have no further power in the matter.

The officer is entitled to a personal notice. He is entitled to be heard and have counsel.

Dill. Mun. Corp. §§ 254, 256.

The ancient method of proceeding against one who, without authority, usurped a public office, by a writ of *quo warranto*, is still recognized by statute in this State (Rev. Stat. chap. 77, § 5); but the more modern and much the more convenient remedy is by an information in the nature of *quo warranto* (Dill. Mun. Corp. § 888).

Under the legislation and practice in the different States of this country, an information in the nature of *quo warranto* is the appropriate

remedy, both for the usurpation of municipal and other public offices, and for the usurpation of a public franchise.

Id. § 890.

This proceeding has long been recognized in Massachusetts as the proper one.

Commonwealth v. Fowler, 10 Mass. 290; *San v. Same*, 11 Mass. 339; *Commonwealth v. Allen*, 128 Mass. 308; *Commonwealth v. Swoasey*, 13 Mass. 539.

And in a very recent case in New Hampshire the same proceeding has been held the correct one.

State v. Megin, 1 N. H. (L. ed.) 17, 1 New Eng. Rep. 51.

In this State, in the case of *Reed v. Cumberland & O. Canal Corp.* 65 Me. 58, the information has been recognized as a concurrent remedy with the old-fashioned writ.

It was formerly held in Massachusetts that this proceeding could not be maintained against a public officer whose term of office would expire in one year, for the reason given that a decision could not be reached during his term.

Commonwealth v. Athearn, 3 Mass. 285.

For the form of a judgment in proceedings of this kind, see—

Commonwealth v. Fowler, 11 Mass. 339.

Libbey, J., delivered the opinion of the court:

At a meeting of the aldermen of the city of Ellsworth, held on the 15th of March, 1887, for the purpose of electing city officers, a ballot was taken for second assessor of taxes, and Albert G. Blaisdell was declared elected, and his election was entered of record. The meeting then took a recess until the next day, March 16, when, on motion therefor, it was voted to reconsider the election of second assessor, and a new ballot was taken, and the respondent was declared elected. Blaisdell took the necessary oath of office on the 1st day of April, 1887.

On the foregoing facts the court held that Blaisdell was duly elected, and that the election of Phillips, the respondent, was void, and ordered judgment of ouster against him, to which rulings exceptions were taken.

We think the rulings of the court below correct. The election of assessors was required to be by ballot. While a municipal body having the power of election may set aside a ballot by which it appears that an election is made, for some irregularity or illegality, before the election is declared (*Baker v. Cushman*, 127 Mass. 105), we are aware of no authority which holds that, when the election by ballot is declared and entered of record, it may be reconsidered at an adjourned meeting on a subsequent day, and a new election had. When the aldermen balloted and declared the election of Blaisdell, and it was recorded, their power over the election to that office was exhausted unless it should decline to accept it. He did not decline to accept, and the aldermen could not deprive him of the office except by removal in the manner provided by law. There being no vacancy in the office when the respondent was elected, his election was void.

Exceptions overruled; judgment of ouster affirmed.

Peters, Ch. J., Walton, Danforth, Emery, and Haskell, JJ., concurred.

* This case was decided and announced by report June 29, 1887, and is reported 1 Me. (L. ed.) 510, 4 New Eng. Rep. 770. At the time of the announcement the law court requested Judge Libbey to draw an opinion showing the grounds of the decision. The opinion was announced November 22, 1887.

MASSACHUSETTS.
SUPREME JUDICIAL COURT.

Joanna TRACY
v.
John A. LINCOLN.

Where a husband, to secure a loan to himself, gave his note and a chattel mortgage on property belonging to his wife, to the knowledge of the wife, but without objection by her, and subsequently secured a new loan from the mortgagee, and gave another note and mortgage on the same property, covering the amount of both loans; and the mortgagee surrendered to the mortgagor the note and mortgage first given, and afterward took possession of the property for the purpose of foreclosing the second mortgage given,—Held, in an action by the wife, on tort, for the conversion of the property by the defendant, that, while the wife was estopped by her silence from claiming the property as against the mortgage first given, she was not thereby estopped from claiming the property as against the subsequent mortgage.

(Middlesex—Filed November 23, 1887.)

ON defendant's exceptions. *Overruled.*

Tort for the conversion of personal property. At the trial the evidence showed that the property in suit was owned by the husband of the plaintiff; that he conveyed the property, October 10, 1883, to William H. Ryan, who on the same day conveyed the same to the plaintiff, the consideration being \$400 in each instance. January 26, 1885, the plaintiff's husband borrowed of the defendant \$105, on his note, secured by a chattel mortgage covering the property in suit. The mortgage provided that upon any default the vendee became absolute owner, and for an entry and taking of the property. April 16, 1885, the plaintiff's husband borrowed \$100 more of the defendant, and gave his note for \$200, payable in one month, secured by another chattel mortgage on the same property. At the same time the defendant surrendered to the plaintiff's husband the January mortgage and note. September 13, 1885, the plaintiff's husband died; and the defendant, September 26, 1885, took possession of the property in suit for the purpose of foreclosing the April mortgage, which had not been paid. It appeared by defendant's evidence that the plaintiff was present and heard the defendant and her husband making the arrangements for the defendant to loan her husband the \$105 on January 26, 1885; that she knew such loan was to be made on the security of a mortgage by her husband, on the property which she herself claimed to own; that she neglected to inform the defendant of her claim to the property; and that the defendant did not know of her claim to the property until after her husband's death. The defendant requested the court to instruct the jury that such conduct on the part of the plaintiff would estop her from claiming the property, as against de-

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fendant, until the January loan of \$100 was repaid to the defendant. The court declined to instruct the jury as requested, and instructed them "that the giving of the April mortgage and note was *prima facie* payment of the January mortgage and note." The jury found for the plaintiff, and the defendant alleged exceptions.

Messrs. John I. Brown and Prescott Keyes, for defendant:

The plaintiff, having neglected to assert her claim to the property when good faith required her to, cannot now assert it when justice requires her to keep silence.

Bigelow, Est. 4th ed. pp. 25, 548 *et seq.*; *Dewey v. Field*, 4 Met. 881; *Fall River Nat. Bank v. Buffington*, 97 Mass. 498; *Hinchley v. Greany*, 113 Mass. 595; *Machinists Nat. Bank v. Field*, 126 Mass. 348; *Griffin v. Lawrence*, 135 Mass. 365; *Graves v. Lake Shore & M. S. R. R. Co.* 137 Mass. 33; *May v. Gates*, Id. 390; *Commonwealth v. Reading Sav. Bank*, Id. 431; *Fowler v. Parsons*, 2 Mass. (L. ed.) 45, 8 New Eng. Rep. 445, 143 Mass. 401; *Continental Nat. Bank v. Bank of Commonwealth*, 50 N. Y. 575; *Leather Mfrs. Bank v. Morgan*, 117 U. S. 96 (29 L. ed. 811); *Pickard v. Sears*, 6 Ad. & El. 469; *Knights v. Wiffen*, L. R. 5 Q. B. D. 660; *Re Bahia & San Francisco R. Co.* L. R. 3 Q. B. D. 584; *Simm v. Anglo-American Tel. Co.* L. R. 5 Q. B. D. 188; *Goodwin v. Roberts*, L. R. 1 App. Cas. 476.

If the estoppel begins at the time when the person to whom the representation is made changes his position, if its validity rests upon such change of position, and if it extends only so far as his position is changed, then surely it ought to continue as long as his position remains thus changed. The reason of the estoppel continuing, the estoppel ought to continue.

Bigelow, Est. 4th ed. 620 *et seq.*; *Cambridge Inst. for Sav. v. Littlefield*, 6 Cush. 210; *Ladrick v. Briggs*, 105 Mass. 508; *Levis v. Webber*, 116 Mass. 450; *White v. Greenish*, 11 C. B. N. S. 299, 232; *McKenzie v. British Linen Co.* L. R. 6 App. Cas. 82; *Simm v. Anglo-American Tel. Co.* L. R. 5 Q. B. D. 188, 198.

The right the defendant acquired was the right to hold the property as security for his debt of \$105; this right did not depend upon the actual title of the husband, but was derived from the representation of the plaintiff, which now precludes her from disputing, against the defendant, the existence of the title which she represented to be vested in the husband.

Bigelow, Est. 4th ed. p. 547; *Audenried v. Betteley*, 5 Allen, 882; *Simm v. Anglo-American Tel. Co.* L. R. 5 Q. B. D. 206.

Of course, this being an action of trover, the plaintiff must show a right of possession; if there was an estoppel even as to the \$105 loan, it was sufficient to defeat the action by depriving her of the right of possession until such loan was repaid.

Tobey v. Chipman, 13 Allen, 123; *Fall River Nat. Bank v. Buffington*, 97 Mass. 498; *Griffin v. Lawrence*, 135 Mass. 365; *May v. Gates*, Id. 390; *Fowler v. Parsons*, 2 Mass. (L. ed.) 45, 8 New Eng. Rep. 445, 143 Mass. 401; *Leather Mfrs. Bank v. Morgan*, 117 U. S. 96 (29 L. ed. 811); *Cotton v. Atlas Nat. Bank*, 2 Mass. (L. ed.) 602, 4 New Eng. Rep. 859, 145 Mass. 43.

The estoppel should apply to the April mortgage so far as it covered the January loan.

Compare the case of tenant's estoppel to deny the title of his landlord. This depends on the surrender of possession by the landlord to the tenant, and continues, without regard to the formal lease, so long as the tenant holds the possession which he obtained by admitting the landlord's title. So, in the case at bar, the estoppel depends on the loan of money by the defendant to the plaintiff's husband, and should continue, without regard to the formal mortgage and note, so long as her husband holds the money which he obtained by her admission of his title to the property.

Taylor, Land. & T. 8th ed. §§ 89, 705, note 3; Bigelow, Est. 4th ed. pp. 19, 449, *et seq.*; *Hilburn v. Fogg*, 99 Mass. 11; *Miller v. Lang*, Id. 13.

Mr. H. N. Allen, for plaintiff.

Knowlton, J., delivered the opinion of the court:

The plaintiff, by her silence on January 26, 1885, was estopped from claiming her property, as against the mortgage which the defendant then took. The intention, by one's conduct, to induce another to change his situation, which is said, in many of the cases, to lie at the foundation of the doctrine of estoppel *in pais*, is commonly inferred from the conduct itself. It is sometimes even conclusively presumed from it; or, rather, the actor is held to be bound by the inference of his intention legitimately drawn from his acts by the party with whom he is dealing. If his conduct is in fact acted upon by another, and is of such a kind that a reasonable man would rely on it and would believe that he meant it as an inducement to be acted upon, he is bound by it. And this is often true of conduct by negligence or omission, where, for any cause, it is the duty of a person to disclose the truth. The plaintiff's failure to declare her ownership, when she was present and knew that the defendant was lending his money on the supposed security of her husband's mortgage of her chattels, was equivalent to consent to the conveyance, and an agreement not to set up her title against it. *Fall River Nat. Bank v. Buffington*, 97 Mass. 498; *Fowler v. Parsons*, 2 Mass. (L. ed.) 45, 3 New Eng. Rep. 445, 143 Mass. 401; *Freeman v. Cooke*, 2 Exch. 654; *Re Bahia & San Francisco R. Co.* L. R. 3 Q. B. 584.

But the law does not regard estoppels with favor, nor extend them beyond the requirements of the transactions in which they originate. The plaintiff was estopped from denying the validity of the transaction into which, with her knowledge, the defendant was induced to enter by her conduct. The arrangement then made gave him security for the note then given. She was not estopped from claiming her property as against a new mortgage, which might subsequently be made, nor from availing herself of a release of the mortgage, or a payment of the note, even though such payment would not have been accepted, in the form in which it was made, if the mortgagee had known that the mortgagor could not give a good title by a new mortgage. Her silence cannot, upon any correct principle, be held to affect her in connection with transactions which did not directly result from it. She cannot be deemed to have contemplated

the making of a mortgage in April, 1885, nor the payment of the original mortgage note by a new one. If the defendant suffered from mistaken confidence in his new security, it was a misfortune for which she is not legally responsible.

The jury were rightly instructed "that the giving of the April mortgage and note was *prima facie* payment of the January mortgage and note," which were surrendered at the same time; and, under all the instructions, they must have found that, when the defendant surrendered the papers, he intended to give up his claim under them. *Taft v. Boyd*, 13 Allen, 84; *Dodge v. Emerson*, 131 Mass. 467.

Exceptions overruled.

COMMONWEALTH of Massachusetts v.

William PRATT.

1. Where a complaint contained an **allegation of an unlawful sale of intoxicating liquor to a certain person** "whose name is to the complainant unknown," and upon the trial a witness for the prosecution, on cross-examination, testified that he **had told** complainant, before the complaint was made, the name of the person to whom the sale had been made; and the complainant testified, in answer to the question whether, when he made the complaint, he knew the name of the person to whom the sale was made, that he **did not know the man**, and upon cross-examination further testified that he **did not remember** that preceding witness had told him the name of the person who bought and paid for the liquor; that he **could not say**, and **would not like to say**, that he did or did not tell the name of the person, — *Held*, that upon this evidence a motion of the defendant, that the court order his acquittal, was properly denied.
2. *Held*, further, that whether the allegation that the name of the person to whom the sale was made was in fact unknown to the complainant was sustained by the evidence, was a **question of fact** for the jury.

(Bristol—Filed November 22, 1887.)

ON defendant's exceptions. *Overruled.*
Complaint for an unlawful sale of intoxicating liquor to a certain person whose name is alleged by the complainant to be unknown.

William Morancy, in company with four other persons, went to the defendant's premises, and one of the persons, named Taber, asked defendant for some beer, and defendant handed five of the bottles of lager beer to Taber, who handed defendant payment therefor. Morancy testified he was positive he told Wilbur at the time he reported the occurrence, on April 17, that the person who bought and paid for the beer was Abe Taber.

The complaint was made on April 24, 1887.

The defendant rested, and moved the court that the complaint be dismissed on the ground that it appeared in evidence that the name of

the person to whom the sale was made was known to the complainant before the complaint was made.

James L. Wilbur, the complainant, testified as follows, in answer to the question: "When you made this complaint, did you know the name of the person to whom the sale was made?" "I did not know the man; I don't remember; I could not say; I would not like to say that he did or did not tell me the name of the person."

The court overruled the defendant's motion, and ruled that it was a question to be submitted to the jury. To which ruling and refusal to rule the defendant duly excepted.

The court submitted to the jury, under instructions not excepted to, the question whether the allegation in the complaint, that the name was unknown to the complainant at the time he made the complaint, was sustained by the evidence.

The defendant requested the court to instruct the jury, among other things, as follows:

"The complainant is bound to describe the person by such name as was given to him. He must give the best name he can.

"If the complainant was told, before making the complaint, that the person buying the liquor was Abe Taber, then he was bound to describe such person by such name in such complaint, if that was the best name he could give him."

The court refused so to instruct them; to which refusal the defendant duly excepted. The jury returned a verdict of guilty.

Mr. T. F. Desmond, for defendant:

The testimony of Morancy, that he told the complainant the name of the purchaser when he reported the transaction, was direct and positive, and the second motion made, that the complaint be dismissed, should have been granted.

Wilbur's testimony was palpably evasive, for he might have known the name, and yet not have known the man.

The testimony that the name of the purchaser was known to Wilbur when he made the complaint was unaffected by Wilbur's testimony, and "the defendant should be discharged, subject to be tried on a new indictment adapted to the case."

Commonwealth v. Thornton, 14 Gray, 41; *Commonwealth v. Blood*, 4 Gray, 81.

The prosecutor is bound to give as good a description of the person as he can, but his ignorance of the name does not defeat the process.

Commonwealth v. Intoxicating Liquors, 116 Mass. 23; *Commonwealth v. Stoddard*, 9 Allen, 282; 1 Bish. Cr. Proc. 680, 681, 686.

Assuming that the question was properly submitted to the jury, the defendant was entitled to the second and fourth instructions.

Commonwealth v. Intoxicating Liquors, *supra*; *Commonwealth v. Glover*, 111 Mass. 401; *Commonwealth v. Mehan*, 11 Gray, 822.

But we submit that it was the duty of the court to order the defendant acquitted. There was no pretension that complainant was in doubt as to the surname of the purchaser.

Re v. Robinson, Holt, N. P. 595; *Reg. v. Campbell*; 1 Car. & K. 82.

Mr. Andrew J. Waterman, Atty-Gen., for the Commonwealth:

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There was no sufficient evidence introduced upon which the presiding justice could rule, as a matter of law, that the name of the person to whom the liquor was sold was known to the complainant. The question whether or no he did know it was rightfully submitted to the jury, under appropriate instructions not excepted to.

Commonwealth v. Stoddard, 9 Allen, 280; *Commonwealth v. Sherman*, 18 Allen, 248, and cases cited; *Commonwealth v. Thompson*, 2 Cush. 551, and cases cited; *Commonwealth v. Glover*, 111 Mass. 401; *Commonwealth v. Thornton*, 14 Gray, 41.

Devens, J., delivered the opinion of the court:

The complaint contained an allegation of an unlawful sale of liquor by the defendant to a person unknown. The defendant, at the trial, put in evidence the statement of one Morancy, that he told the complainant, on April 17, the name of the person to whom the unlawful sale of liquor relied on was made. The complainant, Wilbur, testified, in answer to the question whether, when he made the complaint, he knew the name of the person to whom the sale was made, that he did not know the man. On cross-examination he further testified that he did not remember that Morancy told him the name of the person who bought and paid for the liquor; that he could not say, and would not like to say, that he did or did not tell the name of the person.

Upon this evidence, the court rightly refused the motion of the defendant to order the defendant acquitted, and submitted the case to the jury upon the inquiry whether the allegation that the name of the person to whom the sale was made was in fact unknown to the complainant was sustained by the evidence. If the fullest credence be given to Morancy's testimony, it does not necessarily follow that, at the time of making the complaint, about a week after (on April 24), the complainant then knew and remembered the name of the person. The question before the court was not what the complainant might, with reasonable diligence, have ascertained, or what he ought to and might have known if he had remembered what had been previously told him, but what he actually knew. This was to be determined by the jury as a question of fact. The presiding justice could not rule, as matter of law, that, because complainant had been once informed of the name of the person to whom the liquor was sold, it was known to him at the time of making the complaint.

For similar reasons the defendant was not entitled to the second and fourth instructions asked. *Commonwealth v. Sherman*, 18 Allen, 248; *Commonwealth v. Glover*, 111 Mass. 401.

Exceptions overruled.

John WINN

v.

Frederick C. SANFORD.

1. Where a wife as principal, and the defendant as surety, gave a bond to wife's husband,—Held, that the agreement on the part of the wife was void.

because of her incapacity to contract, but that fact did not release the surety.

2. Held, further, that there is no distinction between the promise of a married woman which is void, and that of a minor which is voidable, as to the obligation of the surety.
3. Exception to the rule, that the liability of a grantor or of a surety is limited by that of his principal, stated.

(Nantucket—Filed November 23, 1887.)

ON plaintiff's exceptions. *Sustained.*

On contract to recover of a surety the penalty of a bond, which was as follows:

"Know all men by these presents that we, Susan B. Winn, wife of John Winn, of Nantucket, as principal, and Frederick C. Sanford, of Nantucket, as surety, are holden and stand firmly bound unto John Winn, of Nantucket, above named, in the sum of \$300, to the payment of which to the said John Winn, or his executors, administrators, or assigns, we hereby jointly and severally bind ourselves, our heirs, executors, and administrators. The condition of this obligation is such that whereas, in a settlement of differences between said John Winn and Susan B. Winn, it was agreed by said Susan B. Winn, and on her behalf, that she should give to said John Winn a bond, with surety, 'to release dower whenever requested, and make no further claim on said John Winn for any support, or for any cause whatever.' Now, therefore, if said Susan B. Winn shall, whenever requested, sign release of dower in any real estate of said John Winn, and shall make no further claim upon him for any support, or for any cause whatever, then this obligation shall be void, otherwise it shall be and remain in full force and virtue."

At the trial in the Superior Court, before Thompson, J., the presiding judge ruled, as matter of law, "that the bond sued on cannot be made the basis of any legal claim against the defendant; that Mrs. Winn not being liable to her husband under it, the defendant is not liable;" and found for the defendant, and the plaintiff alleged exceptions.

Mr. J. Brown, for plaintiff:

The tendency of all the decisions of this court has been to conform with the spirit of the existing laws, which give a married woman a right of action against her husband for separate support, greatly enlarge her rights and liabilities as to property, and "impair the unity and identity of interest between husband and wife which existed at common law."

Butler v. Ives, 139 Mass. 202.

This court impliedly regarded this instrument as of some binding force and effect, when it was brought to the attention of the court in a suit where a party sought to collect of this plaintiff a bill for necessities furnished the wife after its execution and a continued separation.

Alley v. Winn, 184 Mass. 77.

The instrument being a several as well as a joint undertaking, the fact that the wife signed as a party affords no defense for the defendant upon his undertaking to incur the penalty named, should the wife do or fail to do what was there stipulated. In undertakings of trus-

tees and others, upon a separation, both husband and wife often sign as parties, but that is nowhere held to excuse the third party from performing his stipulations.

Fox v. Davis, 118 Mass. 255; *Page v. Trusant*, 2 Mass. 160; *Albee v. Wyman*, 10 Gray, 222. See also *Chapin v. Chapin*, 135 Mass. 393.

vs. Messrs. L. Le B. Holmes and Elliot D. Stetson, for defendant:

The contract of the defendant was to be collaterally, and not originally, liable.

Nelson v. Boynton, 3 Met. 403.

The express language of the bond shows clearly enough this intention of the defendant. He therein binds himself only as surety for Mrs. Winn as principal. The defendant, being only liable collaterally in this bond, cannot be held under it, because it is void as to his principal, Mrs. Winn. A plain distinction exists between this case and those where the contract to which a party is surety is simply voidable as to the principal, not void.

Byles, Bills, 45.

A guarantor of a void contract cannot be held if the promisee knows it is void. As between Winn and his wife, this contract was absolutely void; but if Winn could not contract with his wife by this bond, he could not contract with her jointly with another.

Edwards v. Stevens, 3 Allen, 315; *Kenworthy v. Sawyer*, 125 Mass. 28.

To allow this suit against a surety for the wife in her contract with her husband is to permit indirectly all that the law seeks to prevent, and would apparently be to allow not only one but two suits to be brought on it; because, if the husband may maintain suit against the surety, the latter may against the wife.

Devens, J., delivered the opinion of the court:

It is true, as a general proposition, that the liability of a guarantor or of a surety is limited by that of his principal. But to this there are certain exceptions. Thus, where the principal is excused from liability for reasons personal to himself, and which do not affect the debt he has incurred or the promise he has made, the surety would not be entitled to the benefit of this excuse. In such case he is, in a certain sense, an independent promisor and must perform his promise. In *Maggs v. Ames*, 4 Bing. 470, the defendant had guaranteed the purchases made by a married woman incapable of making a contract. The question in the case was whether this guaranty should have been in writing; but it is assumed throughout by court and counsel that if it had been the defendant would have been liable, although there could have been no liability on the part of the principal. In a similar manner, where one becomes a surety for the performance of a promise made by a person incompetent to contract, his contract is not purely accessorial, nor is his liability necessarily ascertained by determining whether the principal can be made liable. Fraud, deceit in inducing the principal to make his promise, or illegality thereof which would release the principal, would release the surety, as these affect the character of the debt; but incapacity of the principal party promising to make a legal contract, if understood by the parties, is the very defense, on the part of the

principal, against which the surety assures the promisee. *Yale v. Wheelock*, 109 Mass. 502.

The bond in the case at bar is several as well as joint. It appears from it that Mrs. Winn is the wife of the promisee, and it recites the agreement made between them. This agreement made by her is void, so far as the evidence now discloses, solely because of her incapacity to contract, but this should not release the defendant, Sanford, from his engagement that she should perform the promise made by her. The defense which Mrs. Winn personally has, resulting from her situation, should not be open to him. Nor do we perceive that any distinction can be made (as suggested by the defendant) between the promise of a married woman which is void, and that of a minor which is voidable. In either case the surety assures the promisee against the incapacity of the principal to make a legal contract, whether it be more or less complete.

The cases in which it has been held that the coverture of the principal promisor at the time of making her promise will not discharge the surety, where such coverture was known to him, are numerous, and have arisen on many descriptions of contracts. *Smyley v. Head*, 2 Rich. (S. C.) 590; *Kimball v. Newell*, 7 Hill, 116; *Nabb v. Koontz*, 17 Md. 288; *Jones v. Crosthwaite*, 17 Iowa, 398; *Weed Sewing Machine Co. v. Maxwell*, 63 Mo. 486; *St. Albans Bank v. Dillon*, 30 Vt. 123; *Davis v. Statts*, 48 Ind. 103; *Stillwell v. Bertrand*, 22 Ark. 875.

Exceptions sustained.

Edwin HOWE

v.

Stephen SALISBURY.

Where a suit in equity was brought to procure an injunction to restrain defendant from withholding water from the plaintiff's sawmill, and for damages for so doing; and plaintiff moved for a preliminary injunction, but consented to postpone the hearing upon the motion therefor, in consideration of defendant agreeing (as claimed by plaintiff) to let enough water flow down to run plaintiff's mill; and, upon failure of the defendant so to do, plaintiff brought an action on contract, for damages for breach thereof.—*Held*, that, whatever the agreement may have been, it related only to the proceeding in the suit and to the motion for an injunction, and the remedies of the parties for a breach of it must be sought in the equity suit.

(Worcester—Filed November 23, 1887.)

ON report. *Nonsuit sustained*.
Howe brought a suit in equity against Salisbury for an injunction to restrain him from holding back from a sawmill the natural flow of water of a stream, by means of a certain reservoir about one mile above said mill, and for damages for so doing. Plaintiff made a motion for an interlocutory judgment, and a day was assigned for a hearing upon the motion. Plaintiff consented to a postponement 2 Mass.

of the hearing, at request of the defendant, upon the understanding, as claimed by plaintiff, that the defendant would let down sufficient water from his reservoir to run plaintiff's factory. Plaintiff claimed a breach of contract on the part of defendant in not providing the water as aforesaid, and brought a suit for damages therefor.

Upon the trial, plaintiff showed damages by reason of the failure of water to come down as aforesaid.

In compliance with the request of the defendant the court ruled, among other things, that the agreement relied on, if made, was connected with the equity suit, and an incident thereof; and that the same could only be enforced, and damages awarded for breach thereof, in the equity suit; and that the damages claimed in the equity case would include the damage claimed in this suit. The court also ruled that upon the whole case, as well as upon the above grounds affecting the contract relied on, the action could not be maintained, and advised the plaintiff to become nonsuit, which the plaintiff did upon the understanding that his rights would be preserved to him in this manner and by a report of the case.

If the court erred in ruling that the action, upon all the facts and evidence, could not be maintained, the nonsuit was to be taken off, and the case to stand for trial; otherwise the nonsuit was to stand.

Messrs. F. A. Gaskill, and H. B. Verry, for defendant:

The evidence does not support the declarations nor the allegation of the consideration.

The same measure of damages would be awarded in the determination of the equity suit as can be claimed in the case at bar.

The damages in the bill would be awarded up to the time of the final decree; so that, in any event, if the acts were unauthorized, the plaintiff would be entitled to receive compensation for these acts, as well as all similar prior ones.

Having selected his court and his remedy, the plaintiff is confined to that.

The contract related to an interest in land, and is within the Statute of Frauds.

The Statute of Frauds applies to water-rights.

Ang. Watercourses, §§ 170, 171: Gould, Waters, § 321.

Mr. C. F. Stevens, for plaintiff:

This agreement or undertaking on part of defendant to furnish enough water to run plaintiff's mills was absolute, and had nothing to do with the issue involved in the equity suit.

There is nothing about this suit, or the undertaking of defendant, or claim on part of plaintiff of any interest in, over, or concerning land, but a plain undertaking to furnish enough water to run plaintiff's mills.

Whitmarsh v. Walker, 1 Met. 313; *Claflin v. Carpenter*, 4 Met. 580; *Parsons v. Smith*, 5 Allen, 578.

This contract was not so indefinite and uncertain but that both defendant and plaintiff understood its terms.

W. Allen, J., delivered the opinion of the court:

The agreement declared on was an agree-

ment in the suit in equity between the parties. The plaintiff sought in that suit to have the defendant enjoined against holding water in his reservoir so that it would not flow to the plaintiff's mill below, and also sought for damages for such detention of the water. The agreement related to proceedings in the former branch of the case. The plaintiff had made a motion for an interlocutory injunction, and a day had been assigned for a hearing upon the motion. The defendant desired a postponement of the hearing. The plaintiff claims that there were mutual promises; that the plaintiff promised that the hearing should be postponed, and the defendant promised that he would let down water from his reservoir to run the plaintiff's factory. But, whatever the agreement may have been, it related only to the proceedings in the suit and to the motion for an injunction, and the remedies of the parties for a breach of it must be sought in the suit. The agreement was intended to be an arrangement in regard to proceedings in the suit, and not to be the ground of an action at law. The plaintiff was seeking, and could recover in his suit, for all damages he might sustain by the wrongful withholding of the water by the defendant; and it was clearly not within the scope and purpose of the agreement to provide for a separate action at law for a part of such damages, or to make the defendant liable for them without regard to whether the detention was wrongful or of right.

As the action cannot be maintained for the reason stated, it is unnecessary to express any opinion upon the other rulings of the court below.

Nonsuit to stand.

Margaret COWEN

v.

Mehitable SUNDERLAND.

1. Where, in an action of tort to recover for injuries sustained by plaintiff's falling into a cesspool, and the plaintiff presented evidence that she did not know of the existence or location of the cesspool; that it was in the yard she had hired and was entitled to use; that it was covered with dirt upon which grass and weeds were growing, and presented the same appearance as the rest of the yard; that it had never been pointed out to her; that it was where she passed over it in her use of the yard; that the boards which covered it and on which the earth rested were rotten and decayed; and that, in stepping upon this covering of the cesspool, she was thrown into it and injured; and there was further evidence that this cover had been repaired with old boards some time before by the defendant's direction, and that defendant was present when this was done, —*Held*, that the questions whether the defendant, knowing the defective covering of the cesspool, and the danger therefrom, had negligently omitted to inform the plaintiff, and whether the

plaintiff, by reason of want of proper examination by herself, was injured thereby, were questions for the jury.

2. Exception to the general rule that caveat emptor applies to a lessee, and that lessee cannot maintain an action except under warranty by, or misrepresentation of, the lessor, *stated*.

(Norfolk—Filed November 23, 1887.)

ON report. *Verdict set aside.*

Action of tort by which the plaintiff sought to recover for personal injuries alleged to have been sustained by her while she was a tenant of the defendant, by reason of alleged concealed defects in the premises let by the defendant to the plaintiff in the month of April before the alleged injuries. The evidence produced on the trial is sufficiently stated in the opinion.

At the conclusion of the evidence offered by the plaintiff, the defendant requested the court to rule that there was no evidence in the case that would authorize a verdict for the plaintiff. The court so ruled, and directed a verdict for the defendant, and thereupon a verdict was so rendered; and, at the request of the plaintiff, the presiding justice reported the case for the consideration of the Supreme Judicial Court. If the ruling and direction aforesaid were wrong, verdict was to be set aside; otherwise judgment to be entered upon the verdict.

Messrs. J. E. Cotter and C. F. Jenney, for plaintiff:

There was evidence for the jury that the defendant knew that said cesspool was unsafe, dangerous, and improperly covered. The defendant is liable for the injury caused to the plaintiff by defendant's acts; as it might "reasonably be contemplated as likely to result," and did in fact result, from such acts,

Wellington v. Downer, K. O. Co. 104 Mass. 64; *Reichenbacher v. Pahn Meyer*, 8 Bradw. 217; *Scott v. Simons*, 54 N. H. 426; *Godley v. Hayerty*, 20 Pa. 397; *Minor v. Sharon*, 112 Mass. 477; *Cesar v. Karutz*, 60 N. Y. 229; *Bowc v. Hunking*, 135 Mass. 880.

In *Bowc v. Hunking*, *supra*, and *Tuttle v. Gilbert Mfg. Co.* 2 Mass. (L. ed.) 674, 5 New Eng. Rep. 169, 145 Mass. 169, the alleged defects were open and obvious.

It was the duty of defendant to disclose the defect to plaintiff.

Scott v. Simons and *Reichenbacher v. Pahn Meyer*, *supra*, are directly in point.

The ruling and direction of the court were erroneous; the verdict should be set aside, and the case stand for trial.

Messrs. Gorely & Bartlett, for defendant:

The defect, if any, arose from ordinary wear and tear, for which the defendant is not liable.

Gott v. Gandy, 2 El. & Bl. 845; 2 C. L. R. 392; 18 Jur. 810; *Dutton v. Gerrish*, 9 Cush. 89; *Foster v. Peyser*, Id. 242; *Welles v. Castles*, 3 Gray, 323; *Leavitt v. Fletcher*, 10 Allen, 121.

Fraud and deceit must be specifically pleaded and proved, and the plaintiff must give some affirmative evidence of negligence on the part of the defendant.

11 C. B. N. S. 588; 8 Jurist, N. S. 796; 31 L. J. 129.

No allegations of fraud or deceit are made, nor does the evidence show that any was practised.

The alleged defect the defendant was not bound, as a matter of law, to reveal to the plaintiff; because (1) there is no evidence that the defendant knew of it; and (2) the defect could have been discovered by investigation and examination by the plaintiff. The plaintiff took the premises as they were, and the rule of *caveat emptor* applies.

McGlashan v. Talmadge, 37 Barb. 313; *Welles v. Castles*, 3 Gray, 326; *Woods v. Naumkeag S. C. Co.* 134 Mass. 359; 30 Pa. 298.

The case of *Bowe v. Hunking*, 135 Mass. 380, is conclusive as to the liability of a landlord to reveal defects in the premises hired of him.

Devens, J., delivered the opinion of the court:

It is a general rule, well established by the decisions of this court, that the lessee takes an estate in the premises hired, and takes the risk of the quality of the premises, in the absence of an express or implied warranty by the lessor, or of deceit. If, therefore, he is injured by reason of the unsafe condition of the premises hired, he cannot ordinarily maintain an action in the absence of such warranty or of misrepresentation. The rule of *caveat emptor* applies, and it is for the lessee to make the examination necessary to determine whether the premises he leases are safe and adapted to the purposes for which they are hired. There is an exception to this general rule, arising from the duty which the lessor owes the lessee. This duty does not originate directly from the contract, but from the relation of the parties, and is imposed by law. Where there are concealed defects, attended with danger to an occupant, and which a careful examination would not discover, known to the lessor, the latter is bound to reveal them, in order that the lessee may guard against them. While the failure to reveal such facts may not be actual fraud or misrepresentation, it is such negligence as may lay the foundation of an action against the lessor, if injury occurs. The principle that one who delivers an article which he knows to be dangerous, to another, ignorant of its qualities, without notice of its nature or qualities, is liable for any injury reasonably likely to result and which does result, has been applied to the letting of tenements. It has thus been held that, where one let premises infected with the smallpox, and injury occurred thereby, he was liable if, knowing this danger, he omitted to inform the lessee; this upon the ground of his negligent failure to perform a duty which he owed the lessee. It was not deemed important whether the omission to give the information was intentional or otherwise. *Bowe v. Hunking*, 135 Mass. 380, and cases cited; *Tuttle v. Gilbert Mfg. Co.* 2 Mass. (L. ed.) 674, 5 New Eng. Rep. 169, 145 Mass. 169.

Obviously there may be many concealed defects and dangers about a house, which careful examination will not discover. If these are known to the lessor it is for him to reveal them. Traps or contrivances may exist, by means of which the most careful occupant might be injured. "Such traps or contrivances," says *Mr. Justice Field*, "are not merely a want of

repair; they are in a sense active agencies of mischief, which no tenant would expect to find even in a decayed and ruinous tenement." *Bowe v. Hunking*, *supra*.

In *Reichenbacher v. Pahnmeier*, 8 Bradw. 217, the defect alleged was in the manner of hanging a chandelier. The chandelier was hung unsafely, and the lessor knew it, and did not disclose this fact to the lessee. It was not apparent to an observer. It was held that the lessor was liable to a servant of the lessee, who was injured by its fall. See also *Scott v. Simons*, 54 N. H. 426; *Godley v. Hugerty*, 20 Pa. 397.

In *Bowe v. Hunking*, *supra*, it was held that the case then at bar was not within the exception to the general rule by which a lessor is rendered liable for negligence of this character. There was no evidence that the defective step, by which the injury in that case occurred, was known to the lessor or her agent to be unsafe, and, further, this defect itself was obvious, and whatever danger existed was readily seen by examination.

In the case at bar, as the plaintiff presented it, there was evidence that she did not know of the existence or location of the cesspool; that it was in the yard she had hired and was entitled to use; that it was covered with from four to six inches of dirt, on which grass and weeds were growing; that it presented the same appearance as the rest of the yard; that it had never been pointed out to her; and that it was where she passed over it in her use of the yard; that the boards which covered it, and on which the earth rested, were rotten and decayed; and that, in stepping upon this covering of the cesspool, she was thrown into it and injured. There was further evidence that this cover had been repaired with old boards some time before, by the defendant's direction, and that defendant was present when this was done. From the description of witnesses of these repairs to the covering of the cesspool, the jury might fairly have inferred that it was left in an unsafe state, and known to be so.

Upon these facts, the learned judge erred in withdrawing the case from the jury. It should have been submitted, with proper instructions, to determine whether the defendant knew the defective covering of the cesspool and the danger therefrom, and had negligently omitted to inform the plaintiff; and whether the plaintiff herself, making careful examination, had been injured thereby, by reason of a want of proper examination.

Verdict set aside.

COMMONWEALTH of Massachusetts
v.

William SNEE.

Where a witness on his cross-examination admitted that he had signed and sworn to a complaint, and identified a copy thereof presented to him as a true copy, the contents of the complaint are admissible to contradict him.

(Essex.—Filed November 25, 1887.)

ON defendant's exceptions. *Sustained.*
This was a complaint against the defendant, alleging that, on a certain day, at Haverhill,

he did keep intoxicating liquors with intent to sell the same unlawfully in this Commonwealth.

Among other evidence, Austin C. Sprague, a police officer, testified for the Commonwealth, to facts tending to show that liquor was kept for sale on said day in a certain saloon; and also as to the presence of said defendant in said saloon upon said day, while a search was being made therein for intoxicating liquors; and still further to certain acts of the defendant at different times before said date, tending to show that the defendant was the keeper of the place.

The witness Sprague was also asked in cross-examination if he had not sworn to a seizure complaint charging one Martin E. Snee as the owner of liquors at that place; and he answered, without objection, in the affirmative.

The defendant introduced evidence tending to explain his presence as an innocent one, on said day; the testimony of the owner of the building that Martin E. Snee, defendant's brother, was the tenant of said saloon at said time, and other testimony tending to control the testimony of said Sprague as to acts of the defendant prior to said date. The defendant then offered in evidence said certified copies as tending to contradict said Sprague in his testimony, and for any purpose for which they might be competent. To this evidence the government objected, and the presiding judge excluded it, to which the defendant duly excepted. A verdict of guilty was found, and defendant alleged exceptions.

Messrs. Brickett & Poor, for defendant:

Under the complaint, it was incumbent upon the Commonwealth to establish two propositions: (1) that intoxicating liquors were kept at the place in question; and (2) that the defendant, William Snee, kept them.

It is a well-settled principle of law that it is competent to contradict a witness upon a material point.

Copies of complaint, etc., were offered by the defendant to contradict the testimony of Officer Sprague, and were competent for that purpose, if none other.

Commonwealth v. Brown, 136 Mass. 171.

There is no intimation in the bill of exceptions that the Commonwealth claimed a joint proprietorship, or that William Snee was bar-keeper or clerk for Martin E. Snee, nor does the bill show that William Snee was in charge of the place on the alleged day. It simply states that he was present while a search was being made for liquors. If the Commonwealth had found him in charge that day it would have been competent to convict him on that alone.

It appears by the bill that, without objection, Sprague admitted, on the cross-examination, that he had sworn to a seizure complaint charging Martin E. Snee as the owner of liquors at that place. It is clear that, in drafting the bill, this was merely put in as descriptive of the complaint which defendant's counsel was endeavoring to have identified by Sprague. Taken most unfavorably, it does not appear that he was asked, without objection, when he had so sworn; nor that Martin E. Snee was anything more than the owner of liquors at that place. The defendant's offer went much

farther. Sprague's testimony inculpated the defendant and exculpated Martin E. Snee, and the declarations made by him in the complaint to search were inconsistent and contradictory, in word and substance, with his testimony.

See *Commonwealth v. Brown*, 136 Mass. 171.

Mr. Andrew J. Waterman, for the Commonwealth:

It was probably intended that it should be and remain a matter of doubt which of the brothers was proprietor and the owner of the place.

The defendant on this day was alone in charge of the place, and Martin was not there.

A servant or bartender in charge of a saloon, intending to sell intoxicating liquors in violation of the law, the proprietor being absent, may be convicted.

Commonwealth v. Galligan, 2 Mass. (L. ed.) 261, 3 New Eng. Rep. 801, 144 Mass. 171.

It would be no defense to show that some other person was the proprietor, if he was not then present, much less to show that a witness had previously sworn that he believed such other person was the proprietor.

Commonwealth v. Churchill, 136 Mass. 148.

The defendant was not injured by the ruling of the court, as it was put in evidence, without objection, that said Sprague had sworn to a complaint charging Martin E. Snee as keeper of the place. Putting such complaint before the jury would not add to the value of the fact as evidence.

See *Commonwealth v. Brown*, 136 Mass. 171.

Field, J., delivered the opinion of the court:

The certified copy of the complaint offered in evidence by the defendant was competent to contradict the witness Sprague. The fact that, on cross-examination, the witness admitted that he had signed and sworn to such a complaint, and identified the copy as a true copy, rendered the contents of the complaint admissible, so far as they tended to contradict the witness, and the contents of the complaint were not offered in evidence during the cross-examination. The defendant, when putting in his defense, offered this copy in evidence. To what extent it tended to contradict the witness, and what weight it was entitled to, in view of the whole evidence and the contentions of the Commonwealth, we do not know. It plainly had some tendency to contradict the witness, and its rejection may have prejudiced the defendant.

Exceptions sustained.

COMMONWEALTH

r.

William E. BURROUGHS.

1. On a complaint for illegal keeping of intoxicating liquors, it is not an objection to a juror that he is a member of a society or association that has for its object the enforcement of the laws as to the sale of intoxicating liquors, without proof that such association had, through its agents, initiated or was conducting the prosecution.

2. The statute which permits—after the statutory questions have been pro-

pounded—a party to a suit to introduce any other competent evidence in support of his objection to a juror, was not intended to give him the right to submit the juror to a cross-examination to ascertain if he could not thereby elicit something done to show bias or prejudice on the part of the juror. The other competent evidence, which he is entitled to introduce is that obtained from other sources than from such an examination.

3. Beyond the statute provisions, the whole matter of such examination is left to the sound judgment and judicial discretion of the presiding judge.

(Worcester—Filed November 22, 1887.)

ON defendant's exceptions. *Overruled.*

Complaint charging defendant with the illegal keeping of spirituous and intoxicating liquors, with intent unlawfully to sell the same, the defendant not being then and there authorized by law to sell the same in any manner, and not having any license, appointment or authority to keep for sale or sell said liquors.

Before the jury were impaneled, defendant moved the court to examine certain of the jurors specified, with a view to challenge for cause with reference to their bias and asked that certain questions be put to them for that purpose. The court asked the said jurors the several questions provided to be asked in Pub. Stat. chap. 170, § 85, which were answered in the negative by the said several jurors.

The court refused to ask the jurors the questions submitted by the defendant, to which refusal defendant excepted. The jurors were retained. The defendant was convicted. The defendant excepted to the ruling of the court in refusing to ask the said jurors the following questions:

1. Are you a member of any Law and Order League, so called? 2. Do you contribute funds to any Law and Order League? 3. Are you a member of any society or association that has for its object, or one of its objects, the enforcement of the laws of the Commonwealth relating to the sale of spirituous and intoxicating liquors? 4. Do you contribute to any society or association which has for its object, or one of its objects, the enforcement of the laws of the Commonwealth relating to the sale of spirituous and intoxicating liquors?

Mr. John Hopkins, for defendant Burroughs:

The duty of the court with reference to the examination of jurors is determined by Pub. Stat. chap. 170, § 85. The right of the objecting party is given him by the same section.

The right of the objecting party is not limited by the preliminary questions suggested in the statute. He may introduce any other competent evidence in support of his objection. He is not concluded by the answers to the preliminary questions. He may seek from the juror himself, evidence. The right of a defendant to make inquiry of the juror as to his connection with an association fund for the purpose of enforcing the law which he is charged with violating is recognized in *Commonwealth v. Eagan*, 4 Gray, 18, where the duty of the court with reference to a juror so con-

nected is plainly defined. The questions proposed to be asked the jurors in the case at bar were well calculated to determine whether or not the several jurors were members of the association referred to in them, and, if answered in the affirmative, would have established their incompetency.

Commonwealth v. Moore, 1 Mass. (L. ed.) 848, 8 New Eng. Rep. 221, 148 Mass. 186.

David F. O'Connell, attorney for the defendant Kennedy.

John R. Thayer, for defendant Bartlett.
Mr. Andrew J. Waterman, Atty-Gen., for the Commonwealth:

The ruling of the Court was correct.

Pub. Stat. chap. 170, § 85, provides that the court upon request shall (*i. e.* must) ask a specified juror four distinct questions. Thus far there appears to be no discretionary power on the part of the court. Up to this point the party requesting this examination is not obliged to do more than make the request. This is a general provision, applicable alike to all cases; aimed to provide a fair and impartial jury; and provides that "the party objecting to the juror may introduce any other competent evidence in support of the objection." This is to be done "after the examination of the juror, as above provided," and both the evidence itself and the form of its introduction is "subject to the discretion of the court."

Commonwealth v. Moore, 1 Mass. (L. ed.) 848, 8 New Eng. Rep. 221, 148 Mass. 187; *Commonwealth v. Thrasher*, 11 Gray, 56; *Commonwealth v. Gee*, 6 Cush. 174.

Beyond the statutory provisions the whole matter relative to the examination of jurors is one that must be left to the sound judgment and judicial discretion of the presiding judge.

In the absence of competent and sufficient evidence, the court cannot go beyond the statutory questions in the examination of jurors.

In the present case the bill of exceptions does not disclose the fact that the defendant offered any evidence, but simply requested the presiding judge to put the additional questions as a matter of right. This he properly refused to do.

Commonwealth v. Gee; *Commonwealth v. Thrasher*; and *Commonwealth v. Moore*, *supra*.

Devens, J., delivered the opinion of the court:

Pub. Stat. chap. 170, § 85, provides that the court shall, on motion of either party in a suit, examine on oath each person who is called as a juror therein on certain subjects; and adds, "the party objecting to the juror may introduce any other competent evidence in support of the objection." The inquiries thus provided for were, in the case at bar, made by the presiding judge. The defendants then moved that certain other questions should be submitted to the juror, as they stated, with a view to a challenge for cause in relation to their bias, which questions the judge declined to put. It would be sufficient in these cases to say that replies to the questions themselves, however answered, would not have afforded any reason to reject the juror. It would have been necessary to supplement them by evidence that the league or association of which the juror might admit himself a member had, through some of its agents, initiated or was then conducting the prosecution of the individual defendants. The

defendants neither offered, nor did they by their motion or by any suggestion propose to offer, such evidence.

We are not, however, disposed to rest the matter upon so narrow a ground. While the statute permits—after the statutory questions have been propounded—the party to a suit to introduce any other competent evidence, it was not intended to give him the right to submit the juror to an inquiry in the nature of a cross-examination, in order to ascertain if he could not thereby elicit something tending to show bias or prejudice on the part of the juror. The other competent evidence which he may of of right introduce is that obtained from other sources than from an examination of this character. Undoubtedly the presiding judge, if he deems it desirable in determining whether a juror stands as impartial, may himself examine, or permit an examination of, the juror, beyond the inquiries provided for expressly by the statute; but, beyond these statute provisions, the whole matter of such examination is left to his sound judgment and judicial discretion.

The trials in the above cases occurred before the passage of the Act of 1887, chap. 149. It is unnecessary to consider how this statute will hereafter affect similar examinations.

Exceptions overruled.

COMMONWEALTH of Massachusetts

r.
Philip McPARLAND.

A copy of the record transmitted to the superior court is sufficiently attested when attested by the trial justice who tries the case; that he describes himself in the attestation as "justice" instead of "trial justice" is immaterial.

(Norfolk—Filed November 25, 1887.)

ON defendant's motion. *Overruled.*
Motion by defendant, after verdict and before judgment, in arrest of judgment.

Mr. John L. Eldridge, for defendant:

The defendant, after verdict and before judgment, comes and moves in arrest of judgment, because the trial justice has not transmitted to this court a true and attested copy of the record, and because the court has no jurisdiction.

Mr. Andrew J. Waterman, for the Commonwealth:

The ruling of the court was correct.

Commonwealth v. Wait, 131 Mass. 417, and cases cited.

By the Court:

The copy of the record transmitted to the superior court is sufficiently attested. It is attested by the trial justice who tried the case; and the fact that, in the attestation, he describes himself as "justice" instead of "trial justice" is immaterial.

Judgment on the verdict.

COMMONWEALTH of Massachusetts

r.
Frederick H. BISCH.

1. Where the record of the magistrate shows that defendant, being convicted,

appealed to the superior court, and was ordered to be recognized, and does not state that the defendant entered into a **recognizance**, but the magistrate transmitted to the superior court a copy of his record, accompanied by the recognizance actually entered into by defendant; this sufficiently shows that the appeal was perfected by the recognizance, and that the superior court had jurisdiction.

2. A mere clerical error in the record, which misleads no one, is **no ground** for quashing the complaint or arresting judgment.

(Middlesex—Filed November 25, 1887.)

ON defendant's exceptions. *Overruled.*

Complaint charging the defendant with keeping and maintaining a tenement for the illegal keeping and illegal sale of intoxicating liquors. Trial in the Superior Court, before Bacon, J., where the jury returned a verdict of guilty, and the defendant alleged exceptions.

The facts are stated in the opinion.

Mr. J. L. Eldridge, for defendant:

The record transmitted was not complete. It fails to show a necessary part of the record, viz., whether the defendant recognized or was committed. It sets forth merely an order to recognize. This was not a compliance with the rules of practice and the statute. The transmission of the original recognizance does not supply the defect, but shows the record incomplete.

Henderson v. Benson, 1 Mass. (L. ed.) 187, 1 New Eng. Rep. 533, 141 Mass. 218.

The judgment as to the term of the superior court to which appeal was made is inconsistent and contradictory, and it is so as to the recognizance. The proper course was an amendment of the record.

Commonwealth v. Galligan, 113 Mass. 208.

The superior court could only have jurisdiction by virtue of a valid recognizance, or the custody of the defendant for failure to recognize. The defendant was not in custody; he gave a recognizance with but one surety. But the statute requires sureties, and a valid recognizance creates a constructive custody, as in the case of poor debtors' recognizance.

There was no lawful appeal.

Pub. Stat. chap. 155, § 58; *Henderson v. Benson*, *supra*.

Mr. Andrew J. Waterman, Atty-Gen., for the Commonwealth:

The recognizance received was in proper form and legally sufficient.

Pub. Stat. chap. 155, § 58, provides for an appeal from the sentence of a trial justice to the superior court.

It is contended by the defendant that the superior court had no jurisdiction, in that the recognizance discloses but one surety. If it is anything, it is a matter in his favor, and no exceptions lie to a ruling or to a sentence in favor of the defendant.

See *Commonwealth v. Dillane*, 11 Gray, 67.

The fact that the statute says "sureties" does not preclude this construction. The very use of the plural word indicates discretionary power lodged with the justice.

Pub. Stat. chap. 3, § 3, cl. 4; *Commonwealth v. Barry*, 115 Mass. 147.

The motion in arrest of judgment was properly overruled.

Commonwealth v. Wait, 131 Mass. 117; *Commonwealth v. Huard*, 121 Mass. 56.

Morton, Ch. J., delivered the opinion of the court:

The motion to quash and the motion in arrest of judgment were properly overruled. There are no such errors in the record of the magistrate as show that the superior court had not jurisdiction of the case. The record shows that the defendant, being convicted, appealed to the term of the superior court next to be held for the county, and was ordered to recognize; it does not formally state that the defendant was recognized, but the magistrate transmitted to the superior court a copy of his record accompanied by the recognizance actually entered into by the defendant. This sufficiently shows that the appeal was perfected by a recognizance, and that the superior court had jurisdiction. Under Pub. Stat. chap. 55, § 58, the magistrate has the right in his discretion to accept, as sufficient, a recognizance with one surety.

The defendant was sentenced on November 22, 1886; the record recites that he appealed "to the superior court next to be held at Cambridge, in and for said county, on the second Monday of February, 1886." The date "1886" is clearly a mere clerical error. Taking the whole record, it is plain it was intended to be "1887." The first part of the sentence shows this. The error misleads no one, and furnishes no ground for quashing the complaint or arresting judgment.

Exceptions overruled.

Charles TAYLOR et al., Exrs., Appellants from Probate Court in the Estate of William Taylor, Deceased.

1. Where a will gave to the brothers and sisters of the testator the rest and residue of his estate, and provided that, in case any of the legatees were indebted to him at the time of his decease, such indebtedness should be deducted from the legacy, and the balance only paid over to the legatees; and, if such indebtedness exceeds the legacy, the surplus thereof was to be discharged,—*Held*, that it was the intention of the testator that such debts should, at his decease, cease to be debts, and become in the nature of advancements, by the force of the will.
2. *Held*, further, that the executors have no right to charge, against the brothers and sisters of the testator, who were indebted to him at the time of his decease, interest upon their debts after his decease.

(Berkshire—Filed November 22, 1887.)

ON appeal from a decree of the Probate Court in favor of legatees indebted to the estate.

Affirmed.

2 MASS.

William Taylor died August 8, 1878, testate. His will was proved September 3, 1878. At the decease of said William, his brothers and his sister were severally indebted to him on their respective promissory notes payable to him or order on demand, with interest.

There were four brothers and three sisters living at his death.

The will provides that, in case any of the legatees are indebted to him at the time of his decease, such indebtedness shall be deducted from the legacy given him or her, and balance only paid over to such legatees; and if such indebtedness exceeds the legacy given them, the surplus of such indebtedness is to be discharged.

After setting aside the \$25,000 to be held in trust for the widow during her life, and after paying the other small legacies, the executors had in their hands from time to time a small surplus, and therefrom made, during the life of the widow, three distributions to the four brothers and three sisters, who were the residuary legatees: one in January, 1880, of \$1,000; one in April, 1881, of \$500; one in September, 1881, of \$526.28.

These sums were paid over in money to those who were not indebted to the estate, and to those who were indebted the same sums were credited as an indorsement or part payment of such indebtedness due from them to the estate, as of the date of each of said distributions. These legatees, Horace, and Franklin G., and Mrs. Churchill, claim that interest on their indebtedness stopped at the death of the testator. The executors claim that interest would continue to accrue as long as the principal or any part remained outstanding; and that the indebtedness to be deducted from the legacy of each of them should be the principal, together with accruing interest, till paid, or extinguished by having been deducted from or allowed out of their legacies in the course of the administration of the estate.

The above are agreed to as substantially a statement of facts in the matter of the second account of the estate of William Taylor, in which the executors of the will appealed from the decree of the probate court.

On substantially the foregoing facts, the probate court rendered a decree against the executors, in favor of legatees indebted to testator at his decease.

From this decree the executors appealed.

Mr. Marshall Wilcox, for executors:

The testator directed his executors to set aside \$25,000 for the benefit of his wife during her life, and made a few other legacies; the rest and residue of his estate to his brothers and sisters living at the time of his decease, to be divided equally between them, share and share alike.

He then provided that, in case any of the legatees were indebted to him at the time of his decease, such indebtedness should be deducted from the legacy given him or her, and the balance only paid over to such legatees; and if such indebtedness exceeded the legacy given them, he discharged and released the surplus of such indebtedness.

At his decease, his brothers Horace and Franklin, and his sister Mary, were indebted to him on their respective promissory notes, payable to him or order on demand, with interest. The

indebtedness on these notes not having been included in the inventory of the estate, the same is brought into this, the second account, by crediting the estate with it, including interest since testator's death, as will appear on inspection of the account.

These items of interest, so far as they include interest since the death of the testator, it is claimed, should not have been credited to the estate, because, as the debtors claim, their indebtedness, by force of the will, was not to bear interest after the decease of the testator. This is a question of intent to be ascertained from the terms of the will and the facts and circumstances in the case.

The notes of the respective parties were interest-bearing demands, and, in the absence of anything to the contrary, were assets of the testator's estate, and would continue bearing interest till principal, with interest, should be fully paid.

The interest after the death of testator, as well as the principal, would be indebtedness, and form a part of the estate, and necessarily contributed to make up and form what is termed in the will "the rest and residue of my estate."

It is obvious that the shares of those residuary legatees who were not indebted to the estate would be increased or diminished in accordance with the allowance or disallowance of interest on indebtedness represented by the interest-bearing notes of those who were indebted.

There is nothing in the will indicating a purpose to treat the residuary legatees otherwise than upon a footing of absolute equality. Their shares were to be equal and alike in amount.

Nor is there in the will any language modifying or changing the legal character or effect of the debts or notes of those indebted to him. They were left as they were made.

When the testator provides that the indebtedness of those who owed him should be deducted from the legacy given them, and the balance only paid over, the natural and reasonable inference is that he intended such indebtedness at the time of distribution as the promise in the notes called for.

The testator treats the indebtedness referred to as debts to be paid by the debtors, by deduction from their shares in the residuum, if not otherwise paid.

Had the testator, by his will, reduced these debts to the nature and quality of mere advancements, as known to the law, and to be dealt with as such in the distribution of the residuum, the principal only would be deducted, not as a debt, however, but as a gift in the nature of a portion. There would be no interest in such case except as in the manner required by the will.

The following are cases of this description: *Hall v. Davis*, 3 Pick. 450; *Bacon v. Gassett*, 18 Allen, 337; *Cummings v. Bramhall*, 120 Mass. 552, 559-563; *Treadwell v. Cordis*, 5 Gray, 341; *Pool v. Poole*, L. R. 7 Ch. App. Cas. 17.

In all of the above cases the language of the wills seemed explicit in requiring the indebtedness to be treated, not as a debt, but as an advancement.

In the absence of such requirement in a will we submit that an actual debt would not be reduced to the legal quality of an advancement,

but would retain its quality as a debt; and if it was an interest-bearing debt, then interest on it followed and attached to it as a part of it.

Mr. John Banning, for appellees.

Morton, Ch. J., delivered the opinion of the court:

The question whether the executors have the right to charge interest, after the death of the testator, upon the debts due by his brothers and sisters, depends upon the intention of the testator, to be gathered from his will. *Bacon v. Gassett*, 18 Allen, 334; *Cummings v. Bramhall*, 120 Mass. 552. The will gives legacies to several persons; directs that the executors "shall lay aside a fund of \$25,000," of which his widow is to have the income during her life, and devises and bequeaths the rest and residue of the estate to his brothers and sisters who may be living at the decease of the testator, to be divided equally between them. It then provides that, "in case any of the legatees are indebted to me at the time of my decease, such indebtedness shall be deducted from the legacy given him or her, and the balance only paid over to such legatee; and, if such indebtedness exceeds the legacy given them, I hereby discharge and release the surplus of such indebtedness."

The amounts due by the brothers and sisters at his death cannot, in strictness, be regarded as advancements; but it is clear that the testator did not intend that they should be treated as debts, capable of being collected. At his death they ceased to be debts to be collected, and became amounts which were to be included in making up the residue to be divided and then to be deducted from the separate shares of the legatees. The language first used implies that the debts to be deducted are to be taken as they exist at the death of the testator. It is, "in case any of the legatees are indebted to me at the time of my decease, such indebtedness shall be deducted." "Such indebtedness" means the amount due at the decease of the testator. We think that the intention of the testator was that these debts should cease to be debts, and become at his decease in the nature of advancements. They therefore become substantially advancements, not by force of the statute, nor by reason of the original character of the debts, but because they are made so by the will of the testator.

It follows that the executors are not entitled, in making up the residue, to charge, against the brothers and sisters of the testator who were indebted to him at the time of his decease, interest after his decease.

Decree affirmed.

Ann TOMLINSON *et al.*

v.

John BURY *et al.*

A specific legacy is one which separates and distinguishes the property bequeathed from the other property of the testator, so that it can be identified. It can be satisfied only by the thing bequeathed. In a clause of a will, where there was a bequest of "all the mill stock and bank stock remaining in my name after the decease of my said wife."

and testator had no shares of the capital stock of any bank, or any other property in banking associations, except deposits.—*Held*, that the words "bank stock" are to be construed as describing the testator's deposits in various savings banks, and that the legacy called "mill stock" and "bank stock" is a specific legacy.

(Bristol—Filed November 21, 1887.)

APPEAL to the Supreme Judicial Court from a decree in equity of the Superior Court in favor of plaintiffs. *Affirmed*.

A bill in equity was brought by Ann Tomlinson and her children Alice Abbott and William Shaws, all of Blackburn, England, against Sarah Bury and John Bury, of Fall River, and William Blythe, Annie Blythe, and Leonard Blythe, the children of Rachel Blythe, deceased, of North Adams (all the parties being beneficiaries under the will of John Tomlinson, late of Fall River), for contribution toward certain legacies in said will, of which the plaintiffs claim to have been deprived.

John Tomlinson died without issue on May 15, 1885, leaving a will and certain real and personal estate. The real estate consisted of the two estates mentioned in the will, and the personal estate of certain deposits in certain savings banks in Fall River and certain shares of the capital stock of certain mills in Fall River, said mills being manufacturing corporations.

Rachel Tomlinson, the widow, duly waived the provisions of the will in her favor, and she became, in addition to other property, entitled to the balance of the personal estate remaining after the payment of debts, charges of administration, and widow's allowances.

The result of the waiving of the provisions of the will by the said Rachel Tomlinson, and the setting off and assigning to her, under her petition, the personal estate, was to deprive the plaintiffs of all the mill stock and the bank stock or deposits devised to them.

Mr. M. Reed, for defendants:

The rights of the plaintiffs under the will of John Tomlinson rest upon the fourth and sixth clauses of said will, the latter being the residuary clause. If the claim of the plaintiffs for contribution rested upon their interest as residuary legatees alone, it would be inoperative.

Wilcox v. Wilcox, 13 Allen, 256.

Wells, J.: "The devise of all the rest and residue of the testator's estate, both real and personal, is in no sense specific, and is not therefore exempt from the usual burden of residuary bequests, namely, payment of all debts and legacies."

Blaney v. Blaney, 1 Cush. 115.

A residuary legacy is not regarded as specific, and the residuary legatee cannot call upon the other legatees to abate.

Whenever a testator makes a residuary devise, he, by the necessary effect of the provisions of the will, exempts all other devisees and legatees from contribution to the residuary devise, towards the loss which he may sustain by the taking, for the dower of the widow, the estate devised to him.

Richardson v. Hall, 124 Mass. 233; *Same v. Same*, 127 Mass. 67.

2 Mass.

A specific devise or bequest is a devise or bequest by a description which identified a particular subject, then existing, as intended to pass to the donee *in specie*, either directly or indirectly.

Ashburner v. Macguire, 2 Bro. C. C. 108. See 2 White & T. Lead. Cas. Eq. 4th Am. ed. p. 606, notes.

The language of the testator needs to be carefully scanned. The gift is of "all the mill stock and bank stock remaining in my name after the decease of my said wife." By the terms of the will the testator contemplated that his wife should have the "use, improvement, and income" of the same, which must have been subject to many contingencies, such as losses, sales, reinvestments.

The theory that "bank stocks" and "savings-bank deposits" are the same is a mere assumption.

Tonle v. Swasey, 106 Mass. 106.

There is a line of cases where gifts of stock or government securities have been held to be specific; but it is when the specific thing or *corpus* is described as "my" stock or identified with equal distinctness.

Kirby v. Potter, 4 Ves. 750; *Barton v. Cooke*, 5 Ves. 461; *Metcalf v. First Parish*, 128 Mass. 370.

If the gift to the plaintiffs in the fourth clause of the will should be construed as conveying all the mill stock and savings-bank deposits (there being no bank stock) which the testator owned at the time of his decease, it is the same thing as a gift of all my personal estate or of the whole of my personal estate.

The weight of authority is in favor of regarding such a bequest as residuary, unless a contrary intention appears from the context or can be gathered from the other clauses of the will.

Aldrich v. Cooper, 8 Ves. 382. See 2 White & T. Lead. Cas. Eq. 4th Am. ed. 228-353, notes; *Walker's Estate*, 3 Rawle, 229; *Re Woodworth's Estate*, 31 Cal. 595, 602; *Broadwell v. Broadwell*, 4 Met. (Ky.) 290; *Farnum v. Bascom*, 122 Mass. 282.

The defendants Blythe are specific devisees, whether their interest is in fee or for life only.

Farnum v. Bascom, *supra*.

The intent of the testator was undoubtedly to devise a fee; for, had he intended to limit the devise to a life interest, he would have added the words "during his life," as in the third clause of the will, and as in the subsequent annuity to Sarah Bury.

Chase v. Chase, 132 Mass. 473; *Wilmarth v. Bridges*, 113 Mass. 407; *Barrett v. Marsh*, 126 Mass. 213; *Brown v. Merrill*, 131 Mass. 324; *Ladd v. Whitney*, 117 Mass. 201.

As the devise to Mrs. Blythe and her heirs was made on condition of the payment of the annuity to Sarah Bury by the devisees, the legacy to Sarah Bury is not merely a charge upon, but is primarily payable out of the land devised.

Harris v. Fly, 4 Paige, 421; *Clyde v. Simpson*, 4 Ohio St. 445; *Frampton v. Blunce*, 129 Mass. 152; *Nudd v. Powers*, 136 Mass. 273.

Messrs. Morton & Jennings, for plaintiffs:

The devise to Ann Wilkinson and her children, contained in the fourth clause of the will,

was a specific devise of the deposits in the savings banks and of the mill stocks. It is the same as if testator had said: "I give the deposits in such and such banks and the stocks in such and such mills."

Chase v. Lockeman, 11 Gill & J. 185; *Gilbreath v. Alban*, 10 Ohio, 64; *Everitt v. Lane*, 2 Ired. Eq. 548; *Walton v. Walton*, 7 Johns. Ch. 258; *Shepherd v. Guernsey*, 9 Paige, Ch. 360; *Townsend v. Martin*, 7 Hare, 471; *Hosking v. Nicholls*, 1 Younge & C. 47; *Stephenson v. Dowson*, 3 Beav. 342; *Field v. Peckett*, 29 Beav. 573; *Foxen v. Foxen*, 10 L. T. N. S. 290; *Richardson v. Hall*, 124 Mass. 233; *Farnum v. Bascom*, 122 Mass. 282; *Toule v. Swasey*, 106 Mass. 100; *Foote, Appellant*, 22 Pick. 302; *White v. Winchester*, 6 Pick. 51.

It is evident the testator used the words "bank stocks" as equivalent to and in the sense of bank deposits.

The plaintiffs are entitled to contribution.

Borden v. Jenks, 1 Mass. (L. ed.) 257, 1 New Eng. Rep. 705, 140 Mass. 562; *Farnum v. Bascom*; *Richardson v. Hall*; and *Toule v. Swasey*, *supra*; *Blaney v. Blaney*, 1 Cush. 115; *Snow v. Callum*, 1 Desaus. 542.

Devens, J., delivered the opinion of the court:

The parties litigant have agreed, if the plaintiffs, whose legacy has been appropriated to the claims of the widow, are entitled to contribution from other legatees, as to the amount to which contribution shall be made, and also as to the proportions in which it shall be distributed. This leaves open, as the only question for discussion, whether they are thus entitled. This depends apparently upon the inquiry whether the legacy to them is to be held specific or general. The rule is well settled that, if a legacy is specific and is appropriated to the payment of debts, the legatee (if the general or residuary legacies are not sufficient) is entitled to contribution from the holders of other specific legacies. *Farnum v. Bascom*, 122 Mass. 282. Nor is there any distinction between such a case and one where a specific legacy is appropriated to satisfy the lawful claims of the widow of the testator, who has waived the provisions of the will made in her favor. To the extent to which a specific legacy has been taken by the widow, the legatee would be entitled to contribution as much as if it had been taken for the payment of debts. It is equally well settled that, if the claim of the plaintiffs for contribution rested upon the fact that they were residuary legatees, it could not be maintained. Nothing is given by a residuary clause, except upon the condition that something remains after all paramount claims upon the testator's estate are satisfied. *Richardson v. Hall*, 124 Mass. 233.

The gift to the plaintiffs by the fourth clause of the testator's will was "all the mill stock and bank stock remaining in my name after the decease of my said wife." The plaintiffs were also residuary legatees and devisees under the sixth clause of the will, but they make, and could make, no claim on that account to any contribution. The words "bank stock" are to be construed as describing the testator's deposits in various savings banks. He had no shares of

the capital stock of any bank, or any other property in banking associations; and, while the expression is not accurate, it must be held, under these circumstances, to describe these deposits. The question is not of importance in the case at bar, as, if there is a specific legacy of the mill stocks which have been taken, the plaintiffs would be entitled to contribution from the other legatees, and the amount has been agreed. Specific legacies are held to contribute proportionally to the charges on the estate, unless, from the expressions of the will or from the position of the legatee,—as where he receives a legacy in lieu of a debt or claim against the estate,—it is sure that such legacy is entitled to a preference. *Farnum v. Bascom*, *supra*. There is a presumption of intended equality between general legatees as a class, and between specific legatees as a class. A specific legacy is one which separates and distinguishes the property bequeathed from the other property of the testator so that it can be identified. It can only be satisfied by the thing bequeathed; if that has no existence when the bequest would otherwise become operative, the legacy has no effect. If the testator subsequently parts with the property, even if he exchanges it for other property, or purchases other property with the proceeds, the legatee has no claim on the estate for the value of his legacy. The legacy is adeemed by the act of the testator. Tried by these tests, the legacy of the testator's mill stock and bank stock must be held specific. It could only be satisfied by this mill and bank stock, and, if the testator had disposed of them or any part of them, to that extent the legacy would have been adeemed.

Nor, in considering whether the legacy is specific, is it important that it was of such of these stocks as remained after the decease of his wife. He had bequeathed to her "the use, income, and improvement" of all of his estate, real and personal. He may have anticipated that it might suffer some diminution during her life; but, whether he did so or not, the subject of the gift was distinctly defined.

The defendants contend that this case comes within a class of cases where it has been held that a gift of all a testator's personal estate, enumerating the various classes, has been held to be general, and not specific. *Hays v. Jackson*, 6 Mass. 150; *Howe v. Dartmouth*, 7 Ves. Jr. 137; *Brumel v. Prothero*, 8 Ves. Jr. 114; *Walker's Estate*, 3 Rawle, 229; *Re Woodworth's Estate*, 31 Cal. 595. But the reason why it has been thus held, is that there no intent was shown to give a distinct part of the estate or to separate a portion thereof from the residue, but rather an intent to give the whole. A bequest is not the less specific because it includes numerous articles. A bequest of all the horses which the testator may own; of all his plate; of all the books in his library; of all the horses, cattle, and farming tools or a particular farm or farms,—are specific. *Stephenson v. Dowson*, 3 Beav. 342; *Borden v. Jenks*, 1 Mass. (L. ed.) 257, 1 New Eng. Rep. 705, 140 Mass. 562.

In the case at bar the mill and bank stock were, by the bequest, separated and distinguished from his other personal property.

Decree affirmed.

George A. BIGELOW

v.

Samuel H. CAPEN.

1. Parol proof of extrinsic circumstances may be admitted to apply a description to the subject-matter of a contract.
2. Where a note described in a mortgage has been renewed, or another note substituted for the original note, this fact may be shown, and the security applied to the renewed or substituted note.
3. It does not invalidate a mortgage given as security for the payment of notes, that the obligation really secured was one of indemnity for indorsing, rather than to pay, the notes described therein.
4. A demand which is substantially correct is not vitiated by a slight mistake in the amount demanded.

(Worcester—Filed November 23, 1887.)

ON defendant's exceptions. *Overruled.*

This is an action brought against the defendant, a deputy sheriff of Norfolk County, for the alleged conversion of property.

A mortgage of personal property was given the plaintiff by one William Burleigh, dated October 1, 1885, recorded in the town clerk's office of Needham, where said Burleigh then lived, October 3, 1885.

The condition of said mortgage is as follows: "Provided, nevertheless, that, if I or my executors, administrators, or assigns shall pay unto the grantee or his executors, administrators, or assigns the sum of \$1,000 in one year from this date, with interest as stated in my notes dated October 27, 1884, signed by me, then this deed, as also the aforesaid note, shall be void." It appeared that on or about October 12, 1885, the defendant, as said deputy sheriff, attached, on a writ issued from the Superior Court for Suffolk County, in which one R. F. M. Atwood was plaintiff and said Burleigh was defendant, a part of the property described in the writ and in said mortgage.

Further facts are sufficiently stated in the opinion.

Mr. Henry E. Fales, for defendant:

The sheriff, who defends under the process of the court, is entitled to require of the plaintiff proof of his title, and a strict compliance with those provisions of the statute which enable him to bring this action.

Citizens Nat. Bank v. Oldham, 186 Mass. 515.

A correct description of the debt or claim secured by the mortgage is as important and material as a correct description of the property covered by the mortgage; and the mortgage and record, to be sufficient as against attaching creditors, must correctly state the debt or claim secured by the mortgage.

Pub. Stat. chap. 161, § 75, provides that a mortgagee, when demanding payment of the money due him, shall "state in writing a just and true account of the debt or demand for which the property is liable to him, and deliver it to the attaching creditor or officer."

Any material misstatement in the account, which tends to mislead the attaching creditor, renders the demand inoperative to dissolve the

attachment, and defeats the right of the mortgagee to maintain an action against the attaching officer.

Hicknell v. Cleverly, 125 Mass. 164.

The demand is also erroneous in that it demands four dollars and four cents, costs of protest, which have nowhere been shown in the evidence to have constituted a debt against the mortgagor.

Mr. David Manning, Jr., for plaintiff:

The admission of that portion of the testimony of William Burleigh objected to by defendant was competent upon the "ordinary principle of allowing extrinsic evidence to apply a written contract to its subject-matter."

Johns v. Church, 12 Pick. 557; *Hall v. Tufts*, 18 Pick. 455; *Goddard v. Sawyer*, 9 Allen, 78; *Baxter v. McIntire*, 18 Gray, 168; *Clark v. Houghton*, 12 Gray, 38; *Pierce v. Parker*, 4 Met. 80; *Barrows v. Turner*, 50 Me. 127; *Bodge v. Potter*, 18 Barb. 193; *Jones, Mort.* § 352; *Hampden Cotton Mills v. Payson*, 130 Mass. 88.

The fact that the notes produced at the trial varied in some particulars from the notes described in the mortgage is immaterial.

Hall v. Tufts, and *Dodge v. Potter*, *supra*; *Jones, Mort.* § 352.

The demand upon the defendant, made by plaintiff, contained "a just and true account of the debt or demand for which the property was liable," according to the provisions of Pub. Stat. chap. 161, § 75.

The mortgage was duly executed, delivered, and recorded before the property was attached by defendant. It was given for a valuable consideration. The demand was properly made upon the defendant, and the amount due was not paid or tendered by him within ten days, or at any time thereafter.

Pub. Stat. chap. 161, §§ 74, 75.

Devens, J., delivered the opinion of the court:

Parol proof of extrinsic circumstances may be admitted to apply a description to the subject-matter of a contract. If it appears that the description is not in all respects accurate, it may, to a certain extent, be rejected, and what remains alone regarded, if that be sufficient to identify it. *Hall v. Tufts*, 18 Pick. 457; *Baxter v. McIntire*, 18 Gray, 168; *Pierce v. Parker*, 4 Met. 80.

Where a note described in a mortgage of personal property has been renewed, this fact may be shown, and the security applied to the note as thus renewed. *Barrows v. Turner*, 50 Me. 127. Conversely, where there has been a substitution for the original note which was the foundation of the liability of the mortgagor, and the parties to the mortgage describe the original note, either by accident, or mistake as to the liability, this error may be shown, and the security applied to the existing liability. In the case at bar the original notes indorsed by the plaintiff were dated the latter part of October, 1884. These notes had been renewed once or twice, the plaintiff indorsing the renewals. It was competent for the plaintiff to show, as he did, by evidence, that, at the date of the execution of the mortgage, on October 1, 1885, the liability intended and understood to be secured by the mortgage was that on these outstanding indorsed notes, and that there was

no other liability to the plaintiff, the \$1,000 mentioned in the condition being the amount of the two \$500 indorsed notes. It was therefore a mistake, and an erroneous description of the notes intended to be secured, to state them as of the date of October 27, 1884, arising probably from the fact that the transactions between the plaintiff and Burleigh, the mortgagor, then commenced; but this would not invalidate the security, when it was shown that the liability of the plaintiff originated with them, and that the later notes were merely a substitution. Nor would it invalidate the plaintiff's security that the obligation of Burleigh was one to indemnify him for indorsing, rather than one to pay him, the notes then outstanding. The plaintiff would, it is true, have no demand against Burleigh, except after payment of them by himself. The plaintiff was the promisee of the notes, and it was the duty of Burleigh to pay them. If, in form, it is stated in the mortgage that Burleigh agrees to pay the plaintiff the notes, rather than to indemnify him against being compelled to pay them, the real character of the transaction will, as between the parties, be regarded. Nor is any injury done to third persons. They are informed of the exact amount of the claim of the plaintiff upon the property of his and their debtor, even if such claim is not described with entire accuracy. There is no evidence that by this any party has been misled; and we have no occasion to consider whether there may not be cases where, if one were misled by the carelessness or inaccuracy of another, the party so misleading might not be estopped thereby from proving the exact character of his transaction with the mortgagor. As the mortgagor was bound to indemnify the plaintiff for signing these notes, it may well be contended that he properly included the fees for protest of the notes, in his demand upon the defendant, and in stating the amount due to him, as he was compelled to do under Pub. Stat. chap. 161, §§ 74, 75. This demand was substantially correct, and it is not vitiated by a slight mistake, even if such was made. *Harding v. Coburn*, 12 Met. 333. A demand is also good, though made for an amount larger than is due, if the amount due exceeds the value of the property. *Clark v. Dearborn*, 103 Mass. 385. An examination of the verdict shows such to have been the fact in the case at bar.

Exceptions overruled.

George STONE

r.

Isaiah GRAVES, Admr.

This court cannot say, as matter of law, that work done by the plaintiff on the Lord's Day, in shaving an old man in his own house, who could not shave himself, was not morally fit and proper. An exception to a recovery for such services, in the court below, overruled.

(Essex—Filed November 23, 1887.)

ON defendant's exceptions. *Overruled.*
Action on contract, in which plaintiff sought to recover for services rendered, a por-

tion of which were performed on the Lord's Day.

The services rendered were shaving the beard of defendant's intestate, at his request, for a number of years before his death.

The case was tried by a judge without a jury.

There was no testimony but that of the plaintiff, in reference to services claimed to have been rendered.

The plaintiff testified he was a shoemaker, occasionally employed as a barber; that the intestate was over eighty years of age, and quite feeble much of the time; that he tried to shave himself at first, but, in consequence of a fall, was unable to use his arm; that at first plaintiff volunteered his services to deceased. After that, deceased requested plaintiff to come and shave him every week as long as he lived, and after that demanded him to hand in his bill; that plaintiff shaved him at that time, and after that regularly every Sunday but one—when plaintiff was disabled—and also sometimes on Wednesdays or Thursdays, and went some two miles to do so.

Upon this evidence defendant asked the judge to rule that plaintiff could not recover for services rendered on the Lord's Day. The judge declined so to rule, and found, as a fact, that the services rendered on that day were works of necessity.

Defendant further asked the judge to rule, there was no evidence to warrant a finding that the shaving of the beard of deceased on the Lord's Day was a work of necessity. The judge declined so to rule, and found for the plaintiff for the full amount of his claim, including the services rendered on the Lord's Day. To each of these rulings defendant excepted.

Further facts appear in the opinion.

Mr. E. F. Smith, for defendant:

The question for the court is whether the plaintiff can recover for work done on the Lord's Day, that work being the shaving of the beard of the defendant's intestate.

The doing of "any manner of labor, business, or work, except works of necessity and charity," on the Lord's Day, is prohibited by Pub. Stat. chap. 98, § 2.

In *Phillips v. Inness*, 4 Cl. & F. 234, it was held that shaving and hair-cutting were not works of necessity. The same point was decided in *Commonwealth v. Jacobus*, 1 Leg. Gaz. Rep. 491.

Lord Chancellor Cottenham, in *Phillips v. Inness*, *supra*, says: "This work (shaving) is not a work of necessity, nor is it a work of mercy; it is one of mere convenience."

It is no sufficient excuse for work on the Lord's Day, that it is more convenient or profitable, if then done, than it would be to defer or omit it.

Jones v. Andover, 10 Allen. 18; *Commonwealth v. Sampson*, 97 Mass. 407; *McGrath v. Merrin*, 112 Mass. 467.

"The necessity contemplated by the exception in the statute was the necessity of the person who worked, and not of him who compelled the work. Gain was the object of the plaintiff, and such work being for hire merely is not a work of necessity."

Lord Brougham, in *Phillips v. Inness*, *supra*. In *Commonwealth v. Jacobus*, *supra*, Elwell, P. J., said: "Although not bound by it

(*Phillips v. Inness*) as authority, yet, as this decision is the only one to be found upon the point in question, and emanates from judges of great learning and ability, and as its conclusions are, as I believe, in accordance with the purposes for which laws for securing the observance of the Sabbath were passed, I adopt them as applicable to the Act under which the defendant was convicted."

The ordinary business of the plaintiff being that of a shoemaker, it was not necessary for him to do the work of a barber on the Lord's Day.

That there was not sufficient evidence that the work was a work of necessity is plain from the testimony of the plaintiff.

Mr. H. P. Moulton, for plaintiff:

Whether the work of shaving beards on the Lord's Day may be said to be always a work of necessity or not, in the least favorable view for the plaintiff it was a question of fact to be determined from the circumstances of the case.

Fital v. Middlesex R. R. Co. 109 Mass. 404; *Gorman v. Lowell*, 117 Mass. 65; *Bennett v. Brooks*, 9 Allen, 122.

The service rendered was, under the circumstances, a work usually fit and proper to be performed on the Lord's Day.

Flagg v. Millbury, 4 Cush. 244, and cases cited; *Doyle v. Lynn & B. R. Co.* 118 Mass. 197.

The recent decisions (*Commonwealth v. Deatra*, 1 Mass. (L. ed.) 796, 3 New Eng. Rep. 182, 148 Mass. 28, and *Commonwealth v. Starr*, 2 Mass. (L. ed.) 894, 4 New Eng. Rep. 204, 144 Mass. 859) relate to keeping an open shop on Sunday, and do not apply to this case.

Field, J., delivered the opinion of the court.

It appears that Mr. Graves, the defendant's intestate, was an old man whose shoulder had been injured, and who could not well shave himself; and that the work of shaving him was done by the plaintiff, not in a public shop, but in the house of Mr. Graves. If Mr. Graves wished to be shaved on the Lord's Day in his own house, we cannot say, as matter of law, that it was not morally fit and proper that the plaintiff should shave him.

Exceptions overruled.

COMMONWEALTH of Massachusetts

v.

JAMES BOYLE.

1. On the trial of a complaint for keeping and maintaining a tenement for the illegal keeping and sale of intoxicating liquor, under Pub. Stat. chap. 101, it is not necessary for the government to prove an act of sale or offering for sale.

2. It must be proved that the defendant kept the premises and used them for the illegal sale or illegal keeping of intoxicating liquors, but this may be proved by other evidence than that of specific sales.

(Middlesex—Filed November 25, 1887.)

Defendant's exceptions. *Overruled.*

Complaint under Pub. Stat. chap. 101,

2 MASS.

charging the defendant with keeping and maintaining a tenement for the illegal keeping and illegal sale of intoxicating liquor. There was evidence tending to show that officers visited the shop of defendant, and found defendant behind the bar, where cigars and hop beer under 8 per cent were kept; that officers took samples of dirty water which were subsequently taken to the State assayer in Boston, and analyzed, and found to contain more than 8 per cent of alcohol; that said water was taken from a tank under the bar near where the defendant stood; and that it appeared, on each occasion when the officers visited the place stated, they saw the defendant go to said tank and go through the motion of rinsing a two-quart can; and on one occasion they found a can empty, in the ice-chest, which smelt of whiskey; and that a sample of the water taken from the bottom of said ice-chest also smelt of whiskey; and that one sample of said dirty water referred to was taken from said ice-chest, the other being taken from the tank. The defendant asked the court to instruct the jury that there must be proved a sale, or some act of keeping or offering for sale, in said shop kept by defendant; that, as this complaint avers "to the common nuisance of all good citizens residing, inhabiting, and passing," it must be proved, and, in the absence of such proofs, the defendant should be acquitted; that the jury may consider the statutes aforesaid and law in the case; that the jury must be satisfied that what liquor was found and analyzed was a beverage to be used as such.

The court refused to give the instructions requested, but instructed the jury, among other things, not excepted to, that there was competent evidence in the case tending to prove that the defendant was guilty, and that the defendant should be convicted, if, upon all the evidence in the case, they were satisfied, beyond a reasonable doubt, that the defendant used his shop, within the time named in the complaint, for the illegal sale of intoxicating liquor. The jury returned a verdict of guilty, and the defendant alleged exceptions.

Messrs. A. V. Lynde and William P. Harding, for defendant:

The complaint in this case is predicated on proof sufficient in law to bring it within the true construction of Pub. Stat. chap. 101, §§ 6, 7. The burden was on the government to show that the defendant had committed some act which brought him within the intent and meaning of the statute. In *Commonwealth v. Kimball*, 105 Mass. 478, Wells, J., says that "the nuisance is maintained by prosecuting therein" (in the building or place) "the illegal traffic;" but in the case at bar there was no evidence of a sale of intoxicating liquor. The instruction that "there was competent evidence in the case tending to prove the defendant guilty" was too general, and not specific enough on this evidence and the question and law of illegal keeping. A single sale is insufficient to establish a use, or warrant conviction. See *Commonwealth v. Patterson*, 188 Mass. 419, 500.

Mr. Andrew J. Waterman, for the Commonwealth:

The evidence objected to was clearly competent and properly admitted.

Commonwealth v. Blood, 11 Gray, 74; *Com*

monwealth v. Certain Intoxicating Liquors, 110 Mass. 500; *Commonwealth v. Collier*, 184 Mass. 208.

The rulings requested by the defendant were properly refused. No evidence was necessary that the defendant maintained a nuisance "to all good citizens residing, inhabiting, and passing."

Commonwealth v. Buxton, 10 Gray, 9.

By the Court:

It was not necessary for the government to prove an act of sale or offering for sale. It was required to prove that the defendant kept the premises and used them for the illegal sale or illegal keeping of intoxicating liquors, but this burden of proof may be met by other evidence than that of specific sales. The instructions given at the trial were sufficient and appropriate. The evidence excepted to was clearly competent.

Exceptions overruled.

TAUNTON NATIONAL BANK

Nahum STETSON.

1. This court has **jurisdiction**, upon the petition or bill of any party aggrieved, to revise and **correct** the decisions of the **court of insolvency**, either in matter of law or of fact, except where special provision is otherwise made.
2. A **general attachment** of all the right, title, and interest which the debtor had in any real estate in the county is valid, and is **effectual to bind any real estate** in the county, of which the record title is in him.
3. An **assignment** for the benefit of creditors which provides for the payment of a promissory note, but reserves all rights and remedies thereon against the indorser, does **not extinguish the debt**, or prevent the holder thereof from **proving** the note as a debt in **insolvency proceedings** against the indorser, although the property assigned is more than sufficient to pay it; and such holder has the right to apply for a **warrant in invitum** against the estate of the indorser, under the statute.
4. It is not necessary or proper that the **judge** of insolvency should be made a **party** to the proceedings in insolvency.
5. It is not necessary that the petitioner in the insolvency proceedings, after his petition was dismissed by the court of insolvency, should apply to that court for **further hearing**, before bringing his petition or bill in this court.

(Plymouth—Filed November 25, 1887.)

ON appeal. *Reversed.*

Appeal from a decree of the Court of Insolvency of Plymouth County, dismissing a petition praying that the defendant, Nahum Stetson, might be adjudged insolvent, and that a warrant issue to take possession of his estate for

the benefit of his creditors. Hearing in the Supreme Judicial Court before C. Allen, J. who ordered such warrant to issue, and reported the case for the consideration of the full court.

The facts are stated in the opinion.

Mr. Hosea Kingman, for defendant:

The petition should have been dismissed, (1) because plaintiff had not, at any time since his petition to the court of insolvency was dismissed, applied to said court for a further hearing to give him an opportunity to introduce additional proof to sustain his petition (*Bandal v. Barton*, 6 Met. 518); (2) because the judge of insolvency was not made a party to the petition (*Randall v. Barton, supra*; *Gilbert v. Hebard*, 8 Met. 129; *Agavam Bank v. Morris*, 4 Cush. 99; *Winchester v. Thayer*, 129 Mass. 129); (3) because it did not appear that an attachment, such as the statutes in relation to proceedings in insolvency (Pub. Stat. chap. 157, § 112) require, had been made (*Dennis v. Sayles*, 11 Met. 283).

The evidence offered, tending to prove that all of the creditors of the Bridgewater Iron Company had signed the composition agreement, and that the assets of said company, held under said agreement, were largely in excess of all the debts of said company, should have been admitted.

Under Pub. Stat. chap. 157, § 15, if, upon a hearing, the judge of insolvency is for any cause satisfied that proceedings upon the application of a creditor or creditors ought to be stayed, he shall order the proceedings to be stayed and dismissed. This provision of the statute leaves the matter entirely in the discretion of the judge of insolvency, and his judgment and finding upon this matter is not subject to the revision of this court.

Messrs. J. M. Morton and H. J. Fuller, for plaintiff:

The petition in this case is brought under Rev. Stat. chap. 157, § 15. This jurisdiction extends to the reviewing by this court of the decisions of the insolvent court in matters of fact as well as of law.

Lancaster v. Choate, 5 Allen, 530.

The defendant claimed, at the hearing in this court, that there was no such attachment as could be made the foundation of proceedings *in invitum*.

The plaintiff submits that the attachment was good and valid. To constitute a valid attachment of real estate, it is not necessary that the real estate attached should be specifically described in the officer's return.

Whitaker v. Sumner, 9 Pick. 308; *Taylor v. Myster*, 11 Pick. 341; *Pratt v. Wheeler*, 6 Gray. 520; *Woodward v. Sartwell*, 129 Mass. 210; *Crosby v. Allyn*, 5 Me. 450; *Cutler, Insolv. L.* 4th ed. p. 145.

There is no reason for holding that the word "attachment," as used in the insolvent law, has a meaning different from that when it is used elsewhere.

Thompson v. Snow, 4 Cush. 126.

The defendant was not discharged or released by reason of the plaintiff's executing this instrument.

Tobey v. Ellis, 114 Mass. 120; *Solier v. Loring*, 6 Cush. 537; *Potter v. Green*, 6 Allen, 442. The assignment of the Bridgewater Iron Company to the trustees cannot be held to op-

erate, in any way, as a payment or discharge of the petitioner's notes.

Dickinson v. Metacomet Nat. Bank, 130 Mass. 135; *Sohier v. Loring*, *supra*; *Fuller v. Hooper*, 3 Gray, 334.

It is evident that the decision of the judge of the insolvent court was based on an erroneous view of the effect of the assignment of the Bridgewater Iron Company on the plaintiff's rights, as matter of law; hence there was no occasion for the plaintiff to apply to that court for leave to introduce further evidence.

The plaintiff was not bound to wait till the settlement of the affairs of the Bridgewater Iron Co.

Re Clemens, 8 Nat. Bankr. Reg. 284.

The judge of insolvency should not be joined as a defendant.

Winchester v. Thayer, 129 Mass. 129.

Pub. Stat. chap. 157, § 115, relates only to a person who, by accident or mistake or other sufficient cause, has failed to dissolve an attachment within the time required by § 112.

Morton, Ch. J., delivered the opinion of the court:

Under Pub. Stat. chap. 157, § 15, this court has jurisdiction, upon the petition or bill of any party aggrieved, to revise and correct the decisions of a court of insolvency, either in matters of law or of fact, except where special provision is otherwise made. *Lancaster v. Choate*, 5 Allen, 530. The question in the case before us is, therefore, whether, upon the facts shown in this court, a warrant should issue against the estate of the respondent.

The insolvency law provides that, if a person whose goods or estate are attached upon mesne process in a civil action for the sum of \$100 or upwards, founded upon a demand in its nature provable against the estate of an insolvent debtor, has not, before the return day of such process, dissolved the attachment in the manner prescribed by law, any of his creditors whose claims provable against his estate amount to \$100 may apply by petition to have his estate seized and distributed under the insolvent laws; and, if the facts set forth in the petition appear to be true, a warrant is to issue against the estate of the debtor. Pub. Stat. chap. 157, §§ 112-114.

In the case before us, it appears that on August 16, 1886, a general attachment of all the right, title, and interest which the respondent had in any real estate in the county of Plymouth, was made, in an action by a creditor, upon a debt of more than \$100, which was, in its nature, provable against the estate of an insolvent debtor; and that such attachment has never been dissolved. It further appears that, at the time the attachment was made, the respondent had "the record title of certain real estate in said county of Plymouth." It is the settled law of this Commonwealth that such a general attachment is valid, and is effectual to bind any real estate in the county, of which the record title is in the debtor. *Taylor v. Mixer*, 11 Pick. 341; *Pratt v. Wheeler*, 6 Gray, 520; *Woodward v. Sartwell*, 129 Mass. 210. The respondent relies upon *Dennis v. Sayles*, 11 Met. 233. There are some expressions in the opinion which, if taken apart from their context and regarded as intended as statements of general

principles, would support the respondent's claim. But in that case the return of the officer was that he had attached the right, title, and interest of the debtor to any real estate in the county, and there was no evidence that the debtor had any real estate which was subject to attachment; and the decision was that such return was not conclusive evidence of an actual attachment. In the case at bar, as we have seen, the return of the officer was supplemented by proof that the debtor had real estate in the county of Plymouth, upon which the attachment operated.

We come next to the question whether the petitioner is a creditor entitled to maintain this petition. It is the holder of three promissory notes, each for the sum of \$1,000, and each signed by the Bridgewater Iron Company, payable to the respondent, and by him indorsed to the petitioner. Each of said notes was duly protested at maturity, and due notice given to the respondent. *Prima facie* this was a debt provable against the respondent as an insolvent debtor. But the respondent put in evidence an indenture by which the Bridgewater Iron Company assigned all its property to trustees for the benefit of its creditors, which indenture was extended by the petitioner and other creditors. This indenture contains the following provision: "And it is further expressly provided and agreed that no holder of any promissory note, draft, bill of exchange, check, or other debt to which the said Bridgewater Iron Company is a party, whether as drawer, indorser, guarantor, surety, maker, joint maker, or otherwise, and upon which any other person, firm, or corporation is absolutely or contingently liable, whether as drawer, indorser, guarantor, surety, maker, joint maker, or otherwise, does, by signing or executing these presents, release or discharge such other person, firm, or corporation therefrom, or in any manner impair his or their liability thereon; but, on the contrary, every such holder hereby fully reserves all rights and remedies thereon against any and all such persons, firms, or corporations, and the same may be as fully enforced as if these presents had not been executed."

We need not consider what would have been the effect of the indenture if it had not contained this provision. By this clause the petitioner, in the clearest manner, fully reserved all rights and remedies which it had against the respondent as indorser of notes signed by the Bridgewater Iron Company. It would clearly have a right to maintain an action at law on the note against the respondent, as indorser, and it is equally clear that it could prove the debt in insolvency proceedings against the respondent. *Tobey v. Ellis*, 114 Mass. 120; *Dickinson v. Metacomet Nat. Bank*, 130 Mass. 132.

The assignment to trustees did not pay or extinguish the petitioner's debt against the principal debtor, the maker of the note. To hold this would nullify the careful provision which we have cited above. It reserved its rights against the indorser, and these rights would continue until the notes are paid either by the makers, trustees, or indorser. Therefore the evidence offered by the defendant to prove that the property received by the trustees is more than sufficient to pay all the creditors of the

Bridgewater Iron Company was properly rejected. If the fact be true, it could not take away the right which the petitioner has to proceed, by any appropriate remedy, against one who is liable, as indorser or otherwise, upon the notes of the Iron Company. It follows that the petitioner is a creditor who had the right to apply for a warrant *in invitum* against the respondent, under the statute.

The two questions we have considered are the only substantial questions raised by the report. It is not necessary or proper that the judge of insolvency should be made a party to these proceedings. *Winchester v. Thayer*, 129 Mass. 129.

The claim of the respondent that the petitioner, after his petition was dismissed by the court of insolvency, should have applied to that court for a further hearing, before bringing his petition or bill in this court, cannot be sustained. We know of no law which requires such application or further hearing. It follows that the order of the judge of insolvency, dismissing the petition, should be reversed, and an order be made directing the judge of insolvency to issue a warrant upon the petition.

Decree accordingly.

John H. CALLAGHAN

v.

D. Webster WHITMARSH *et al.*

The notice required to be given by Pub. Stat. chap. 162, § 32, to the judgment creditor, of the defendant's desire to take the oath for the relief of poor debtors, is sufficiently served by giving to the creditor's attorney the original notice, instead of the attested copy.

(Bristol—Filed November 23, 1887.)

ON appeal from judgment of Superior Court in favor of plaintiff. *Judgment for defendants.*

This is an action of contract on a recognizance entered into with the plaintiff, the judgment creditor, by the judgment debtor, the defendant Whitmarsh,—who was cited in and examined before C. A. Reed, a master in chancery, as provided by Pub. Stat. chap. 162, § 17, cl. 1, as principal,—and by Alvin C. Brownell, the other defendant, as surety.

The defendant Whitmarsh was defaulted, and Brownell alone defends.

The only alleged breach of the recognizance whereby the plaintiff seeks to recover is the fact that the notice required to be given, by Pub. Stat. chap. 162, § 32, to the judgment creditor, his agent, or attorney, was served on the plaintiff's attorney, residing in Taunton aforesaid, the plaintiff creditor being at that time out of this State, by Thomas O. Falvey, a deputy sheriff in and for said county, by delivering to said attorney in hand the original magistrate's notice September 28, 1886, instead of an attested copy thereof, said notice being the only notice served at any time upon said judgment creditor, his attorney, or agents.

Plaintiff's attorney did not appear at the time

and place appointed, or at an adjournment thereof, and the magistrate admitted said Whitmarsh to, and he did take, the oath prescribed by law for the relief of poor debtors, neither the judgment creditor nor any person in his behalf being present.

It was agreed that, upon substantially the above statement of facts, the case might be tried, and, if the plaintiff was entitled to recover, execution was to issue against the defendant; otherwise judgment to be entered for defendant.

Judgment was ordered to be entered for the plaintiff, from which judgment defendant Brownell appeals.

Mr. L. E. White, for defendant Brownell:

A liberal view is taken by the court in proceedings which require a substantial rather than a literal compliance with the statutes.

Williams v. Kimball, 135 Mass. 413. See *Young v. Capen*, 7 Met. 287; *Bussey v. Briggs*, 2 Met. 132. See also *Collins v. Douglass*, 1 Gray, 167; *Pierce v. Phillips*, 101 Mass. 318; *Salmon v. Nation*, 109 Mass. 216; *Hill v. Bartlett*, 124 Mass. 899; *Dana v. Carr*, Id. 897; *Calman v. Toomey*, 129 Mass. 451.

The service of the original notice in this case gave the attorney full and ample notice, and could not, by any possibility, have misled him. This point has been expressly decided in—

Eaton v. Miner, 5 N. H. 542.

Had the attorney, either at the time of service or at the hearing, objected to the sufficiency of the service, or had the magistrate adjudged it insufficient, a new notice could have been issued, as provided by Pub. Stat. chap. 162, § 33; or the surety could have surrendered the debtor, as provided by Pub. Stat. chap. 162, § 63, and have been relieved from all liability.

The debtor and his surety did everything which the statutes required of them, and cannot be held to answer for the mistakes, if any, of the magistrate or officer.

Willis v. Howard, 7 Allen, 266; *O'Connell v. Horey*, 126 Mass. 310; *Chamberlain v. Hoogs*, 1 Gray, 172; *Elliot v. Willis*, 1 Allen, 461; *Petersen v. Stone*, 119 Mass. 465.

Mr. Frederick V. Fuller, for plaintiff:

The notice of the desire of the defendant Whitmarsh to take the oath for the relief of poor debtors (Pub. Stat. chap. 162, § 32), served upon the attorney of the judgment creditor (the plaintiff), was defective, irregular, and void, thereby rendering the debtor's subsequent discharge of no effect. This notice is important, is the initiation of a new proceeding, is the basis of the debtor's application to take the oath, and is open to any legal objections to the regularity of the preliminary proceedings.

Shed v. Tileston, 8 Gray, 244. See Pub. Stat. chap. 162, § 28.

The decisions of this Commonwealth have held the debtor to a strict observance of the statutory provisions, as in *Williams v. Kimball*, 135 Mass. 411.

See also *Young v. Capen*, 7 Met. 287; *Putnam v. Longley*, 11 Pick. 489; *Slason v. Brown*, 20 Pick. 439.

The officer's return is most essential, that the magistrate may acquire jurisdiction.

Williams v. Kimball, *supra*.

There has been no waiver of any of the rights of the plaintiff, acquired by the alleged defect

ive service. There was no attendance by any one in his behalf, at the hearing.

The question is whether service was made in compliance with the terms of the statute.

Soule, J., in *Cutler v. Boyd*, 124 Mass. 181.

The statute regulates and provides the means for the surety to escape liability by a surrender of the debtor.

Merrill v. Prince, 7 Mass. 394; Pub. Stat. chap. 162, §§ 63, 64.

Field, J., delivered the opinion of the court:

It appears, by the agreed statement of facts, that "the only alleged breach of the recognizance whereby the plaintiff seeks to recover is the fact that the notice required to be given by Pub. Stat. chap. 162, § 32, to the judgment creditor," etc., was served by the officer giving in hand to the creditor's attorney the original notice instead of an attested copy. At the argument it was contended, among other things, that the subsequent proceedings before the magistrate were void, because he could not have had before him the notice with the officer's return of service upon it. The record of the magistrate is not before us, and it is consistent with the agreed statement of facts that the officer served the original notice, and made his return to the magistrate, upon an attested copy. We are not required to determine the validity of these subsequent proceedings.

In *Young v. Capen*, 7 Met. 287, it was held that reading a notice to a creditor was "not a compliance with the statute,—literal or substantial"—which required that the notice be served by delivering an attested copy; and it was said "that the service required by statute is manifestly more beneficial and useful than reading."

It is manifest that delivering the original notice is as beneficial and useful to the creditor as delivering an attested copy. The argument is that there must be a literal compliance with the statute, and that the statute requires service by an attested copy. That errors in the terms of the notice which have no tendency to mislead the creditor do not make it insufficient, if properly served, has been often decided. *Calman v. Toomey*, 129 Mass. 457.

In *Wilbur v. Ripley*, 124 Mass. 468, the court reversed a judgment entered upon default in a writ of entry, because an attachment of the defendant's property had been made, and the service of the writ was by leaving an attested copy, and not by leaving an original summons. The statutes then in force provided that "when goods or estates are attached, etc., there shall be a separate summons, to be served on the defendant after the attachment; and the service thereof shall be a sufficient service of the original summons." Gen. Stat. chap. 23, § 11. This separate summons was required to be served by delivering it to the defendant, or by leaving it for him; but an original summons without an attachment was required to be served by reading it to the defendant, or by delivering to him an attested copy, or by leaving such copy for him. Id. § 23. A separate summons informs the defendant that his goods or estate have been attached, to an amount expressed in the summons, while the writ contains only a summons to attach them. Stat. 1784, chap. 28, § 1. The 3 Mass.

two are not literally or substantially duplicates, or copies one of the other.

In the case at bar the service of the notice was not the commencement of the proceedings. The defendant Whitmarsh had been arrested upon execution, and, desiring to take the oath for the relief of poor debtors, but not desiring a time fixed for his examination, had entered into a recognizance with Brownell, the other defendant, as surety, before a magistrate, pursuant to Pub. Stat. chap. 162, § 28. The notice given was for the purpose of informing the creditor that Whitmarsh desired to take the oath at a certain time and place expressed in the notice. This notice must be in writing, and signed by the magistrate in his official capacity. Id. § 31. The contents of the original and of the copy are the same. The statute intended that the creditor should have a notice in writing, in order to ensure the certainty which a writing gives. But whether the officer should deliver the original and return a copy, or the reverse, is a matter of statutory regulation, made for the purpose of directing the manner in which the notice should be served. So far as the rights of the creditor are concerned, we think that the service in this case was a substantial compliance with the statute, and that a literal compliance was unnecessary. See *Eaton v. Miner*, 5 N.H. 542. *Judgment for defendants.*

Charles W. SEARS

c.

Mrs. H. F. LELAND.

1. One who has obtained **personal property** under a **conditional sale** may **mortgage** it, and such mortgage is **valid** although the sale to him was liable to be defeated by nonperformance of the condition.
2. One who obtains from the mortgagee an **assignment of such mortgage**, and of all his interest in the mortgaged property, cannot maintain an **action to recover back the consideration money** paid for such assignment, upon the ground of a mistake in regard to the value of the mortgagee's interest, there being no warranty or fraud or misrepresentation on the part of the mortgagee.
3. Where one **voluntarily purchases** such right, title, or interest in property as another may have, even if both parties are in error as to the extent or value of that title or interest, or even if, in fact, the seller has no right, the purchaser **cannot complain** that such right is of less value than he anticipated, or is of no value, where there is no fraud or misrepresentation on the part of the seller.

(Worcester—Filed November 23, 1887.)

A PPEAL from decree. *Decree sustained.*
The respondent held a chattel mortgage purporting to cover the property mentioned therein. The complainant having attached the property therein contained as the property of the mortgagor, Eugene M. Worthing, named in said

mortgage, said respondent, through her agent and husband, H. F. Leland, believing the said mortgage to be valid, demanded the sum alleged to be secured by said mortgage, to wit: the sum of \$300, representing said mortgage to be an incumbrance upon said property. The complainant, believing said mortgage to be a subsisting and valid lien and incumbrance upon said property, paid said respondent said sum of \$300, and thereupon the said respondent transferred said mortgage and note supposed to be secured thereby to the complainant.

Defendant duly demurred to the bill of the plaintiff, and upon argument the court decreed that the demurrer be sustained, from which decree plaintiff appealed.

Further facts are sufficiently stated in the opinion.

Mr. W. A. Gile, for plaintiff:

The circumstances as shown by the facts bring the cause within the equity jurisdiction of the court, upon the ground of a mutual mistake as to the essential part of the transaction.

Story, Eq. 10th ed. §§ 141-143 *a, b*; *Allen v. Hammond*, 36 U. S. 11 Pet. 71 (9 L. ed. 636); *Irick v. Fulton*, 3 Gratt. 198; *Bailey v. James*, 11 Gratt. 468.

There is no remedy at law to set aside a contract entered into by mutual mistake, where there is neither fraud nor deceit. There was no warranty of title, and the note was indorsed without recourse, so that no action would lie on the contract of assignment or on the indorsement of the note.

See *Jones v. Huggefords*, 3 Met. 519.

Mr. George H. Mellen, for defendant:

There is no common-law right to attach personal property subject to mortgage.

Jones, Chat. Mort. § 555.

It is a right conferred by statute (Pub. Stat. chap. 161, § 74 *ff*), and the object of the statute is to protect the interests of the mortgagee, while fully recognizing the rights of the attaching creditor.

Granger v. Kellogg, 8 Gray, 490.

Worthing, the mortgagor, had possession of the property under a contract of conditional sale, and had a right to mortgage it; and the mortgage was valid and subsisting in Mrs. Leland's hands.

Crompton v. Pratt, 105 Mass. 255; *Day v. Bassett*, 102 Mass. 445.

By the assignment, Mrs. Leland conveyed to Mr. Sears all her "right, title, and interest" in the mortgage, whatever that might be.

An assignment vests in the assignee all the interest of the assignor.

Jones, Chat. Mort. §§ 502, 503.

There is no warranty of title by assignor to assignee of personal-property mortgage.

Jones v. Huggefords, 3 Met. 515; *Horne v. Briggs*, 98 Mass. 510.

The ground of relief sought by this bill is accident or mistake. Fraud is not alleged. It was for Mr. Sears's benefit, for, if he had not satisfied the claim of the mortgagee, his attachment would have failed.

Mrs. Leland used good faith in her dealing with Mr. Sears. The fact of an outstanding title in a third party was equally unknown to both, and the means of information were equally open to both. Equity will not interfere in such cases.

Story, Eq. Jurisp. §§ 149-151; *Etting v. Bank of U. S.* 24 U. S. 11 Wheat. 59 (6 L. ed. 419); *Laidlaw v. Organ*, 15 U. S. 2 Wheat. 178 (4 L. ed. 214), and cases cited.

Devens, J., delivered the opinion of the court:

By the bill of the plaintiff, as amended, it appears that Worthing was in possession of the property mortgaged (which was afterwards attached by the plaintiff), under a conditional sale, although nothing had been paid thereon; and the conditions of such sale had not been complied with. The defendant had, upon the attachment of the property by the plaintiff, demanded the amount due upon her mortgage. The plaintiff paid the same, and the defendant then assigned to him all her right, title, and interest in the mortgage. The plaintiff now claims, upon the ground that such mortgage was invalid, to recover back from the defendant the amount paid by him upon said mortgage, together with certain expenses to which he has been subjected, upon the ground that said payment was made under a mutual mistake as to the validity of the mortgage. Whether the plaintiff should pay his mortgage or not was a matter at his own option, and the defendant was compelled to accept such payment or lose her rights by virtue of it. We do not perceive, upon the case as stated, that the mortgage was invalid as a security, even if it was in fact valueless. The mortgagor, Worthing, having obtained the property under a conditional sale, had a right to mortgage it, and, in the hands of the defendant, the security was a valid and subsisting one. He had the possession of the property and right to possession, and could dispose of the property with his right therein, even if the sale to him was liable to be defeated by nonperformance of the condition. *Day v. Bassett*, 102 Mass. 445; *Crompton v. Pratt*, 105 Mass. 255. Of the right which defendant had to comply with the conditions of the sale, she has been deprived by the act of plaintiff.

But if this were otherwise, and if the mortgagor had no property or right in the articles mortgaged, the plaintiff has no ground of complaint against the defendant. The plaintiff obtained from the defendant an assignment of all her interest in the mortgaged property; but there was no warranty, and the words chosen were apt to express a conveyance of such right, title, and interest, if any, as she might have. Where the subject of a contract has no existence,—as where two parties contract as to the sale of a horse which, without the knowledge of either, is dead,—the contract may indeed be rescinded. But this principle has no application where one voluntarily purchases such right, title, or interest in property as another may have, even if both parties are in error as to the extent or value of that title or interest, or even if in fact the seller has no right. The subject of the contract is such right, title, or interest as may exist. Unless the plaintiff had satisfied this mortgage within the time prescribed by the statute, his attachment would have failed, as the mortgagor and his debtor were the same person. Pub. Stat. chap. 161, §§ 74, 75. It was for him to determine whether it was for his interest to pay it and

obtain the rights of the mortgagee. He cannot now complain that this right is of less value than he anticipated. He has received all he purchased. No fraud or misrepresentation on the part of the defendant is alleged, and it is not important that she supposed she was parting with a more valuable right than she in fact possessed.

Decree affirmed.

COMMONWEALTH of Massachusetts

v.

Elmer TURNER.

1. It is as obnoxious to the statute forbidding the **subjecting an animal to unnecessary suffering** (Pub. Stat. chap. 207, § 53), to wantonly torture a wild animal held in subjection by force, as a tame animal.
2. The statute does not require either the allegation or proof of **torture or cruelty**, except as involved in unnecessary suffering knowingly and willfully permitted.
3. The word "**animal**," in the statute, includes all irrational beings.
4. The statute does not **apply to foxes** in their natural, free condition, but only when they are in the dominion and custody of man. The right to kill a captive fox does not involve the right to inflict **unnecessary suffering** upon it in the manner of its death.
5. It cannot be said, as matter of law, that **throwing a captive fox among dogs**, to be mangled and torn by them, is not exposing it to **unnecessary suffering**.
6. By letting loose the fox for the purpose of being **hunted by the dogs**, the defendant permitted it to be subjected to all the **suffering** which naturally followed its being hunted. It was the act of the defendant, when he had the custody, that put it within the power of the dogs; and it is immaterial that they were restrained for five minutes before starting in fresh pursuit.
7. The defendant can only avail himself of **formal defects in the complaint** by taking objection thereto before judgment in the district court.

(Plymouth—Filed November 23, 1887.)

ON defendant's exceptions. *Overruled.*

Complaint alleging that Elmer Turner, at Rockland, in the county of Plymouth, on April 7, 1887, was the person having the charge and custody of a certain animal, to wit, a fox, and did then and there knowingly and willfully permit the said fox to be subjected to unnecessary suffering, by then and there knowingly and willfully turning the said fox loose to be hunted by divers dogs, in consequence of which turning loose of the said fox, as aforesaid, the said fox was hunted by divers dogs and thereby subjected to unnecessary suffering. At the trial in the Superior Court for Plymouth County, before

2 MARR.

Thompson, J., the jury returned a verdict of guilty, and the defendant alleged exceptions.

Other facts material to the points decided appear in the opinion.

Messrs. Cook & Coughlan, for defendant:

I. The complaint sets forth no offense known to the laws of this Commonwealth.

"The common law warrants the hunting of ravenous beasts of prey, as badgers and foxes, because the destroying such creatures is said to be profitable to the public."

2 Bl. Com. 213; Cro. Jac. 321; *Gundry v. Feltham*, 1 T. R. 834, 836.

The Revised Statutes of Massachusetts, chap. 54, § 1, authorized and encouraged the destruction of foxes, and allowed a bounty of fifty cents per head for them; and towns were authorized to raise money to encourage the destruction of foxes "and any other noxious animals whatever."

Rev. Stat. chap. 54, § 8.

Such is the law at the present day.

Pub. Stat. chap. 27, § 10.

As the law countenances the killing of foxes and allows towns to offer bounties for their destruction, killing them by a lawful method is no offense.

Hunting is the proper and lawful method by which to kill foxes.

2 Bl. Com. § 214.

If hunting a fox is no offense, *a fortiori* letting a fox loose to be hunted is no offense.

Acts 1886, chap. 276, does not apply to foxes.

Pub. Stat. chap. 207, § 53, under which this complaint is brought, does not apply to wild or noxious animals. This is evident from the wording of the section itself, and from the provision of § 56 of said chapter, in relation to the care of animals found in the charge or custody of the person arrested.

II. The offense intended to be charged is not fully, plainly, and substantially set forth: 1. Because there is no allegation that the defendant permitted the fox to be subjected to unnecessary torture or cruelty of any kind. It is not enough to allege "unnecessary suffering." If it were, every person who fishes with hook and line might be convicted of cruelty to animals. 2. Because there is no allegation as to the time when the fox was hunted by divers dogs. 3. Because there is no allegation that, at the time the alleged unnecessary suffering took place, the fox was in the charge or custody of the defendant.

III. The court should have instructed the jury that the evidence was insufficient to convict the defendant: (1) because there was no evidence that the fox was turned loose by the defendant, to be hunted,—the evidence showing that at the time the fox was turned loose the defendant expressly forbade those having dogs letting loose their dogs; (2) because there was no evidence of any unnecessary suffering on the part of the fox; (3) because there was no evidence that the fox found dead in the woods was the fox turned loose by the defendant.

Mr. Andrew J. Waterman, Atty-Gen., for the Commonwealth:

The defendant's motion to dismiss was properly overruled. There appear to be no defects in the complaint, it being substantially in the language of the statute.

The court properly refused to rule that there was not sufficient evidence to warrant the jury in convicting the defendant, rightfully submitting the case to the jury with instructions not excepted to.

Commonwealth v. Thornton, 113 Mass. 457; Pub. Stat. chap. 207, § 53.

W. Allen, J., delivered the opinion of the court:

Pub. Stat. chap. 207, § 53, provides that "every owner, possessor, or person having the charge or custody of an animal, who cruelly drives or works it when unfit for labor, or cruelly abandons it, or carries it or causes it to be carried in or upon a vehicle, or otherwise, in an unnecessarily cruel or inhuman manner, or knowingly and willfully authorizes or permits it to be subjected to unnecessary torture, suffering, or cruelty of any kind, shall be punished," etc. The complaint alleges that the defendant, at a certain time and place, "was the person having the charge and custody of a certain animal, to wit, a fox, and did then and there knowingly and willfully permit the said fox to be subjected to unnecessary suffering," by turning it loose, to be hunted by dogs, whereby it was hunted and subjected to unnecessary suffering. The defendant excepted to the refusal of the court to rule that the evidence was not sufficient to warrant a conviction. The evidence tended to prove that the defendant let a fox loose from his custody in the presence of several dogs; that the fox ran into a thick wood and disappeared; that about five minutes afterwards the dogs were let loose and pursued the fox and caught it and tore it in pieces. The jury might have found that the fox was let loose by the defendant, to be hunted by the dogs, and that the dogs were procured by him, and were let loose by his direction, in order that they should hunt the fox. The evidence is sufficient to prove these facts. The question is whether these facts constitute or prove the offense described in the statute. It is objected that the statute does not include noxious animals; that there is no evidence that the fox was subjected to unnecessary suffering; and that there is no evidence that it was subjected to any suffering by the defendant, or while it was in the charge or custody of the defendant.

1. The word "animal" must be held to include wild and noxious animals, unless the purpose of the statute or the context indicate a limited meaning. There is nothing in the general purpose and intent of the statute that would prevent it from including all animals within the common meaning of that word. The statute does not define an offense against the rights of property in animals, nor against the rights of the animals that are, in a sense, protected by it. The offense is against the public morals which the commission of cruel and barbarous acts tends to corrupt. See *Commonwealth v. Tilton*, 8 Met. 232.

It is as obnoxious to the reason of the statute to wantonly torture a wild animal held in subjection by force, as a tame animal. The history and context of the statute show that all brute animals are intended. Gen. Stat. chap. 185, § 41, re-enacting Rev. Stat. chap. 130, § 22, and in force until Stat. 1868, chap. 212, was enacted, provided that "whoever cruelly beats

or tortures any horse, ox, or other animal, whether belonging to himself or another, shall be punished," etc. Stat. 1868, chap. 212, contained particular provisions which are substantially found in the Public Statutes. Section 1 provided for punishing "whoever shall overdrive, overwork, torment, torture, deprive of necessary sustenance, cruelly beat, mutilate, or kill, or cause or procure" to be so treated, "any horse, ox, or other animal, and whoever, having the custody of any such animal," shall unmercifully fail to provide for it proper sustenance and shelter. Section 2 related to the owner or person having the charge or custody of "any horse, ox, or other animal," who permits it to be subjected to unnecessary torture or cruelty. Section 3 related to cruelly working or abandoning a disabled "horse, mule, or other animal." Section 4 was a general provision in regard to the transportation of "any animal." Sections 5-7 related to the transportation by railroad companies of "cattle, sheep, swine, or other animals." Under this statute it might have been contended that § 2 did not include wild or noxious animals; but the statute was repealed the next year, and the statute of 1869 enacted in place of it, the first two sections of which were in the form in which they appear in Pub. Stat. chap. 207, §§ 52, 53. These two sections include the substance of the first four sections of the Act of 1868. The third section of the Act of 1869 included §§ 5-7 of the Act of 1868, relating to transportation on railroads. The statute of 1869 nowhere designated any particular animal or species, but uniformly used the words "any animal" or "animals." Section 6 provided that "in this Act the word 'animal' or 'animals' shall be held to include all brute creatures." This provision is not re-enacted in the Public Statutes, apparently for the same reason that the provision immediately following it in the same section, that the words "owner," "person," and "whoever" should include corporations, was not re-enacted.—because it was unnecessary. The word "animal," in its common acceptation, includes all irrational beings. It was used in that sense in the statute of 1869, and it is not conceivable that the Legislature intended to give a different meaning to the word in the re-enactment of that statute in the Public Statutes.

2. The statute does not require either the allegation or proof of torture or cruelty, except as involved in unnecessary suffering knowingly and willfully permitted. It is argued that the fox is a noxious animal which man may lawfully kill; that hunting it with dogs is a proper mode of killing it; and that therefore the suffering inflicted by that mode of killing is not unnecessary, within the meaning of the statute. The statute does not apply to foxes in their natural free condition, but only when they are in the dominion and custody of man. The right to kill a captive fox does not involve the right to inflict unnecessary suffering upon it in the manner of its death, any more than the right to kill a domestic animal involves the right to inflict unnecessary suffering upon it or to cruelly kill it. It cannot be said, as matter of law, that throwing a captive fox among dogs, to be mangled and torn by them, is not exposing it to unnecessary suffering.

3. It is argued that there was not sufficient

evidence to prove that the fox was in the custody or charge of the defendant when the suffering was inflicted upon it. It is not necessary to consider whether there was evidence of suffering from fear when the fox was in the custody of the defendant, in the presence of the dogs, because we have no doubt that, by letting loose the fox for the purpose of being hunted by the dogs, the defendant permitted it to be hunted, and permitted it to be subjected to all the suffering which it endured, and which naturally followed its being hunted, in pursuance of that purpose. It was the act of the defendant, while he had the custody of the fox, that put it within the power of the dogs; and it is immaterial that they were restrained for five minutes before starting in fresh pursuit.

The objections to the complaint which are not involved in the questions already considered are for formal defects, of which the defendant could avail himself only by taking the objection before judgment in the district court. Pub. Stat. chap. 214, § 25; *Commonwealth v. Bingham*, 106 Mass. 457.

Exceptions overruled.

Lucy B. BRIGGS *et al.*

Walter S. BARKER.

1. The right to **appeal** from the decision of the **probate court** depends upon the statute which forbids an appeal when more than a year has expired after the decree complained of was rendered.
2. Where a party **fails** to do what is necessary in order to bring his **appeal** before the appellate court, as, where he fails to duly enter the appeal **without** the time prescribed by statute, the court cannot relieve him.

(Plymouth—Filed November 23, 1887.)

ON petitioners' exceptions. *Decree affirmed.*

Petition for leave to enter an appeal from the decree of the Probate Court for Plymouth County admitting to probate the will of Walter S. Barker. In the Supreme Judicial Court, C. Allen, J., ruled that the petition was not seasonably filed, and could not be entered; and the petitioners alleged exceptions.

The material facts appear in the opinion.

Messrs. Simmons & Pratt, for petitioners:

This petition does not fall within the provisions of Pub. Stat. chap. 156, §§ 9, 10, for these petitioners omitted neither to "claim" nor to "prosecute" their appeal. It was seasonably claimed (Pub. Stat. chap. 156, § 7) and prosecuted by properly serving the notice and reasons of appeal. No further "prosecution" could have been made until the May Sittings of this court, last, when the petition for leave to enter was filed.

The mere fact of the omission, through accident or mistake, of one of the several steps in the carrying on the proceeding, viz., the entry upon the docket of this court, is not a nonprosecution. Suppose the reasons of appeal had been improperly served, or the case had been entered without the filing of any "reasons" at all.

Could it be claimed that the petitioners had then omitted to "prosecute" the appeal? If the facts in this case constitute an omission to prosecute, would it not be equally an omission if the petitioners failed to try the case the first term it was in court?

To allow forms and technicalities to defeat justice, and to prevent the full consideration of the merits of a controversy, is, happily, becoming less and less the practice of the courts. That "prosecution" is not synonymous with "entry," in the statute, is shown by the wording of the fifth line of Pub. Stat. chap. 150, § 9, where the language is, "entered and prosecuted."

Not being within the statute, this petition appeals peculiarly to the discretion of this court. Under its equity powers, this court may now correct wrong in cases of accident and mistake.

Pub. Stat. chap. 151, § 2, cl. 13.

Mr. Daniel E. Damon, for defendant.

Devens, J., delivered the opinion of the court:

The appeal from the decree of the probate court was seasonably claimed, notice thereof was duly given, and the reasons of appeal duly filed and served on the adverse party. Through accident and mistake on the part of the appellants, the appeal was not entered at the June Rules, 1886; and, more than a year after the decree of the probate court had been rendered, the present petition was filed. The petitioners do not claim that they are entitled, under any provision of the statute, now to enter their appeal, but urge that the court may permit them so to do by virtue of its general equity powers. The right to appeal from the decision of the probate court depends upon the statute, which, for obvious reasons, requires that it shall be exercised within a fixed, reasonable time. It further provides such safeguards as are deemed necessary to avoid the consequences of any accident or mistake of a party in exercising his rights. Pub. Stat. chap. 151, §§ 7 and 8, provide when the appeal shall be claimed, when notice thereof given, and when the same shall be entered in the supreme judicial court, and, further, for the filing of the reasons of appeal, and the service thereof upon the adverse party. Section 9 provides that, when "a person aggrieved omits to claim or prosecute his appeal, without default on his part," the supreme court of probate may, if justice requires a revision of the case, permit him to enter and prosecute such appeal. Section 10 provides that such appeal shall not be allowed unless the petition is filed within one year after passing the decree or order complained of. Provision is made for petitioners who are without the United States, which has no application to the present petitioners. Section 10, therefore, distinctly forbids the allowance of the petition in the case at bar, if the petitioners have omitted to claim or prosecute their appeal without default on their part, as more than a year had expired since the decree complained of was rendered, when the petition was filed.

The contention of the petitioners is that they have not omitted to claim or prosecute their appeal, and that the failure to enter their appeal in this court is not a failure to prosecute.

They urge that this is merely an omission to take one step in the formality required by the statute. This contention cannot be maintained. It is a failure to prosecute, where the party claiming to be aggrieved fails to do what is necessary in order to bring his appeal before the appellate court. He thus prevents the execution of the decree appealed from by the court below, or the rendition of another decree by this court, unless the adverse party, by some petition, brings the case before it. As the petition was not seasonably filed, the court has now no authority to grant it.

Decree affirmed.

COMMONWEALTH of Massachusetts

v.
Mortimer DOWNEY.

1. On a complaint for keeping, at Somerville, intoxicating liquor with intent to sell the same, where the house in which the liquor was kept was located on the line between Somerville and Cambridge, so that a part of it was in Somerville and a part in Cambridge, evidence showing what liquor was found in that part of the building situated in Cambridge is competent.
2. Evidence of the situation and use of the whole building was proper, and it is immaterial whether the liquors found in Somerville were intended for sale in that town or in the part of the building which was in Cambridge.

(Middlesex—Filed November 25, 1887.)

ON defendant's exceptions. *Overruled.*
Complaint charging the defendant with keeping at Somerville intoxicating liquor with intent to sell the same.

At the trial in the Superior Court, before Pitman, J., one Johnson, a Somerville police officer, testified that on May 25, 1887, he went to defendant's premises, which were located on the line between Somerville and Cambridge, so that part of the tenement was in Somerville and a part in Cambridge; that with him was a Cambridge police officer, and that they entered that portion of the premises which was on the Cambridge side of the line; that they found there hop beer on draught, and also a bottle and a flask, each containing a teaspoonful of whiskey, behind the counter.

Defendant objected to the testimony of the officer as to what was found in the store in Cambridge, the complaint alleging a keeping in Somerville; but the court admitted the evidence, but only as bearing upon the question of intent as to the keeping of the liquor found in Somerville, and defendant excepted.

The officer then testified to finding in the third story a jug containing whiskey, in that part of the building which was in Somerville, and upon the premises of one White; this the officer seized and took away, and it was claimed as the property of White. There was also evidence that a large number of people were seen on Sunday, May 22, to

enter the building, and that Mrs. Downey and a girl were seen to go from the lower part of the building, which was occupied by defendant, up stairs with a pitcher.

The jury returned a verdict of guilty, and the defendant alleged exceptions.

No brief filed for either party.

By the Court:

For the purpose of showing that the intoxicating liquors found in that part of the defendant's premises situated in Somerville were kept with intent to sell, the evidence admitted as to what was found in that part of the building situated in Cambridge was competent. Upon this issue it was proper that the jury should know the situation and use of the whole building, it being immaterial whether the liquors found in Somerville were intended for sale in that town or in the part of the building which was in Cambridge. *Commonwealth v. McCluskey*, 123 Mass. 401.

Exceptions overruled.

COMMONWEALTH of Massachusetts

v.
Catherine HAYES.

1. The provision of the statute (Pub. Stat. chap. 169, § 18), that "neither husband nor wife shall be allowed to testify as to private conversations with each other," is not confined to conversations upon subjects which are confidential in their nature, but includes conversations between them relating to business done by one as agent of the other.
2. It is a question of fact for the jury whether a sale in violation of a license, by a servant, was made by the authority or with the consent of his master.
3. Where it is shown that the sale was made by the servant in his master's shop, in the ordinary course of the master's business, and from liquors owned by the master, and there kept for sale, the jury may infer as a fact that the sale was made by the authority or with the consent of the master; but the weight of such evidence and the inferences to be drawn from it are for the jury alone.
4. The burden of proving that the sale made by the servant was made by the authority or with the consent of the master is upon the Commonwealth.

(Plymouth—Filed November 23, 1887.)

ON defendant's exceptions. *Sustained.*
Complaint, under Pub. Stat. chap. 101, § 6, charging the defendant with maintaining in Brockton a tenement used for the illegal keeping and illegal sale of intoxicating liquor. At the trial in the Superior Court before Brigham, Ch. J., it appeared that defendant was the holder of a license of the first class, under Pub. Stat. chap. 100, and also an innholder's license procured for the purpose of carrying on the business of an innholder and seller of in-

toxicating liquors in the Occidental Hotel, in said Brockton. Defendant offered evidence tending to prove that she in no way or manner managed, controlled, or directed said business at any time, but left the management and direction thereof to her husband; that she did not live in or near the hotel; and that during the time named in the complaint, from May 1, 1886, to August 8, 1886, she was upon the premises but three times, and then only for a short time, and not for the purpose of directing officers there; that the barkeeper of the hotel was unknown to her and employed by her husband. There was also evidence tending to prove that defendant's husband, at the request of the defendant, instructed the only person employed as a barkeeper at the hotel never to sell intoxicating liquor to minors or drunken men, or to any but guests of the house after 11 o'clock, P. M., or in any way violate the conditions of the license. It also appeared that defendant's husband resided with her, and not at the hotel, but that he went daily to the hotel at about 8 A. M. and remained until about 9.40 P. M. All the evidence relied upon by the government, to show a breach of the conditions of the license, related to acts happening between 11 P. M. and 2.30 or 3 o'clock, A. M., and to the sale of intoxicating liquors; and also the sales to persons other than guests, upon the Lord's Day. The defendant's husband testified that he gave the instructions to the barkeeper in good faith, and intended that they should be obeyed; and the defendant testified that she wished him obeyed. The defendant testified in her own behalf, and was asked by her attorney what instructions were given by her to her husband (no other person being present at the time) that the barkeeper should not sell liquor in violation of the license, and, for the purpose of showing her good faith, her reasons then given to her husband for such instructions. To this question the government objected upon the sole ground that neither the husband nor the wife could testify as to private conversation with each other, and the court excluded it. The court then instructed the jury as follows:

"1. Nothing to the contrary appearing, the natural and just inference from a sale, by a servant employed in his master's shop, of his master's goods there kept for sale, would be that such a sale was authorized by the master.

"2. If a sale of intoxicating liquor was made in the Occidental Hotel, during the time alleged in the complaint, by any person employed by defendant to conduct her business in that hotel, without defendant's knowledge, and really in opposition to her will; and defendant in no way participated in, approved, or countenanced such sale,—and this is clearly shown by defendant,—defendant would not be responsible for such sale.

"3. Did the defendant, in good faith give instructions—intended to be obeyed and enforced—that no sales of intoxicating liquor should be made in her hotel, by any of the persons employed by her to conduct her business there, in violation of the condition of her license; and did defendant know that those instructions were disregarded by the persons so employed, in their management of her hotel and the intoxicating liquors in it?

"4. In considering whether defendant acted in good faith in giving instructions as to the conducting of her business in the Occidental Hotel, and intending that her instructions should be obeyed, the jury may consider defendant's relations to and practical connection with the business of her hotel; her means and opportunities of knowing how her business was conducted there, in the matter of selling intoxicating liquor; and what information her interest and duty in that matter would reasonably induce her to seek and obtain.

"5. An instruction would not be given in good faith, which the person giving it, from the nature of the matter to which that instruction applied, and the character of the persons to whom it was given, could not reasonably expect to be obeyed, and which he did not follow by any supervision or care, for the purpose of ascertaining if that instruction was obeyed."

The jury returned a verdict of guilty, and the defendant alleged exceptions.

Mr. Asa P. French, for defendant:

The instruction given to the jury, that, "nothing to the contrary appearing, the natural and just inference from a sale, by a servant employed in his master's shop, of his master's goods there kept for sale, would be that such a sale was authorized by the master," is incorrect; for it is equivalent to saying that such a sale is *prima facie* authorized by the master, and this is directly contrary to the doctrine.

Commonwealth v. Briant, 1 Mass. (L. ed.) 721, 8 New Eng. Rep. 33, 142 Mass. 463; *Commonwealth v. Stevenson*, 1 Mass. (L. ed.) 722, 8 New Eng. Rep. 84, 142 Mass. 466, and cases cited.

That the first and second instructions asked for by the defendant should have been given as requested, follows from the doctrine of *Commonwealth v. Wachendorf*, 1 Mass. (L. ed.) 174, 1 New Eng. Rep. 520, 141 Mass. 270.

The court, in its instructions upon the question of "good faith" has qualified the doctrine in *Wachendorf's Case*, and has erred in so doing.

Commonwealth v. Wachendorf, *supra*.

The statute provision, that "neither husband nor wife shall be allowed to testify as to private conversations with each other," does not apply, if either is acting as the agent of the other or in any representative capacity, to such part of the conversation as relates to the business of such agency, or to such part of the conversation as is incident to business transactions, not between the husband and wife as such, but between either of them and the other in such representative capacity.

Hunt v. Eaton, 55 Mich. 362; *Wood v. Chetwood*, 27 N. J. Eq. 311.

Mr. Andrew J. Waterman, Atty-Gen., for the Commonwealth:

"Neither husband nor wife shall be allowed to testify as to private conversations with each other."

Pub. Stat. chap. 169, § 18, cl. 1.

The instruction that, "nothing to the contrary appearing, the natural and just inference from a sale, by a servant employed in his master's shop, of his master's goods there kept for sale, would be that such a sale was authorized by the master," is correct. There is a pre-

sumption that an agent acts within the scope of his authority and duty.

Commonwealth v. Nichols, 10 Met. 263; *George v. Gobe*, 128 Mass. 289; *Commonwealth v. Holmes*, 119 Mass. 195.

The presiding justice rightfully instructed the jury that they might "consider defendant's relation to and practical connection with the business," as bearing upon the question of the good faith of the instructions given by the defendant.

One holding a liquor license cannot justify for violations of the conditions thereof, by evidence that he gave instructions to a servant to follow the conditions of the license, without showing that he made some effort to see that his instructions were followed.

Commonwealth v. Nichols, 10 Met. 259; *Commonwealth v. Wachendorf*, 1 Mass. (L. ed.) 174, 1 New Eng. Rep. 520, 141 Mass. 272; *George v. Gobe*, 128 Mass. 289; *Commonwealth v. Kelley*, 1 Mass. (L. ed.) 98, 1 New Eng. Rep. 384, 140 Mass. 441; *Commonwealth v. Uhrig*, 188 Mass. 492; *Commonwealth v. Sinclair*, Id. 493.

Field, J., delivered the opinion of the court:

The provision of the statute (Pub. Stat. chap. 169, § 18, cl. 1), that "neither husband nor wife shall be allowed to testify as to private conversations with each other," is not confined to conversations upon subjects which are confidential in their nature; and it includes conversations between them relating to business done by one as agent of the other. If the defendant could not be allowed to testify that she gave directions to her husband, relating to her business, for the purpose of showing that they were given, he could not be allowed to testify that she gave them for the purpose of proving that she acted in good faith in giving them. The evidence offered was rightly excluded. *Dexter v. Booth*, 2 Allen, 559; *Jacobs v. Healer*, 113 Mass. 157; *Drew v. Tarbell*, 117 Mass. 90; *Brown v. Wood*, 121 Mass. 187.

The fourth and fifth instructions given relate to the good faith of the defendant in giving directions as to the management of her business. The presiding justice had already instructed the jury, in conformity with the decision in *Commonwealth v. Wachendorf*, 1 Mass. (L. ed.) 174, 1 New Eng. Rep. 520, 141 Mass. 270, if, from the nature of the business and the character of the servants employed in it, the defendant could not reasonably expect her directions to be obeyed, and if she took no care and exercised no supervision for the purpose of ascertaining that her directions were obeyed, it was competent for the jury to find that the directions were not given in good faith, and that the sales of intoxicating liquors on which the Commonwealth relied were made with her consent. It might be contended that she could not be convicted if she, in fact, expected that her directions would be obeyed, although this was not a reasonable expectation. We think that it was the duty of the defendant, if she intended to raise this question, distinctly to have called the attention of the court to it. The exceptions to this part of the charge are general, and must be overruled.

In *Commonwealth v. Wachendorf*, *supra*, the defendant had a license, and the complaint

charged that he unlawfully sold intoxicating liquors "between the hours of 11 at night and 6 in the morning;" and it was said in the opinion "that the defendant was not liable criminally as a seller, when the sale proved was made by a servant, without his knowledge, in opposition to his will, and which was in no way participated in, approved, or countenanced by him;" and *Commonwealth v. Nichols*, 10 Met. 259, was cited. *Commonwealth v. Nichols*, arose under Rev. Stat. chap. 47, § 2, and it was said in the opinion "that a sale by the servant in the shop of the master is only *prima facie* evidence of such sale by the master as would subject him to the penalty; * * * that the relation of these parties; the fact that the defendant was in possession of the shop and was the owner of the liquor; and that the sale was made by the servant,—furnish strong evidence to authorize and require the jury to find the defendant guilty. * * * Unexplained, they would be sufficient to convict the party." In *Commonwealth v. Briant*, 1 Mass. (L. ed.) 721, 3 New Eng. Rep. 33, 142 Mass. 468, and in *Commonwealth v. Stevenson*, 1 Mass. (L. ed.) 722, 3 New Eng. Rep. 34, 142 Mass. 466, the complaints were for unlawfully selling intoxicating liquors to a minor, and the rulings which were held to be erroneous were to the effect that a sale of intoxicating liquors by a bartender, in his master's shop, and in the regular course of his master's business, was *prima facie* a sale by the master, whether made to a minor or any other person. In *Commonwealth v. Briant*, *supra*, it was said that, "although we should admit that a jury might be warranted in inferring that such a sale was authorized, it would not follow that a court could rule that there is a presumption of fact that it was so; which is the purport of the instruction fairly considered." These last cases must be taken to have decided that, in complaints for selling intoxicating liquors unlawfully, it is a question of fact for the jury whether a sale in violation of a license, by a servant, was made by the authority or with the consent of his master; and that no presumption of law of any kind arises from the fact that it was made by the servant in his master's shop, in the ordinary course of the master's business, and from liquors owned by the master and there kept for sale. Evidence of these facts may be sufficient to warrant a jury in inferring, as a fact, that the sale was made by the authority or with the consent of the master; but the weight of this evidence and the inferences to be drawn from it are for the jury. The same rule is applicable to this case.

Whether evidence, if believed, is sufficient to warrant a jury in finding a defendant guilty, is a question of law; and if the presiding justice in this case had charged the jury that, "nothing to the contrary appearing," evidence of a sale by a servant in his master's shop, of his master's goods there kept for sale, would, if believed, warrant the jury in finding that the sale was authorized by the master, the instructions would, perhaps, have been unobjectionable. The expression, that "the natural and just inference from" such a sale is that it was authorized by the master, may be considered, either as an expression of an opinion by the justice that the jury ought to find, if nothing to the contrary appeared, that the sale was in

fact authorized by the master, or as a strong statement of the law that they would be warranted in so finding. Whether the first clause of the charge ought to be held to be such an expression of an opinion upon a matter of fact so as to require a new trial, we need not decide. The second clause of the charge, although not specifically excepted to, puts upon the defendant the burden of clearly showing that the sale, if made by a person employed by her to conduct her business in the hotel, was made "without defendant's knowledge, and really in opposition to her will, and defendant in no way participated in, approved, or countenanced such sale." The two clauses, taken together, may well have been understood by the jury to mean that the presumption was that a sale made by a servant under the circumstances stated was a sale authorized by the defendant, and that it was for the defendant to "clearly show" that the sale was made without her knowledge, and in opposition to her will, in order to escape criminal responsibility. It was wholly a question of fact whether the sales proved were made by the authority or with the consent of the defendant, and the burden was upon the Commonwealth to prove this fact beyond a reasonable doubt. We think that the charge, in this respect, was erroneous.

Exceptions sustained.

COMMONWEALTH of Massachusetts
v.
Holden M. BROWNELL.

Counsel for defendant has the right to impress upon the jury their duty to acquit the defendant if his guilt was not proved by the evidence in the case, and to remind them, in a logical or rhetorical form, that whenever they should have a proper occasion to give a reason for acquitting the defendant, it would be sufficient to say that his guilt was not proved.

(Dukes—Filed November 23, 1887.)

ON defendant's exceptions. *Sustained.*
Complaint for maintaining a tenement for the illegal keeping and illegal sale of intoxicating liquors.

At the trial, during the closing argument, counsel for defendant relied mainly upon the point that there was no proof that the defendant exercised any control over the bar-room. He said, substantially: "But, gentlemen, if you acquit Mr. Brownell of this charge, how will you answer the question of your neighbors and friends as to why you did it? You will answer it as your own consciences must feel here,—'It was not proven. The government failed to convict him.'" Here the presiding judge interposed, and said that such a line of argument was not proper. Counsel replied that he regarded it as a legitimate and proper line of argument, and requested the court to have his directions put in writing. This was done, and was as follows: "In so far as counsel for the defendant desires to instruct the jury what reasons they may hereafter give to anybody

who chooses to talk with them about their verdict, the counsel for defendant is stopped by the court." To this defendant excepted.

The jury returned a verdict of guilty, and defendant alleged exceptions.

Mr. J. Brown, for defendant:

The right of a defendant to be heard through his counsel is guaranteed by the Federal Constitution, and amply and carefully secured by the Bill of Rights. It has also ever been the practice of the courts of Massachusetts to give great latitude to counsel in arguing to the jury, not only the facts, but even the law.

Commonwealth v. Porter, 10 Met. 268.

There have been but two recorded attempts in the superior court, on the authority of this charge, to instruct the jury in regard to this point. They have both been challenged by the present counsel for this defendant, and his exceptions thereto sustained.

Commonwealth v. Maloney, 118 Mass. 211; *Commonwealth v. Costley*, 118 Mass. 14; *Commonwealth v. Harlow*, 110 Mass. 411.

The courts shall not charge juries with respect to matters of fact, but may state the testimony and the law.

Pub. Stat. chap. 153, § 5; *Perkins v. Adams*, 5 Met. 46; *Hathaway v. Crocker*, 7 Met. 262.

Mr. H. C. Bliss, for the Commonwealth:

The presiding judge acted within his rightful discretion in checking the counsel in his address to the jury on a subject that was irrelevant and improper for their consideration in forming a verdict.

Tucker v. Henniker, 41 N. H. 324; *Rolf v. Rumsford*, 66 Me. 564; *Frick v. Barbour*, 64 Pa. 121.

Evidence had been offered strongly tending to show (*Commonwealth v. Costley*, 118 Mass. 27) that the defendant was the proprietor of the premises.

"Probable proof" (*Commonwealth v. Webster*, 5 Cush. 816) had been offered of substantive facts of defendant's guilt.

The case falls under—

Rex v. Burdett, 4 Barn. & Ald. 140; *People v. Dyle*, 21 N. Y. 580.

The question is, Did the evidence "put the defendant to an explanation?"

Commonwealth v. Maloney, 118 Mass. 213.

W. Allen, J., delivered the opinion of the court:

It was proper for the counsel for the defendant to impress upon the jury their duty to acquit the defendant if his guilt was not proved by the evidence in the case, and to remind them that, whenever they should have a proper occasion to give a reason for acquitting the defendant, it would be sufficient to say that his guilt was not proven. The counsel had a right to present this thought in a logical or in a rhetorical form; he was at liberty to dramatize it in imaginary dialogue, and to illustrate and enforce it by imaginary occasions. The counsel in his argument suggested an occasion on which the jury might be asked the reason why they acquitted the defendant, and the answer which they would give. The language put into the mouth of the jurors is entirely proper and unobjectionable; the impropriety, if any, must have been in the supposed occasion of uttering it. The supposed occasion was the inquiry by

friends and neighbors of the jury, why they acquitted the defendant; and the supposed impropriety must have consisted, either in the implied suggestion that the jury might have in mind the opinions of their friends and neighbors, or in the suggestion that the jury might at some future time state to their friends and neighbors the grounds of their verdict.

Any attempt to influence a verdict by outside opinion and sentiment is improper, but an appeal to the jury not to be influenced by such opinions and sentiments is proper; and such appeal involves a recognition of the fact that the thought of such opinions may be in the mind of the jury. It is not an assertion of a fact, but the recognition of a possibility. There was no other suggestion of outside influences in the case at bar than was involved in warning the jury against them. We see no impropriety in the other suggestion involved, that, if the defendant was acquitted for want of proof, the jury were at liberty to say, in answer to questions of their friends and neighbors, that the proof was not sufficient. No question of disclosing the secrets of the jury room, or of calling a juror to account for his verdict, is involved. The suggestion is that the juror may voluntarily and on his own account make a statement of the true grounds on which he rendered his verdict. It was made to influence the jury to render their verdict upon the evidence, without regard to the opinions of others. Whether the exigencies of the defense called for such an appeal, and in what form it can be most effectively made, the court cannot know; that must be left to the discretion of counsel, within the limits of decorum and propriety. If a juror and his neighbors have, in common, information not in evidence, which satisfies them that the defendant is guilty; or if the jury know that the defendant is held to be guilty in common repute among their neighbors, it is still their duty to acquit him if the evidence does not prove him guilty. In such a case, the jurors could not but have in mind that outside knowledge and opinion; and it might be difficult for them to resist the influence of it, and to render a verdict solely upon the evidence. The reflection that they were not obliged to be forever silent, but could at some time explain that their verdict was rendered on the evidence before them, and not upon outside facts and opinions, might aid them in arriving at a true verdict, and would be proper for them to make; and we think that it is a consideration which counsel have a right to present to them. It was not for the defendant to show that the argument was particularly pertinent or applicable to his case. That is not matter of inquiry. It is not addressed to a known, but to a possible, influence. The liability of the influence to exist, not its actual existence, makes the appeal proper. As the defendant had a right to make the argument in the form in which his counsel put it, and as the considerations he desired to present were proper to be presented to the jury, the defendant was aggrieved by not being allowed to pursue his argument, and by the practical ruling of the court that the consideration was not proper to be regarded by the jury.

We do not find any other error in the rulings of the court.

Exceptions sustained.

Adoniram J. MARBLE

v.

Emma S. MELLEN.

Where there is evidence, sufficient to go to the jury, of a fact in issue, a party can have no ground to complain that the judge submitted the question to the jury.

(Bristol—Filed November 23, 1887.)

ON defendant's exceptions. *Overruled.*

Action upon contract, to recover on count for money had and received, upon a written agreement signed by defendant. The instrument sued upon is as follows:

Fall River, October 1, 1881.

Received of A. J. Marble \$2,062.50, to be paid to said Marble in stock at its par value in the Livingston & Auburn Horse Railroad Co. or in cash, within ten days.

Emma S. Mellen.

The verdict was for the plaintiff.

Other facts are sufficiently stated in the opinion.

Messrs. Jackson & Slade, for defendant:

The plaintiff, to recover, must show that the defendant knew at or before the time when she signed the agreement the consideration therefor.

The minds of the parties must have met and agreed upon the terms of the whole contract.

Ellis v. Clark, 110 Mass. 389, 14 Am. Rep. 609.

Messrs. Morton & Jennings, for plaintiff:

If the question of the defendant's knowledge of the consideration was material, it was a question of fact for the jury, and the court left it to them under instructions not excepted to.

The agreement signed by the defendant was an original undertaking on her part for a sufficient consideration, and not a collateral promise coming within *Ellis v. Clark*, 110 Mass. 389; 14 Am. Rep. 609, and the cases referred to therein.

Curtis v. Brown, 5 Cush. 488; *Wood v. Corcoran*, 1 Allen, 405.

Devens, J., delivered the opinion of the court:

The ruling of the presiding judge submitted to the jury the question whether the defendant knew of the consideration for her agreement. She has no ground of complaint, if there was evidence sufficient to go to the jury, of such knowledge. Direct evidence was not necessary; it could be inferred from the conduct of the party. The instrument recited an adequate money consideration, and was signed by defendant. The plaintiff's testimony was that he made a settlement of mutual demands with the defendant's husband at his house, and that the husband was to transfer to him the stock described in the paper signed by defendant; that defendant was in the house but not in the room; that the husband went out of the room to get her to sign the paper (as the stock was in her name), and soon returned with it. It further appeared that the husband and the defendant were present at the trial; he and the plaintiff's testimony as to the transaction did not contra-

dict it, and did not testify that the defendant did not know of the consideration. Upon these facts it could not have been ruled that there was no evidence to go to the jury, who might fairly have inferred that, even if the money consideration recited was not the actual one, the real consideration, namely, the settlement between her husband and plaintiff, was known to the defendant.

Exceptions overruled.

COMMONWEALTH of Massachusetts

v.

Frank MCGURTY.

1. On the trial of an indictment for altering a ballot, the government can give secondary evidence of what the ballot was, although it had been destroyed as required by statute; it does not come within the rule that a document which has been destroyed through the fault of the prosecutor cannot be proved by secondary evidence.
2. Evidence showing that the ballot came from the ballot-box which was actually used in the election, will warrant the inference that it had been duly cast.
3. It is not necessary to show that the ballot had been canceled by a mechanical device. Such cancellation is not essential to ensure the counting of a ballot.
4. Lines drawn across a name upon a ballot, which are sufficient to show an apparent intention upon the part of the voter to erase the name so that the ballot would not be counted as a vote for that person, are sufficient to support the charge of altering the ballot.
5. A ballot having on it the name of a candidate for office who was not elected, and which was cast for him, is "a ballot cast for any officer," within the meaning of the statute.
6. The fact that the fraud of the defendant did not succeed, and that, by direction of the election officer, the ballot was counted and returned for the person over whose name the lines were drawn, cannot avail the defendant in defense to the indictment.

(Suffolk—Filed November 22, 1887.)

ON defendant's exceptions. *Overruled.*

This was an indictment in two counts, under Stat. 1884, chap. 299, § 43, against the defendant, Frank McGurty, for altering a ballot cast for Nelson S. Wakefield for alderman, at precinct 1, of ward 25, at the municipal election of the city of Boston, on the 14th day of December, 1886, by drawing lines with a lead-pencil across the name of said Wakefield.

The defendant requested the court to rule that the witness could not testify as to what he saw the defendant then do, or to the marks or alteration on, or to the appearance of, said ballot, after said alleged alteration, without the

production of the ballot. The court refused so to rule, and the defendant excepted.

At the close of all the evidence in the case, the defendant requested the court to rule that there was not sufficient evidence in the case; that the ballot alleged to have been altered was "cast" within the intent and purpose of the above section of the statute; that there was a variance between the proof and the allegation of alteration in the indictment; that, on all the evidence in the case, Nelson S. Wakefield was not an "officer," within the intent and purpose of the above section of the statute; that the defendant had committed no crime within the intent and meaning of the above section of the statute.

The court refused so to rule, and the defendant excepted.

The court, having declined and refused to make such rulings as above requested, under instructions not otherwise excepted to, submitted the case to the jury, who found by their verdict the defendant guilty, with a recommendation to the court for mercy; and defendant alleged exceptions.

Mr. Francis Burke, for defendant:

The rule is well established that a paper alleged to have been altered, if in existence and accessible, must be produced at the trial. If it be proved, however, that it was destroyed by the defendant, secondary evidence is admissible; but otherwise if the destruction were by the prosecutor or through his fault.

3 Greenl. Ev. § 107; *Commonwealth v. Hutchinson*, 1 Mass. 7; *Commonwealth v. Snell*, 8 Mass. 84; *Commonwealth v. Bigelow*, 8 Met. 285.

The city clerk, in destroying the ballot, acted not merely as a city officer, but as an officer of the Commonwealth, the prosecutor; and his act is its act. That the city clerk acted under the requirements of the statute is no excuse, nor that the Legislature has put into the same statute § 26, a compliance with the provisions of which makes impossible a conviction under the provisions of § 43.

Chap. 299, § 10, requires the use at elections of a special ballot-box with "mechanical devices for securing, registering, and canceling every ballot deposited therein," and § 11 provides that "no ballot shall be counted, in ascertaining the result of such election, unless so deposited and canceled." It was necessary, then, as a part of the government's case, to show that the ballot alleged to have been altered had been deposited and canceled in such box. Failing to do this, there was no evidence that the ballot had been cast, and the ruling requested should have been given.

The indictment charges the "drawing lines and marks across the words and name 'Nelson S. Wakefield,'" in the first count, and in the second the "drawing lines and marks with a certain lead-pencil over and across the name 'Nelson S. Wakefield.'" These are material allegations, and set forth the substance of the complaint, and must consequently be proved as alleged.

State v. Jackson, 80 Me. 29; *Rex v. Deeley*, 1 Moody, Cr. Cas. 308; *Commonwealth v. Lavery*, 101 Mass. 207.

The charge of drawing lines across the words "Nelson S. Wakefield" is not supported by evidence of drawing lines across the words "S.

Wakefield;" nor is the name "S. Wakefield" the same as, nor *idem sonans* with, "Nelson S. Wakefield." The variance is fatal.

An officer is one "lawfully invested with an office."

Bouv. L. Dict.; Stormonth, Eng. Dict.

A candidate for an office does not become thereby an officer; and in this case the said Wakefield, even if elected, would not have been invested with office, or become an officer, until after the expiration of the year. The fourth ruling should have been given as requested.

The ballot alleged to have been altered was, in fact, counted and returned for Nelson S. Wakefield, and, even if the defendant had attempted to alter the ballot, he failed so to do. It is not made a criminal offense to attempt to alter a ballot, and, as attempt only was shown in this case, the defendant had committed no crime.

No brief for plaintiff.

C. Allen, J., delivered the opinion of the court:

1. It was impossible to produce the ballot at the trial, because it had been destroyed by the city clerk, as required by the statute of 1884, chap. 299, § 26. It is now objected that such destruction must be deemed to have been the act of the prosecutor,—namely, the government,—and that therefore the government could not properly be allowed to introduce secondary evidence of what the ballot was. But a destruction of ballots, under this general provision of law, cannot be deemed a wrongful or negligent destruction of a document, or one which involves any fault upon the part of the government or its agents; and the case does not fall within the doctrine which has sometimes been declared or implied, that a document which has been destroyed through the fault of the prosecutor cannot be proved by secondary evidence. See 3 Greenl. Ev. § 107; *Commonwealth v. Snell*, 8 Mass. 82; *Joannes v. Bennett*, 5 Allen, 169.

2. It was not necessary to show that the ballot had been canceled by a mechanical device, as provided in § 10 of the statute. Such cancellation is not essential to ensure the counting of a ballot, since § 12 makes provision for the case where a ballot-box containing such mechanical device cannot be furnished. Besides, the evidence showing that the ballot came from the ballot-box which was actually used in the election would warrant the inference that it had been duly cast, within the meaning of § 43.

3. The alteration was sufficient to sustain the indictment. If the ballot had been originally cast with the erasure shown, it could not properly have been counted as a ballot for Mr. Wakefield. The erasure was sufficient to "alter" the ballot, so that the voter's intention would have been defeated if the fraud had not been observed or discovered. The name upon the ballot is to be taken as a whole. If the lines and marks drawn across it were sufficient to show an apparent intention, upon the part of the voter, to erase the name, so that the ballot would not be counted as a vote for Mr. Wakefield, that is sufficient to support the charge of altering the ballot by drawing lines and marks

across the words and name "Nelson S. Wakefield."

4. The objection that the vote for Mr. Wakefield was not a "ballot cast for any officer," because he was merely a candidate for office, and was not elected, cannot prevail. The statute merely uses a short form of expression, and the meaning is not open to doubt; otherwise the statute would only apply to existing officers, who might be candidates for re-election. The phraseology of "voting for any officers to be then chosen" is common and familiar in the legislation of this Commonwealth. Pub. Stat. chap. 7, § 55; Gen. Stat. chap. 7, § 28. See also Stat. 1884, chap. 299, § 41.

5. The facts that the fraud of the defendant did not succeed, and that, by direction of the election officer, the ballot was counted and returned for Mr. Wakefield, cannot avail the defendant, in defense to the indictment. The ballot was altered with intent to cheat and defraud, although the fraud was discovered at once.

Exceptions overruled.

Alexander McCALLUM

v.

Jasper E. LAMBIE.

Chauncey H. PIERCE v. SAME.

1. A party aggrieved by an erroneous ruling upon a demurrer in the superior court may allege exceptions thereto, upon which the matter may be further heard.
2. In actions of libel and slander it is necessary, by the common law, to allege the application of the words to the plaintiff, and if, in themselves, they do not make their meaning clear, to allege also what will show their defamatory character.
3. The fundamental principle of our statute does not differ from that of the common law; the allegations of the declaration must show, not only that the words apply to the plaintiff, but also in what sense they are used, and how they are defamatory. The statement that they were published "concerning the plaintiff" is insufficient, if, from their character, they do not intelligibly apply to him in a defamatory sense. General allegations and innuendoes are not enough.
4. Where the words alleged to have been published do not indicate their application to the plaintiff, or what relation he had to the matters to which they refer, and their meaning, as imputing what would expose him to hatred, contempt, or ridicule, is not intelligible, and can only be vaguely conjectured,—a demurrer to the declaration held properly sustained.
5. Damages for an injury to the plaintiff's business cannot be recovered in such an action, without an allegation that

the words were published of and concerning the plaintiff in his business or profession.

(Hampshire—Filed November 22, 1887.)

ON plaintiff's exceptions. *Overruled.*

This is a suit for the publication of a libelous article.

The defendant demurred to the declaration: (1) because there is not set forth anything in either count which is by its natural import libelous, or which furnishes legal ground for an action for libel, or is actionable on any ground; (2) because the matter set out, with accompanying averments, in either count, is not libelous as to plaintiff, or at all,—nor does it appear that the matter set out relates to plaintiff.

The court, upon hearing, sustained the demurrer, to which ruling plaintiff alleged exceptions.

Plaintiff's declaration was as follows:

"1. The plaintiff says the defendant falsely and maliciously accused the plaintiff of conspiring with Chauncey H. Pierce, of said Northampton, to defraud the neighbors and friends of said plaintiff and said Pierce; and the defendant caused said false and malicious libel to be published in a newspaper published in said Northampton, called the Hampshire County Journal, a copy whereof is hereto annexed, viz.:

"As to the electric light company, I doubt not all are willing it should pay a fair dividend, 6 per cent, even 10 per cent, on the actual value of the plant. Here comes the rub, when the Northampton Electric Light Company was capitalized for \$40,000 its actual value was not \$15,000. It was a plan for the Thomson-Houston Company to make a good sale, as no profit could be made with the sharp, bitter competition of the Schuyler Company in the field; and it was a scheme by which certain parties (meaning the plaintiff and said Pierce) attempted to make \$20,000 or more, by buying a property worth in the neighborhood of \$15,000 and capitalizing it for \$40,000, and by selling stock to their neighbors and friends (meaning the neighbors and friends of the plaintiff and said Pierce), which was more than half water (meaning that more than half of the par value of said stock represented no assets and was of no real value). In fact, the Thomson-Houston plant, at the time it was sold and capitalized for \$40,000, was not worth near \$15,000, as a large sacrifice had to be made and was made by the projectors (meaning the plaintiff and said Pierce), who dare not force the loss of removing the Schuyler competition on the stockholders, after making 100 per cent, and more, on the stock sold."

"2. The plaintiff says that he is engaged in the business of a merchant in said Northampton, and as a manufacturer in the city of Holyoke, in the county of Hampden, in said Commonwealth; and the plaintiff says the defendant caused to be published in a newspaper published in said Northampton, called the Hampshire County Journal, a false and malicious libel concerning the plaintiff, a copy whereof is hereto annexed [the same as set forth in first count], whereby the plaintiff was greatly injured in his trade, business, and employment."

Mr. D. W. Bond, for plaintiff

To perfect a scheme alleged by defendant, it

was necessary for the officers of the Northampton Electric Light Company to sign and swear to a statement that the capital stock was paid in, that it was paid in by a conveyance of the property at a fair valuation.

Pub. Stat. chap. 196, §§ 46, 48.

Such a scheme is a conspiracy to cheat and defraud.

It is not always essential that the acts contemplated should constitute a criminal offense, for which, without the element of conspiracy, one alone could be indicted.

Commonwealth v. Boynton, cited in *Commonwealth v. Hunt*, Thach. Cr. Cas. 609, 640; and in *Commonwealth v. Waterman*, 122 Mass. 43, 57.

The plaintiffs also claim that the effect of the article was to prejudice and injure them in their trade or business.

When words have such an effect, it is not necessary that the trade or business be referred to in the article.

Sanderson v. Caldwell, 45 N. Y. 398; *S. C.* 6 Am. Rep. 105.

Mr. William G. Bassett, for defendant:

Plaintiff's remedy was by appeal.

Pub. Stat. chap. 167, § 67; chap. 152, § 10; *Cowley v. Train*, 124 Mass. 226; *Amherst & B. R. R. Co. v. Watson*, 4 Gray, 61; *Bennett v. Clemence*, 3 Allen, 431.

Exceptions are applicable to rulings arising upon and incidental to a trial.

Pub. Stat. chap. 167, § 70.

The practice is by appeal.

Cook v. Cook, 100 Mass. 194; *Colt v. Learned*, 118 Mass. 380; *Homer v. Engelhardt*, 117 Mass. 539; *Ames v. Union R. Co.* Id. 541; *Adams v. Stone*, 181 Mass. 438; *McCann v. Tillinghast*, 1 Mass. (L. ed.) 206, 1 New Eng. Rep. 566, 140 Mass. 327.

The words of the article are not libelous in themselves. They neither accuse plaintiff of crime, dishonesty, or immorality nor blacken his reputation or expose him to public hatred, contempt, or ridicule.

Twombly v. Monroe, 136 Mass. 464, 468; *Goodrich v. Davis*, 11 Met. 473; *Homer v. Engelhardt*, and *Adams v. Stone*, *supra*; *Dooling v. Budget Pub. Co.* 2 Mass. (L. ed.) 386, 4 New Eng. Rep. 50, 144 Mass. 258; *Shattuck v. Allen*, 4 Gray, 540; *Boynnton v. Remington*, 3 Allen, 397; *Muligan v. Cole*, L. R. 10 Q. B. 549; *Capital & Counties Bank v. Henty*, L. R. 5 C. P. D. 514; *S. C. L. R.* 7 App. Cas. 741; *Odg. Sland. & Lib.* Bigelow's ed. p. 25.

The article is impersonal.

Goodrich v. Davis, 11 Met. 480; *Chenery v. Goodrich*, 98 Mass. 224; *York v. Johnson*, 116 Mass. 482; *Baldwin v. Hildreth*, 14 Gray, 221; *Clay v. Brigham*, 8 Gray, 161; *Tebbetts v. Godding*, 9 Gray, 254; *Carter v. Andrews*, 16 Pick. 1; *Capital & Counties Bank v. Henty*; and *Adams v. Stone*, *supra*.

The language was not such as, either as a necessary or as a natural and proximate consequence, occasioned damage to it.

Swan v. Tappan, 5 Cush. 104; *Cook v. Cook*, 100 Mass. 194; *Bloss v. Tobey*, 2 Pick. 320; *Snell v. Snow*, 18 Met. 278; *Weldon v. De Batho*, 54 L. J. Q. B. 113; L. R. 14 Q. B. D. 389; *Chamberlain v. Boyd*, L. R. 11 Q. B. D. 407; 2 Greenl. Ev. §§ 420, 254, 256; *Townsh. Sland. & Lib.* 2d ed. § 146

Knowlton, J., delivered the opinion of the court:

These two cases differ only in the kinds of business in which the plaintiffs are respectively alleged to have been engaged, and the opinion given in the first is equally applicable to the second also.

The defendant contends that the only remedy for an erroneous ruling upon a demurrer is by appeal, and that the bill of exceptions should be dismissed. The usual and better practice is to bring to this court questions of law arising upon demurrers in the superior court, by appeal, and not by exception. But by Pub. Stat. chap. 153, § 8, "in all cases civil and criminal, * * * a party aggrieved by an opinion, ruling, direction, or judgment of the court, in matters of law, may allege exceptions thereto," upon which the matter may be further heard. An appeal from a ruling or judgment upon a demurrer in an action at law in the supreme judicial court will not lie, and the remedy for error in such a case is by exception only. *Cowley v. Train*, 124 Mass. 226. Appeals and exceptions taken upon interlocutory matters cannot be heard in this court until the proceedings at *nisi prius*, to determine the legal rights of the parties, appear to be ended. *Bennett v. Clemence*, 3 Allen, 481. In this suit the record indicates that the order of judgment and the ruling sustaining the demurrer were simultaneous, and the exceptions then taken are properly before us.

The declaration is in two counts, the first to recover general damages for an injury to reputation from the publication of a libel, and the second charging an injury to the plaintiff's business from the same cause. In actions of libel and slander it has always been held necessary, both in England and in this country, to allege the application of the words to the plaintiff, and, if in themselves they do not make their meaning clear, to allege also what will show their defamatory character. *Goldstein v. Foss*, 6 B. & C. 154; *Capital & Counties Bank v. Henty*, 7 App. Cas. 741; *Bloss v. Tobey*, 2 Pick. 320; *Carter v. Andrews*, 10 Pick. 1; *Goodrich v. Davis*, 11 Met. 473. The technical strictness of the common law has been relaxed by the English Common Law Procedure Act of 1852, and by the Massachusetts statute of the same year; but the general principle of our practice, stated in Pub. Stat. chap. 167, § 2, which requires that the "substantive facts necessary to constitute a cause of action shall be stated with substantial certainty, and without unnecessary verbiage;" and the more particular requirement, accompanying the form for a declaration in slander in the same chapter, that, where the natural import of the words is not otherwise intelligible, "the declaration shall contain a concise and clear statement of such things as are necessary to make them intelligible to the court and jury in the same sense in which they were spoken,"—call for averments to show particularly how the plaintiff has been defamed. *Baldwin v. Hildreth*, 14 Gray, 221; *Chenery v. Goodrich*, 98 Mass. 224; *York v. Johnson*, 116 Mass. 482; *Brettun v. Anthony*, 103 Mass. 37; *Adams v. Stone*, 131 Mass. 433.

The first count does not allege, in accordance with the form in the statute, that the libel was published "concerning the plaintiff." In *Bald-*

win v. Hildreth, *supra*, it was decided—*Chief Justice Shaw* giving the opinion—that a declaration that a "defendant publicly, falsely, and maliciously accused the plaintiff of the crime of larceny, in words substantially as follows, 'He is a thief,'" was bad on demurrer, for want of an allegation that the words were spoken of the plaintiff.

But the second count contains the allegation; and it becomes important to determine whether, with that, enough is set out to enable the plaintiff to maintain his action. The fundamental principle of our statute does not differ from that of the common law. The allegations must show, not only that the words apply to the plaintiff, but also in what sense they are used, and how they are defamatory. A statement that they were published "concerning the plaintiff" is insufficient if, from their character, they do not intelligibly apply to him in a defamatory sense. The defendant is entitled to be informed by the declaration what is imputed to him, what injury he is said to have inflicted, and how he is said to have inflicted it. If the meaning of the language is clear, and a charge that it was used of the plaintiff shows how it would materially injure him, nothing more is necessary. But if it is ambiguous and, with an allegation that it was published of another, it is not apparent whether it was applicable to him, or whether it was applicable in a defamatory sense, or, if it was, in which of possible different defamatory senses,—all such additional facts must be alleged as will make its meaning clear. General allegations and innuendoes are not enough. In *Brettun v. Anthony*, *supra*, it is said that "general allegations that the defendant charged the plaintiff falsely and maliciously with the commission of a particular crime, accompanied by innuendoes, however broad and sweeping, will not aid a declaration otherwise imperfect." It is familiar doctrine that innuendoes do not enlarge, but merely restate in plainer terms, the meaning of the language which precedes them.

In the declaration in this case, the "concise and clear statement" called for by our statute, and answering to the inducement and colloquium of common-law pleading, is wanting. The words alleged to have been published do not indicate their application to a particular person,—much less how they apply to him, or what relation he had to the matters to which they refer. It is impossible to determine with certainty, from them, how many actors participated in the transactions, or what parts they respectively took, or whether the conduct of anyone was moral or immoral, innocent or guilty. Their meaning, as imputing what would expose to hatred, contempt, or ridicule one of whom they are alleged to have been published, is not intelligible, and can only be vaguely conjectured. The demurrer was therefore rightly sustained.

The gist of the charge in the second count seems to be the injury to the plaintiff's business; and damages for such an injury cannot be recovered without an allegation that the words were published of and concerning the plaintiff in his trade, business, or profession. *James v. Brook*, 9 Ad. & El. N. S. 7; *Ordione v. Bacon*, 6 Cush. 185. But we prefer to rest our decision upon the broader ground already stated, and

so we have not considered the questions that might arise in this aspect of the case.

Exceptions overruled.

COMMONWEALTH of Massachusetts

v.

George HILL.

1. The presumption that acts done by the wife in the immediate presence of the husband were done by his command or authority, may be contradicted by evidence.
2. A husband has the rightful power to prevent his wife from using, as a resort for prostitution, a house owned by her as her separate property and occupied by both as the home of the family.
3. If she kept such tenement for such purpose of her own free will, and without her husband's consent, and against his will, he cannot be convicted of thereby maintaining a nuisance in such tenement, although he did not use all practicable means to control her conduct.
4. His whole conduct, including what he did and said, as well as what he could reasonably have done, and did not do, may be shown for the purpose of proving or disproving his consent in fact to the acts done by his wife.
5. Evidence that, prior to the time covered by the indictment, he had ordered, directed, persuaded, and used all means in his power to prevent his wife from doing any of the acts charged, and that his wife told him the property was hers, and she would do as she pleased, is admissible, on his behalf, on the trial of such indictment.
6. When the question is of the state of mind of a person at or during a particular time, which can only be shown by acts or speech, evidence of what he said or did for a reasonable time before, if it tends to show a permanent or settled state of mind on the subject, is admissible.
7. How far back he shall be permitted to go is in the discretion of the trial judge. The general rule is that the evidence should be admitted if, under the facts, there can be a reasonable inference that the same state of mind continued to exist up to and during the particular time which is the subject of inquiry.
8. It is in the discretion of the trial judge whether counsel shall read to the jury statutory or common law from the books, or shall state it orally, subject to the correction of the court.

(Bristol—Filed November 23, 1887.)

ON defendant's exceptions. *Sustained.*

Indictment for maintaining a nuisance in a tenement. A house was used for the illegal sale of liquor, and was resorted to for prostitution and lewdness during the period covered by

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the indictment,—from January 1886, to June. The business was transacted with the witnesses by the wife of defendant, in whom was the title to said house, but the defendant lived with her, and was present and had knowledge thereof. On the trial, counsel for defendant proceeded to read to the jury Pub. Stat. chap. 147, §§ 1, 2, relating to rights of married women in the management and control of her separate property, but was interrupted by the presiding judge, and directed not to read said statutes to the jury. Counsel claimed the right to read said statutes to the jury, and to have an exception to the refusal of the court to allow him to do so. The court thereupon ruled that the matter of reading said statutes to the jury was within the discretion of the court, and not a matter of exception. The defendant offered evidence to show that, from time to time during five years prior to the finding of the indictment, he had ordered, directed, persuaded, and used all reasonable and practicable means in his power to prevent his wife from doing any of the acts charged; and that his wife told him the property was hers, and she would do as she pleased. The court excluded any evidence on this point at any time prior to January 1, the time covered by the indictment. To this the defendant excepted.

The defendant requested the court to rule and instruct the jury, among other things, as follows:

"1. That a married woman who owns real estate in fee has as full control of the same during her life as she would have if single. That she has a right to lease it for a term of years; to convey it by deed, which will be good and effectual as against her husband during her lifetime. She has a right to occupy it alone, and expel her husband therefrom, if it suits her pleasure or convenience, even though she occupies it as her dwelling-place.

"2. That her husband has no legal right to expel her therefrom, and any force used by him for that purpose would be a criminal assault,"—which the court refused to do, and defendant duly excepted.

The court ruled substantially as follows:

The husband would be responsible for such use of the house, if it was with his knowledge and consent, or with his participation, or if he permitted and suffered that use; but he would not be responsible for that use if it was without his knowledge or consent, or against his wishes, and in spite of every reasonable, lawful, and practicable effort on his part, exercised in good faith, to prevent such use.

A verdict of guilty was returned, and defendant alleged exceptions.

Mr. J. Brown, for defendant:

The first question is whether a presiding justice has, in a criminal case, the right, under his discretion, to prohibit counsel from reading a statute to the jury,—directly applicable to the issue on trial,—or even to offer it as evidence in the case.

This is not supported by authority in any case that has come before this court for revision.

Commonwealth v. Murphy, 10 Gray, 1; *Commonwealth v. Austin*, 7 Gray, 51; *Commonwealth v. Porter*, 10 Met. 263.

Bill of Rights, art. 12, and Pub. Stat. chap.

214, § 17, have special application in the case at bar. Also, the rule of court limiting arguments of counsel to the jury to one hour avoids and prevents any gross abuse of the privilege of reading the law or a statute involved in the issue.

That the statute offered to be read, either as evidence or in argument, had a direct application to the issue, is apparent.

Pub. Stat. chap. 147, §§ 1, 2. See *Commonwealth v. Barry*, 115 Mass. 146; *Commonwealth v. Wood*, 97 Mass. 225. But see Stat. 1874, chap. 184.

These provisions are substantially incorporated in Pub. Stat. *supra*.

It is not enough to say that in the trial of causes much is left to the discretion of the presiding judge, in giving direction or controlling it.

The only cases referring to the matter, found upon diligent search by counsel, are—

Lynch v. State, 9 Ind. 541; *Murphy v. State*, 6 Ind. 490; *Cutler v. Thomas*, 24 Vt. 647; 1 Park. Cr. 147.

The point attacked directly in this part of the case is the assumption, on the part of presiding justices, that no book can be read from, either as evidence or in argument, even though it contains a direct, terse, and authoritative statement of the law directly pertinent to the question at issue in a criminal charge.

The defendant was entitled to the first and second instructions, at least in substance; and the court erred in ruling that they were immaterial.

The court should have permitted the defendant to show that, during the five years prior to the time charged in the indictment, "he had ordered, directed, persuaded, and used all reasonable and practicable means in his power to prevent his wife from doing the acts charged."

Mr. Andrew J. Waterman, Atty-Gen., for the Commonwealth:

The reading of the statutes to the jury is wholly a matter within the discretion of the presiding justice.

Commonwealth v. Austin, 7 Gray, 51; *Commonwealth v. Porter*, 10 Met. 286.

The relative technical legal status of the parties had nothing to do with the question of fact as to whether the defendant permitted the keeping of the nuisance.

Commonwealth v. Kennedy, 119 Mass. 211.

There was no evidence upon which to base the rulings, and for this reason they were rightfully refused.

Commonwealth v. Gallagher, 126 Mass. 54; *Commonwealth v. Sargent*, 129 Mass. 123.

Field, J., delivered the opinion of the court: In offenses like that charged in this indictment there is a presumption of law that acts done by the wife in the immediate presence of her husband were done by her under coercion from him. This was originally a presumption in favor of the wife, but it is now also considered that there is a presumption against the husband that acts done by the wife in his immediate presence were done by his command or authority. In each case it is a disputable presumption, and may be rebutted or contradicted by evidence; and this presumption has perhaps lost something of its force in modern

times in consequence of the rights given to married women by statute, and the diminished power of control which, by law and usage, husbands now have over the person and property of their wives. Still it has recently been declared that a husband has the rightful power to prevent his wife from using, for the illegal sale of intoxicating liquors, a house owned by her as her separate property and occupied by both as the home of the family. This must be equally true when the wife uses the home as a resort for prostitution. *Commonwealth v. Carroll*, 124 Mass. 30.

If the husband took no part in keeping the tenement for the purposes charged in the indictment, we think that the question of fact was whether he consented to his wife's keeping it for these purposes. If she kept it of her own free will, and without his consent, and against his will, he could not be convicted. Whether he used all reasonable and practicable means to prevent her from keeping the tenement for these illegal purposes was relevant only upon the question of his consent or want of consent; and if in fact she acted of her own free will, and without his consent, and against his will, he could not be convicted although he had not used all reasonable and practicable means to control her conduct.

We are aware that, in some of the decisions, expressions have been used which indicate that it is a substantive part of the law that, to excuse himself, the husband must show that he has used all reasonable and practicable means to restrain his wife; but, taking all the decisions together, we think it appears that his whole conduct, including what he did and said, as well as what he could reasonably have done and did not do, is admitted as evidence only for the purpose of proving or disproving his consent, in fact, to the acts done by his wife. *Commonwealth v. Kennedy*, 119 Mass. 211; *Commonwealth v. Carroll*, *supra*; *Commonwealth v. Pratt*, 126 Mass. 462; *Commonwealth v. Barry*, 115 Mass. 148; *Commonwealth v. Wood*, 97 Mass. 225; *Commonwealth v. Tryon*, 99 Mass. 442; *Commonwealth v. Cheney*, 114 Mass. 281; *Commonwealth v. Welch*, 97 Mass. 593; *Commonwealth v. Putnam*, 4 Gray, 16.

If, then, the tenement was the separate property of the wife, this fact, and the rights generally which belonged to the wife as owner of the tenement, and the knowledge or belief of the husband, and the claim of the wife, in reference to these rights,—so far as there was evidence that the conduct of the husband might have been influenced thereby,—were competent evidence for the jury upon the question of his consent.

The defendant's counsel had the right to argue to the jury all questions of law and fact involved in the case, subject to the ultimate decision of the presiding justice upon all questions of law. *Commonwealth v. Porter*, 10 Met. 283. Those provisions of the statutes which directly related to the offense charged, counsel have always been permitted to read to the jury. Whether counsel should be permitted to read other provisions of the statutes to the jury, we think was in the discretion of the presiding justice. The whole law which defined the nature and extent of the right which the husband had to control the conduct of

his wife was not contained in the statutes, and the general rule is that it is within the discretion of the presiding justice whether counsel shall read to the jury statutory or common law from books, or shall state it orally, subject to the correction of the court. *Commonwealth v. Austin*, 7 Gray, 51.

The first two instructions requested apparently involved some questions of law which were not raised by the evidence, and upon which the presiding justice was not required to rule; and the instructions given were correct, unless the last clause be considered as substantially modifying the instruction that the defendant would be responsible if the use of the house by his wife was with his knowledge and consent, and would not be responsible if her use of it was without his knowledge or consent. We are not convinced that this clause was intended to modify the substance of the instructions previously given.

The time covered by the indictment was from and including January 1, 1886, to the day of finding the indictment, which was June 10, 1886. It appears that "the defendant offered evidence to show that, from time to time during five years prior to the finding of the indictment, he had ordered, directed, persuaded, and used all reasonable and practicable means in his power, to prevent his wife from doing any of the acts charged; and that his wife told him the property was hers and she would do as she pleased. The court excluded any evidence on this point at any time prior to January 1, the time covered by this indictment."

The defendant was necessarily somewhat restricted in his defense, as he could not be permitted to testify to private conversations with his wife. The offense charged was a continuing one; and it might well be that he could produce but slight evidence that, during the time covered by the indictment, he had endeavored to prevent his wife from using the tenement for the illegal purposes charged; and yet he might have had ample proof that, within a reasonable time before this, he had in vain done, in good faith, all that he reasonably could to prevent her from using it as she did; and from this evidence the jury might have found that he continued to be of the same state of mind during the time covered by the indictment as before, and that his wife knew this and continued to keep the premises in the same illegal manner against his will. When the question is of the state of mind of a person at or during a particular time, which can only be shown by acts or speech, evidence of what he said or did for a reasonable time before, if it tends to show a permanent or settled state of mind on the subject, has always been admitted. How far back a party shall be permitted to go is largely in the discretion of the presiding justice. The only general rule is that the evidence should be admitted if, under all the facts proved, there can be a reasonable inference that the same state of mind continued to exist up to and during the particular time which is the subject of inquiry. Similar considerations apply to the knowledge or belief of the wife in regard to her husband's assent to or dissent from her course of conduct. We think that the presiding justice erred in limiting the defendant to the time covered by the indictment,

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and for this reason the exceptions are sustained. *Potter v. Baldwin*, 138 Mass. 427.

Exceptions sustained.

M. Bradford SLOCUM

v.

John C. RILEY.

1. In an action against an officer for negligently suffering the **escape** of one whom he had arrested on a writ, the plaintiff can only recover such **damages** (except nominal damages) as he proves he has actually sustained by the wrongful acts of the officer. The debt against the escaped debtor is not the measure of damages, but the **loss in fact sustained**; and the officer may show in mitigation that the debtor was unable to pay.
2. Where the Statute of **Limitations** is set up in bar, the **burden** of proof is on the plaintiff to show both the cause of action and the issuing of the process within the period of limitation.
3. If the **absence** of the maker of a note from the State is relied upon as bringing the cause within the exception of the statute, the burden is upon **plaintiff to prove** that the **absence** was of such a character as that the time of his absence is to be deducted.
4. In such action for escape, the burden being upon plaintiff to prove that he had a **debt** against the escaped debtor which he has lost by the misconduct of the defendant, it is not sufficient for him to show merely that he holds a **note** against such debtor which is **barred** by the Statute of Limitations.
5. In computing the period of limitations, the time of the debtor's absence from the State is not to be excluded, unless it is of such a character as to work a change of his domicile.
6. Under the Practice Act, which requires only facts in avoidance of the action to be set forth in the answer, it was not necessary to set forth a fact available only in mitigation,—as that the note was barred by the Statute of Limitations.

(Bristol — Filed November 25, 1887.)

ON plaintiff's exceptions. *Overruled.*

This is an action of tort brought by plaintiff against defendant for neglect of duty in service of civil process as constable, namely, a writ in favor of plaintiff against one Peter Maynard.

It appeared at the trial that the defendant duly arrested said Peter Maynard, who requested to see counsel, to which defendant assented. Maynard's counsel told defendant that the claim under which process issued was outlawed, and that he would get into trouble if he held Maynard. Thereupon defendant left Maynard at the office of his counsel, and, upon returning to the said office, by the advice of plaintiff's counsel, he found the door locked and could not find defendant Maynard.

One Alexander Liberty testified that he saw Maynard at Fall River the day before his arrest; that he had "a good, nice gold watch," and that he saw quite a lot of money in Maynard's hands, but could not tell how much; and that he had not seen Maynard at Fall River since the day of his arrest.

At the close of the evidence, the defendant's counsel said he was willing that a verdict should be rendered in plaintiff's favor for \$5.93,—being nominal damages of \$1, and \$4.93 for the writ, affidavit for arrest, and fees paid defendant on the writ against Maynard. And he claimed that the jury would not be warranted in including in their verdict damages for the alleged loss of plaintiff's note and claim against Maynard; that, upon the facts and evidence, they would not be justified in finding that said note and claim were not barred by the Statute of Limitations.

Plaintiff's counsel contended, and asked the court to rule, that said facts and evidence would warrant the jury in including in their verdict damages for the loss of said note and interest; but the court ruled otherwise, and directed the jury to return a verdict in plaintiff's favor for the sum of \$5.93, which was done. And plaintiff alleged exceptions.

Further facts are sufficiently stated in the opinion.

Mr. J. M. Wood, for plaintiff:

The plaintiff was not required to prove that the note was not barred by the Statute of Limitations; for that issue was not raised by the pleadings, and the plaintiff would have no notice of such an issue.

See *Thomas v. Waterman*, 7 Met. 227.

The statute being a strict defense, if the party omit to plead it, the court will not relieve him by permitting him to amend by adding the plea.

Ang. Lim. §285, and cases there cited.

The court say, in *West Hoboken v. Syme*, 2 N. J. (L. ed.) 326, 8 Cent. Rep. 614: "The Statute of Limitations should be regarded as a strict defense, and if the party lets it slip the court ought not to relieve him."

St. Louis, I. M. & S. R. Co. v. Brown (Ark.) 4 S. W. Rep. 781.

It was competent for the plaintiff to put in evidence of the reasonable probability of the payment of the note by Maynard, had the defendant committed him, by showing that he had personal property. Plaintiff was not required to prove mathematically that Maynard had over \$20; it was for the jury to say, upon all the evidence, what the probabilities were that the debt would have been paid, and the damage to plaintiff resulting from the escape.

Chase v. Keyes, 2 Gray, 214, 215; *Griffin v. Brown*, 2 Pick. 304-309.

Defendant might show the damage to be less than the debt.

Moore v. Moore, 25 Beav. 8; *Brooks v. Hoyt*, 6 Pick. 468.

Messrs. Braley & Swift, for defendant:

The burden of proof was on the plaintiff to show such damages as he had suffered by the wrongful act of the defendant in permitting the escape of Maynard.

If he had no legal claim against Maynard, then he is entitled to nominal damages only.

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Weld v. Bartlett, 10 Mass. 473; *Laflin v. Willard*, 16 Pick. 64, 67.

The defendant could show, in mitigation of damages, that plaintiff's debt was barred by limitation.

Brooks v. Hoyt, 6 Pick. 468, 469; *Woods v. Varnum*, 21 Pick. 165, 168; *Gallup v. Robinson*, 11 Gray, 20, 25.

The plaintiff's declaration alleged that, at the time of suing out the *capias* writ, Maynard was indebted to him, and that Maynard had lately moved out of the State. The answer, among other things, set up a general denial. The plaintiff was obliged to prove a debt due at the time of the issuing of said writ, if he claimed more than nominal damages. While no question as to the weight of evidence arises on these exceptions, the burden was on him to show that the debt so sued for was an existing obligation, and not barred by the Statute of Limitations.

Pond v. Gibson, 5 Allen, 19, 21; *Hill v. Crompton*, 119 Mass. 376, 381.

The plaintiff, in trying to prove his case for damages, failed to establish his debt as legally existing at the time when the arrest was made.

Absence from the State, of itself, is clearly not sufficient to suspend the operation of the statute.

Maynard had acquired a domicile without the State.

Pub. Stat. chap. 197, § 11; *Langdon v. Doud*, 6 Allen, 423, 425.

The statute operates by mere lapse of time. The deduction is to be made out affirmatively by the plaintiff.

Corliss S. E. Co. v. Schumacher, 109 Mass. 416, 418.

Morton, Ch. J., delivered the opinion of the court:

This is an action against an officer for negligently suffering the escape of one Maynard, whom he had arrested upon a writ sued out by the plaintiff. At the trial the defendant admitted his liability, and the only question presented to us is as to the correctness of the ruling of the court upon the subject of damages. The plaintiff claimed that he was entitled to recover the amount of his debt against Maynard. It appeared that the plaintiff's writ against Maynard was dated on August 20, 1881. In order to prove the debt of Maynard, the plaintiff produced a note signed by Maynard, and described in the writ against him, of the following tenor:

Fall River, March 21, 1874.

Four months after date I promise to pay to the order of M. Bradford Slocum, \$41.07. value received.

Upon the face of the note it was barred by the Statute of Limitations, more than six years having elapsed from its maturity to the date of writ against Maynard. The plaintiff then attempted to show that the running of the Statute of Limitations had been suspended by the absence of the maker from the State. But, in computing the period of limitation, the time of a debtor's absence from the State is not to be excluded unless it is of such a character as to work a change of his domicile. *Collector v.*

2 MASS.

Hailey, 6 Gray, 577; *Langdon v. Doud*, 6 Allen, 423.

The evidence offered by the plaintiff, at most, proved a temporary absence of Maynard, and was insufficient to show that he had changed his domicile from this State to another. In this state of the case, the superior court ruled that the plaintiff was not entitled to recover the face of the note, with interest; and we are of opinion that the ruling was correct. In an action like this, the plaintiff can recover such damages as he proves he has actually sustained by the wrongful act of the officer. *Chass v. Keyes*, 2 Gray, 214. If he shows that the officer has permitted an escape, he is entitled to nominal damages; but, beyond this, he can recover no damages except what he proves he has actually sustained. The debt against the escaped debtor is not the measure of damages, but the loss in fact sustained. Accordingly, it has been repeatedly held that the officer might show, in mitigation of damages, that the debtor was poor and unable to pay the debt. *Weld v. Bartlett*, 10 Mass. 470; *Brooks v. Hoyt*, 6 Pick. 468; *Woods v. Varnum*, 21 Pick. 165.

Upon the issue whether the right of action was barred by the Statute of Limitations, the burden of proof was not upon the defendant. On the contrary, it is settled that, where the Statute of Limitations is set up in bar, the burden of proof is on the plaintiff to show both a cause of action and the suing out of process within the period of limitation. *Pond v. Gibson*, 5 Allen, 19, and cases cited; *Corliss Steam Engine Co. v. Skumacher*, 109 Mass. 416. Inasmuch as the note, on its face, appears to have matured more than six years before suing out process against the maker, if the plaintiff relies upon the absence of the maker from the State as bringing the case within the exception of the statute, the burden is upon him to prove that the absence was of such a character as that the time of his absence is to be deducted in computing the period of limitation. As we have before intimated, there is not sufficient evidence to justify the jury in finding this to be so.

In the case at bar, therefore, the burden being upon the plaintiff to prove that he had a valuable debt against Maynard which he has lost by the misconduct of the defendant, he shows merely that he holds a note signed by Maynard, which is barred by the Statute of Limitations. This does not meet and sustain the burden. It is no answer to say that the defense of the Statute of Limitations is in the nature of a personal privilege, and that possibly Maynard might not avail himself of it. To hold that the jury might, on this ground, find that the note was of value, would be to allow them to supply by the merest conjecture a vital deficiency in the plaintiff's proofs. Indeed the only evidence upon this point is that Maynard did object to the plaintiff's suit against him, on the ground that the debt sued was barred by the Statute of Limitations; and it was for this reason that the defendant released him from arrest. For these reasons we are of opinion that the facts and evidence in the case would not warrant the jury in including in their verdict damages for the loss of said note, and interest; and that the court rightly so ruled.

The defendant contends that the issue of the

Statute of Limitations was not open to the defendant, because not raised in his answer. He was not required to plead it. Under our Practice Act it is necessary to set forth in the answer each substantial fact intended to be relied upon in avoidance of the action. Pub. Stat. chap. 187, § 20.

But in this case the fact that the note was barred by the Statute of Limitations is not a fact in avoidance of the action. It is available only in mitigation of damages. It only goes to show that the plaintiff has not lost a valuable debt, and this to reduce the damages.

Exceptions overruled.

COMMONWEALTH of Massachusetts v.

David C. GODFREY *et al.*

A servant of a proprietor cannot be convicted for keeping a tenement for the illegal sale of intoxicating liquors, on evidence of his sale of intoxicating liquors on the premises, in the presence and under the actual control of his employer.

(Essex—Filed November 22, 1887.)

ON defendant's exceptions. As to Godfrey, *sustained*. As to Murphy, *overruled*.

Complaint against the defendants, Godfrey and Murphy, for maintaining a liquor nuisance.

At the trial testimony was introduced showing that both defendants had been seen in and about the bar-room. It was claimed by the defense that one defendant was in the employ of the other, and the court was asked to rule: "If G. was employed by M., as an assistant, * * * and did not act in the absence of M., nor at any time have sole charge of the premises, he cannot be convicted. That neither defendant can be convicted unless a joint partnership of the premises during some part of the time is shown."

The court declined to charge as asked. The defendants were both convicted, and both excepted.

Mr. H. P. Moulton, for defendants.

Mr. Andrew J. Waterman, *Atty-Gen.*, for the Commonwealth:

The rulings and refusals to rule of the court were correct.

Cards, labels, tags, and signs are admissible in evidence for the purpose for which the card in this case was to be used.

Commonwealth v. McCue, 121 Mass. 358; *Commonwealth v. Trembly*, 119 Mass. 104; *Commonwealth v. Collier*, 134 Mass. 203; *Commonwealth v. Jennings*, 107 Mass. 488; *Commonwealth v. Dearborn*, 109 Mass. 368; *Commonwealth v. Certain Intox. Liquors*, 110 Mass. 500.

The distinction between acts which amount to maintaining the nuisance and those which do not is one of degree, and it was for the jury to say whether, upon all the evidence, Godfrey assisted Murphy in keeping the nuisance to the extent of keeping it himself.

This he may have done, although he was his "assistant on wages," since he may have "emerged from his subordinate position, to aid directly in maintaining it," in some other way than assuming sole control of the premises.

Holmes, J., delivered the opinion of the court:

The jury may fairly have understood that they were instructed to convict the defendant Godfrey, although they should find that Murphy was the sole proprietor, and that the defendant's assistance was only that of a servant, rendered in Murphy's presence, and without exercising any kind of control over the premises. This case therefore falls within *Commonwealth v. Galligan*, 2 Mass. (L. ed.) 261, 8 New Eng. Rep. 801, 144 Mass. 171, which was decided after the ruling excepted to. See also *Commonwealth v. Churchill*, 136 Mass. 148, 157. This is the only exception argued, and is admitted not to affect the defendant Murphy.

Exceptions of Godfrey sustained. Exceptions of Murphy overruled.

John T. DONNELLY

v.

Homer M. DAGGETT, Jr.

1. Whether there is **probable cause** for a prosecution is a **question of law** only when all the facts which are relevant are either agreed or are undisputed.
2. In an action for malicious prosecution, it is also a question of law whether there is **sufficient evidence** of a **want of probable cause** to sustain the burden of proof which is on the plaintiff.
3. If a **person lays before counsel** learned in the law, fully, all the **facts** which he **knows**, and all the facts which he **believes** to be true and can be established by evidence, and he is advised by counsel that they constitute a **legal cause** for a prosecution; and he in **good faith** accepts this advice and follows it,—he is **not liable** to an action for malicious prosecution.
4. **Evidence** which is pertinent to the question of **malice** may have a tendency to show a want of probable cause.

(Bristol—Filed November 23, 1887.)

ON defendant's exceptions. *Overruled.*

This was an action for malicious prosecution.

The declaration contained two counts.

The first count alleged that the defendant did, at a term of the First District Court, holden at Attleborough on the second day of December, 1885, falsely and maliciously, and without any reasonable or probable cause, procure the plaintiff to be complained against; for that the plaintiff, at Attleborough aforesaid, on or about the 1st day of July, 1885, did, with fraudulent intent to place mortgaged personal property beyond the control of the mortgagee, remove and conceal, and did aid and abet in removing and concealing, certain personal property, while a mortgage to said defendant was in force upon the same, and unpaid.

The second count alleged that, at the same place and date, the defendant did falsely and maliciously, and without any reasonable or

probable cause, procure the plaintiff to be complained against; for that the plaintiff, at Attleborough, on the 7th day of January, 1885, did convey by mortgage to said defendant certain personal property, he, the plaintiff, not being the owner of said personal property,—but had hired or leased the same,—without the written consent of the owner or lessor, and without informing said defendant that said personal property was so hired or leased.

On the 28d day of December, 1885, the said complaints were tried in the First District Court of Bristol, at Attleborough, and, after a hearing, the court ordered the plaintiff to recognize in the sum of \$300 on each of said complaints for his appearance before the grand jury; and the grand jury found "no bills," and the plaintiff was discharged.

Two mortgages were given by plaintiff to defendant, covering an organ, rifle, violin, and certain household furniture; and, while the plaintiff was in South Framingham, the furniture was taken away from his house. The plaintiff told the defendant, before the complaints were made, that he understood the mortgaged furniture had been taken by the Providence Furniture Company.

The organ, rifle, and violin had disappeared previous to the making of said complaints, and the defendant did not know where they were, and was unable to find them. Donnelly knew where the rifle and violin were. Daggett demanded their return repeatedly before the complaints were made, but Donnelly neglected to deliver them up or inform Daggett of their whereabouts until long after the criminal complaints were made; but the plaintiff testified that he told the defendant that he had loaned the rifle and violin.

Daggett asked plaintiff to assign to him, in settlement, a suit against the Providence Furniture Company for taking away the goods, so that Daggett could sue the company in his own name, which he did not do. Daggett afterward demanded payment of the money on the mortgages, but as Donnelly did not furnish the money he was arrested.

The defendant called J. E. Pond, Esq., who testified that he was an attorney at law; had practiced law about fourteen years in Attleborough; that the defendant came to him as an attorney at law, with the two mortgages before mentioned, and telling him he wanted him to collect on those mortgages, either by foreclosure and sale under the power, or by getting them from the party himself; that said Pond gave the mortgages to Deputy Sheriff James W. Riley of North Attleborough to hunt up the property; that, from the report made by Riley, said Pond told the defendant the only course he could see was for him to bring a criminal prosecution in the matter, in the manner and form in which the above-mentioned complaints were made; and that he did not obtain any of the facts on which he based that advice from the defendant, except the fact that the mortgages were given, and that all the defendant said to him with regard to the subject was the fact that those mortgages were given.

The defendant replied, to the question whether he had any facts within his knowledge with relation to this matter which were not stated to Mr. Pond, that he had not.

Deputy Sheriff James W. Riley was called by the defendant, and testified as follows: "Mr. Daggett and Mr. Pond called on me to look up some furniture that was mortgaged. I went to look after it, and saw Mr. Donnelly; he told me that this property that was mortgaged to Mr. Daggett,—that Mr. Flint, of Providence, had come and taken it on a lease and carried it away. In a few days afterwards I had a warrant placed in my hands for his arrest. I showed him the warrant; told him what it was for. He said they came and took that property and carried it off. It was leased property. He supposed he could get the money for Mr. Daggett. When he mortgaged the property there, he expected to pay for it; but business had been dull; he could not pay for it."

The plaintiff, in answer to the question whether he told Mr. Riley that the property that was mortgaged was the property of the Providence Furniture Company, testified as follows: "I did not have nothing to say about the furniture. I was talking about the settlement with Daggett. That was all the conversation we had."

At the close of the evidence and before argument, the defendant requested the court to rule that the question whether or not there was probable cause on the facts proven was a question of law for the court, and to rule, as a matter of law, that the evidence did not show want of probable cause.

These requests the honorable judge refused, and the defendant excepted.

The court submitted to the jury the question whether, on the evidence, there was probable cause, and the jury returned a verdict for the plaintiff, \$975, and defendant alleged exceptions.

Messrs. William H. Fox and Frank I. Babcock, for defendant:

Whether there was probable cause was a question of law upon the evidence. The facts are undisputed; so it is a mere question of law which the court must decide.

When material facts are in dispute, the finding upon these facts must be left to the jury, with instructions from the court as to what leading facts or classes of fact, if proved to the satisfaction of the jury, will constitute probable cause.

Stone v. Crocker, 24 Pick. 81, 85; *Kidder v. Parkhurst*, 3 Allen, 398; *Good v. French*, 115 Mass. 201, 203.

The exceptions do not state that the court gave any instruction to the jury as to what facts would, as matter of law, constitute probable cause; but they do say that the court submitted to the jury the question whether, on the evidence, there was probable cause. Can this court infer, in the utter absence of any statement to that effect in the exceptions, and in view of the fact that the court had just declined to rule that the question of probable cause was a question of law upon the facts proven, that the case was given to the jury under any adequate and proper instructions as to what would, in law, constitute probable cause?

Bacon v. Towne, 4 Cush. 217, 241.

Probable cause does not depend on the actual state of the case, in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution. And the bur-

den of proving a want of probable cause is on the plaintiff.

James v. Phelps, 11 Ad. & El. 488, 489; *Bacon v. Towne*, 4 Cush. 217, 239; *Krulevitz v. Eastern R. R. Co.* 1 Mass. (L. ed.) 849, 2 New Eng. Rep. 37, 140 Mass. 573; 2 Greenl. Ev. § 449; *Good v. French*, *supra*.

We submit that the facts show a probable cause in the mind of the plaintiff at the time he made the complaints, or rather fail to show a want of such probable cause; for the burden of proving a want of probable cause is on the plaintiff.

Stone v. Swift, 4 Pick. 389; *Wills v. Noyes*, 12 Pick. 327; *Wilder v. Holden*, 24 Pick. 8, 11; *Olmstead v. Partridge*, 16 Gray, 881, 883; *Allen v. Codman*, 139 Mass. 139.

There is no suggestion in the evidence or in the exceptions that the defendant ought not to have relied upon the advice of his counsel; and the decision of the magistrate in sending the cases to the grand jury is *prima facie* evidence that he had reason to rely upon it and act upon it.

The court was asked to rule that the evidence did not show want of probable cause. If the defendant acted honestly in following the advice of his counsel, and testified truly as to matters not contradicted, there was probable cause. Can it be assumed that any instructions to this effect were given?

It has always been held that actions of this kind are not to be favored. And if it seems probable to this court that injustice has been done to the defendant, the exceptions should be sustained.

Stone v. Crocker, 24 Pick. 84; *Kidder v. Parkhurst*, 3 Allen, 398.

Mr. A. E. Bragg, for plaintiff:

In order to set up the advice of counsel to show probable cause, it is incumbent on the defendant to prove that, before the commencement of criminal proceedings, he made a full and fair statement of all the facts in the case within his knowledge to his attorney, which, according to his bill of exceptions, the defendant failed to do.

White v. Carr, 71 Me. 555; *Stone v. Swift*, 4 Pick. 393.

The defendant's bill of exceptions shows on its face that there was a conflict of testimony between the defendant and his counsel, between the plaintiff and the defendant, and between the plaintiff and Deputy Sheriff Riley, on matters material to the question of probable cause; and, when facts material to the question of probable cause are in dispute, that question is properly one for the jury to decide.

Cooley, Torts, 181; *Driggs v. Burton*, 44 Vt. 125, 147, 148; *Heyne v. Blair*, 62 N. Y. 19, 22; *Hall v. Suydam*, 6 Barb. 83; *Beason v. Southard*, 10 N. Y. 240; *Kidder v. Parkhurst*, 3 Allen, 395; *Cloon v. Gerry*, 13 Gray, 201; *Blachford v. Dod*, 2 Barn. & Ad. 184; *Hinton v. Heather*, 14 M. & W. 184; *Mitchell v. Wall*, 111 Mass. 492, 499; *Burton v. St. Paul, M. & M. R. R. Co.* 19 Am. L. Rev. No. 3, p. 489; *S. C.* 33 Minn. 189; *Casebeer v. Rice* (Neb.), 24 N. W. Rep. 693.

Field, J., delivered the opinion of the court:

Whether there is probable cause for a prosecution is a question of law only when all the

facts which are relevant are either agreed or are undisputed. *Sartwell v. Parker*, 1 Mass. (L. ed.) 303, 1 New Eng. Rep. 751, 141 Mass. 405. It is also a question of law whether there is sufficient evidence of a want of probable cause to sustain the burden of proof which is on the plaintiff. If a person lays before counsel learned in the law, fully, all the facts which he knows, and all the facts which he believes to be true and can be established by evidence, and he is advised by counsel that they constitute a legal cause for a prosecution, and he in good faith accepts this advice and follows it, he is not liable to an action for malicious prosecution. *Olmstead v. Partridge*, 16 Gray, 381.

In the case at bar material facts were in dispute, and it does not appear that a full and correct statement of the facts, as known to the defendant, was laid before counsel. There was some evidence that the defendant believed that the Providence Furniture Company had wrongfully taken away the goods, because there was evidence that the defendant asked the plaintiff for an assignment of his cause of action against that company; and, although this evidence was more directly pertinent to the question of malice, we cannot say that it had no tendency to show a want of probable cause. *Mitchell v. Wall*, 111 Mass. 492; *Moyle v. Drake*, 1 Mass. (L. ed.) 403, 2 New Eng. Rep. 141, 141 Mass. 238; *Bohn v. Kingsbury*, 138 Mass. 538; *Kruleritz v. Eastern R. R. Co.* 1 Mass. (L. ed.) 349, 2 New Eng. Rep. 37, 140 Mass. 573.

Exceptions overruled.

Henry J. LANGLEY

r.

Charles DAURAY *et al.*, Exrs.

In an action for **breach of an agreement to purchase lands**, where it appeared that there were **defects in the plaintiff's title** of such a kind that he was never in a condition to perform his part of the agreement, and **no offer** to carry out the contract was made to the defendants, **nor demand** upon them before bringing suit, the plaintiff is not entitled to recover.

(Bristol—Filed November 23, 1887.)

ON report. *Ruling sustained. Judgment for defendants.*

The facts are sufficiently stated in the opinion. The report ends as follows:

Upon the facts, the defendants contended that plaintiff was not entitled to recover in this action, and the court so ruled, and found for defendants.

The case is reported for the determination of the supreme judicial court. If the ruling is correct judgment is to be entered for defendants. If, upon the facts, the plaintiff is entitled to recover, then the finding in defendants' favor is to be set aside, and a new trial ordered.

Messrs. Morton & Jennings, for plaintiff:

The plaintiff was not obliged to tender a deed before bringing his action. It was sufficient that there was readiness and an offer to perform on his part, and a refusal or neglect on the part of defendants' testator to perform.

Tinney v. Ashley, 15 Pick. 546-552; *Adams v. Clark*, 9 Cush. 216; *Howland v. Leach*, 11 Pick. 151; *Cook v. Doggett*, 2 Allen, 440; *Smith v. Boston & Me. R. R.* 6 Allen, 273; *Carpenter v. Holcomb*, 105 Mass. 280; *Hapgood v. Shaw*, Id. 279; *Curtis v. Aspinwall*, 114 Mass. 187; *Palmer v. Sawyer*, Id. 1; *Wells v. Day*, 124 Mass. 88; *West v. Platt*, 127 Mass. 367; *Lowe v. Harwood*, 139 Mass. 133; *Wheelock v. Tanner*, 39 N. Y. 481; *Canda v. Wick*, 1 N. Y. (L. ed.) 12, 1 Cent. Rep. 12, 100 N. Y. 127.

The fact that plaintiff assented to testator's request for delay does not constitute a waiver by plaintiff of the breach by testator.

Ruff v. Rinaldo, 55 N. Y. 664.

The testator's conduct "excused plaintiff from tendering a deed, or discharging the incumbrances so as to be in a condition to convey a good title."

Curtis v. Aspinwall, 114 Mass. 193; *Carpenter v. Holcomb*; and *Wells v. Day*, *supra*.

Defendants' testator made no objection to plaintiff's title, but placed his refusal on the ground of inability.

Brewer v. Winchester, 2 Allen, 390.

The provisions relating to the opening of a street from Lawton Street to Newhall Avenue, and the working of Newhall Avenue, are conditions subsequent to the delivery of the deed.

Couch v. Ingersoll, 2 Pick. 301; *Merrill v. Emery*, 10 Pick. 507; *Cohell v. Alger*, 5 Gray, 67.

Messrs. T. M. Stetson, Hugo A. Du Buque, and *Edward Higginson*, for defendants:

No right of action ever accrued. The case is one of those styled by the court, of "mutual inactivity."

Brown v. Davis, 138 Mass. 459.

Plaintiff was never prepared to perform presently.

Hapgood v. Shaw, 105 Mass. 279; *Mengis v. Carson*, 114 Mass. 411; *Pomroy v. Gold*, 2 Met. 500.

On the declaration, plaintiff cannot show he was excused from any contract duty, but must proceed in the line declared on.

Colt v. Miller, 10 Cush. 49.

To do otherwise would be variance.

Palmer v. Sawyer, 114 Mass. 13-15; *Murdock v. Caldwell*, 10 Allen, 299; *Pomroy v. Gold*, *supra*.

Nor was there any proof of any refusal. Title must be clear. Both declaration and contract annexed aver that plaintiff was "to sell a tract of land."

Mead v. Fox, 6 Cush. 199; *Brown v. Davis*, 138 Mass. 459; *Swan v. Drury*, 22 Pick. 483; *Pomroy v. Gold*, *supra*; *Packard v. Usher*, 7 Gray, 581; *Callaghan v. O'Brien*, 136 Mass. 383; *Tinney v. Ashley*, 15 Pick. 546. See *Stone v. Fowle*, 22 Pick. 174; *Smith v. Boston & M. R. R.* 6 Allen, 272; *Couch v. Ingersoll*, 2 Pick. 302.

Plaintiff never offered to clear the title. His merely saying he was ready to give a deed is too little.

Gormley v. Kyle, 137 Mass. 189.

That plaintiff could and would have cured the defects and cleared the title, but for vendor's refusal, must appear affirmatively.

Packard v. Usher, 7 Gray, 529; *Cook v. Doggett*, 2 Allen, 439; *Donohue v. Chase*, 139 Mass. 409.

The defects here were incurable.

See *Newcomb v. Brackett*, 16 Mass. 161; *Brown v. Davis*, 138 Mass. 459; *Lowe v. Harwood*, 139 Mass. 183.

Bedard had a cause of action against plaintiff. Plaintiff promised to deliver, not general stock or general value, but a specific *res*, and was bound to be able to do so at the time of any alleged breach.

Smith v. Boston & M. R. R. 6 Allen, 278; *Curtis v. Aspinwall*, 114 Mass. 193; *Park v. Johnson*, 7 Allen, 384; *O'Brien v. Higgins*, 110 Mass. 160; *Kenerson v. Henry*, 101 Mass. 152; *Roberts v. Bassett*, 105 Mass. 409; *Gormley v. Kyle*, 137 Mass. 189.

He never told Bedard of most of the defects. *Spurr v. Andrew*, 6 Allen, 420. See Stat. 1826, chap. 31; *Watupa Reservoir Co. v. Mackenzie*, 132 Mass. 71; *Wells v. Calnan*, 107 Mass. 514.

Plaintiff was never "able or ready" to give good title.

See *Packard v. Usher*; *Park v. Johnson*; and *Brown v. Davis*, *supra*; *Swan v. Drury*, 22 Pick. 485; *Linton v. Hichborn*, 126 Mass. 32; *Brigham v. Townsend*, 119 Mass. 287.

Plaintiff abandoned the contract. This was shown by his cutting wood, selling to Fleet, and creating streets in Fleet's favor (*Johnson v. Reed*, 9 Mass. 81; *Newcomb v. Brackett*, 16 Mass. 161); and this without a word to Bedard. Such voluntary breach is irreparable even by repurchase.

Hard v. Bowers, 23 Pick. 460; *Welch v. Matheus*, 98 Mass. 131; *Old Colony R. R. Corp. v. Evans*, 6 Gray, 35.

Holmes, J., delivered the opinion of the court:

This is an action for breach of an agreement to purchase land, made by the defendants' testator. It is conceded that there were defects in the plaintiff's title, of such a kind that he was never in condition to perform his part of the contract; but it is contended that the testator repudiated the contract altogether, and thus exonerated the plaintiff from attempting to perfect his title, and waived all defects. We think it unnecessary to examine the details of the case, or to consider whether it falls within the principles of *Curtis v. Aspinwall*, 114 Mass. 187, 193, and that class of cases; because not only does it not appear that the testator repudiated the contract, but it appears affirmatively that the plaintiff granted delay at his request ("Langley yielded to Bedard's request for delay"); that the delay granted had not expired at the testator's death; and thus that the testator had never broken or refused to perform his covenant. See *Ballou v. Billings*, 136 Mass. 307, 308.

No offer to carry out the contract was made to the defendants, nor demand made upon them, before bringing this suit. The ruling that the plaintiff was not entitled to recover was correct.

Judgment for defendants.

SAMUEL GOLDENBERG

NATHAN F. BLAKE *et al.*

1. In order to waive the legal service of 2 Mass.

a paper, there must be an intention to waive a known right, or at least a willingness to accept the service as sufficient, without caring to inquire whether it was legally sufficient or not.

2. Where it is doubtful what construction to place upon the language and conduct of a party in reference to a waiver, the question of waiver should be submitted to the jury.

(Suffolk—Filed November 23, 1887.)

ON defendant Daggett's exceptions. *Sustained.*

This is an action of contract to recover against Blake as principal, and Daggett as surety, upon a poor-debtor recognizance, in which the condition was as follows:

"That the said judgment debtor, Nathan F. Blake, within thirty days from the day of his arrest, as above mentioned (September 20, 1886), will deliver himself up for examination before some magistrate authorized to act, giving notice of the time and place thereof in the manner provided by law, and appear at the same time and place fixed for his examination, and, from time to time, until the same is concluded, and not depart without leave of the magistrate, making no default at any time fixed for his examination, and abide the final order of the magistrate therein; and if said judgment debtor, Nathan F. Blake, shall in all respects keep, observe, and perform said condition, then this recognizance is to be void; otherwise to be and abide in full force."

At the trial it was admitted that the defendant Blake was duly arrested, and, on the same day, made before Edward J. Jones, master in chancery, the recognizance alleged in the declaration, with the defendant Daggett as surety; and that thereafter, October 13, 1886, Blake, desiring to take the oath for the relief of poor debtors, applied to said Jones, as master in chancery, to fix a time and place for his examination; and thereupon Jones issued the notice to the plaintiff.

It was further admitted that, at the time and place named therein, said Blake appeared before said master in chancery; and, no one appearing in behalf of the plaintiff, Blake took the oath for the relief of poor debtors in the form prescribed by statute, and was discharged. Before the hearing, the attorney for the plaintiff appeared before the master in chancery, and objected to the master's jurisdiction, on account of the service of the notice, and left before the expiration of the hour.

At the trial the defendant introduced evidence tending to show that the notice of desire to take the oath was handed by Blake to one Moses P. Brown, a constable, on October 14, for service upon the plaintiff; that Brown took the notice and called with it upon the plaintiff at the latter's residence and place of business, in East Boston, between twelve and one o'clock P.M., on October 14; that he then read the notice to the plaintiff, and asked him if he understood it, to which the plaintiff replied, "Yes;" that he then asked plaintiff if he (the plaintiff) would come, to which the plaintiff replied, "Yes;" that Brown and the plaintiff then had

some talk in regard to the plaintiff's claim against Blake, and Brown then left; that the next morning Brown, in preparing his return, found that the service of the notice should have been by copy, and thereafter he prepared a copy, dating the copy October 14, and about eleven o'clock on October 15, the day of the hearing, called with the copy at the plaintiff's residence, and, not finding him in, left it with the plaintiff's wife. Brown then made the return upon the notice.

The plaintiff introduced evidence tending to show that, at the time the constable read to him the notice, the constable asked him if he understood it, and he replied, "Yes;" that the constable asked him if he would come, and he replied, "I will see about it." The plaintiff also testified in cross-examination that he knew Brown was a constable, and that he understood the notice when it was read to him.

At the close of the evidence, upon the plaintiff's motion, the court instructed the jury that there was no evidence for the jury of waiver of the service of the notice in the form provided by law, and directed a verdict for the plaintiff; and thereupon the jury found for the plaintiff. The defendant Daggett alleged exceptions.

Mr. C. T. Russell, Jr., for defendant Daggett:

The present statute provides for service of notice by copy. But from 1787 to 1844 the notice had to be served upon the creditor "by reading it to him."

Rev. Stat. chap. 98, § 3; Acts 1787, chap. 29, § 1; Acts 1844, chap. 154, § 8.

Strict compliance with all the formalities of the statute providing the method of such service has never been required.

Davis v. Putnam, 5 Gray, 321, 327; *Pierce v. Phillips*, 101 Mass. 818; *Salmon v. Nation*, 109 Mass. 216, 218; *Danforth v. Knowlton*, 111 Mass. 76; *Dana v. Carr*, 124 Mass. 397; *Hill v. Bartlett*, Id. 899; *Calnan v. Toomey*, 129 Mass. 451.

Any conduct which shows acceptance of the informal service is evidence of waiver, for the consideration of the jury.

Mutual S. F. Ins. Co. v. Woodward, 8 Allen, 148; *Lord v. Skinner*, 9 Allen, 376; *Pacific Mut. Ins. Co. v. Canterbury*, 104 Mass. 483; *Mt. Washington Glass Works v. Allen*, 121 Mass. 238; *Andrews v. Knowlton*, Id. 816; *Lynde v. Richardson*, 124 Mass. 557; *McInerney v. Samuels*, 125 Mass. 425; *Williams v. Kimball*, 132 Mass. 214; *S. C.* 185 Mass. 411; *May v. Hammond*, 2 Mass. (L. ed.) 199, 3 New Eng. Rep. 739, 144 Mass. 151.

It is competent for the creditor to waive provisions in the recognizance made for his own security, and the debtor has heretofore been held excused from strict performance of them by reason of acts done or agreements made by the creditor.

Vinal v. Tuttle, 2 Mass. (L. ed.) 226, 3 New Eng. Rep. 766, 144 Mass. 14, 16.

The waiver in case at bar is even stronger than in following cases:

Mutual S. F. Ins. Co. v. Woodward, 8 Allen, 148; *Williams v. Kimball*, 132 Mass. 411; *S. C.* 182 Mass. 214.

If the service at that time was, by reason of acceptance or waiver, a sufficient compliance with law, no other service was necessary, and

none other could afterwards be required by the plaintiff.

Mr. John F. Kilton, for plaintiff:

The defendant, at the trial, did not claim that the appearance of the creditor's attorney before the magistrate, for the sole purpose of objecting to the magistrate's jurisdiction on account of the illegality of the service of the notice, and then leaving at once after making said objections, was a waiver of the insufficiency of the service of the notice.

Francis v. Howard, 115 Mass. 236; *Williams v. Kimball*, 132 Mass. 214; *Barber v. Floyd*, 109 Mass. 61.

Can there be a legal waiver claimed when subsequently the person claiming it does an act which expressly says he did not consider it a waiver?

The act done or statement made, relied on as estoppel, must have induced action which would not otherwise have been taken, and the party so acting must be injured by the repudiation of the act done or statement made.

Union Mut. L. Ins. Co. v. Slee, 2 Ill. (L. ed.) 909, 10 West. Rep. 154; *Smith v. Newton*, 88 Ill. 235; *International Bank of Chicago v. Bowen*, 80 Ill. 545.

All of the following elements must be present, in order to constitute a legal waiver or estoppel, viz: "There must have been a false representation or a concealment of material facts; the representation must have been made with knowledge, actual or virtual, of the facts; the party to whom it was made must have been ignorant, actually and permissably, of the truth of the matter; it must have been made with the intention, actual or virtual, that the other party should act on it; the other party must have been induced to act upon it."

See Bigelow, Estop. 4th ed. p. 552, and authorities cited.

A waiver is defined to be an intentional relinquishment of a known right; and there must be both knowledge of the existence of the right and an intention to relinquish it, in order to amount to a waiver.

Cutler v. Roberts, 7 Neb. 4; *Livesey v. Omaha Hotel Co.* 5 Neb. 50.

If the act of the party claiming the waiver was purely voluntary, with full knowledge of the other's rights, and no act or conduct of the latter, beyond mere silence, induced the expenditure or other change of position, there will be no estoppel. "To stand by and see," though enough in a case of concealment, is not enough here.

Bigelow, Estop. 4th ed. p. 639, and authorities there cited.

C. Allen, J., delivered the opinion of the court:

It is conceded that the service of notice upon the plaintiff was not in conformity to the requirement of the statute, and the only question is whether the presiding judge ought to have submitted to the jury the question whether the plaintiff waived due service. Upon consideration of this question, as the case is presented upon the bill of exceptions, we do not find that the conduct and language of the plaintiff was such as necessarily to exclude the supposition contended for by the defendant. Clearly, an actual appearance by

the plaintiff at the time and place appointed for the hearing, without objection to the service, would be a waiver. A promise or a declaration of intention to appear might or might not amount to such a waiver. In order to waive a legal service, there must have been an intention to waive a known right, or at least a willingness to accept the service as sufficient, without caring to inquire whether it was legally sufficient or not. If it should be shown, or if it could fairly be inferred from the appearance of the plaintiff, who was a witness, that he was aware that the service was insufficient, and yet told the constable that he would attend the hearing, it might perhaps be a reasonable inference that he waived a more formal service. If, on the other hand, both he and the officer supposed, at the time the service was made, that it was in due form, and the plaintiff, under that supposition, merely declared a present intention to attend the examination, meaning, however, to stand upon all his rights, and not to waive any objection for insufficiency of service; and if the officer was not thereby misled into omitting to make further service seasonably,—there was no waiver. This, apparently, was the view of the facts which was taken by the court. But we cannot say that the language and conduct of the plaintiff were not susceptible of the other construction, and think the question of waiver should have been submitted to the jury. *Williams v. Kimball*, 135 Mass. 411; *S. C.* 182 Mass. 214; *West v. Platt*, 127 Mass. 367.

Exceptions sustained.

Kate MULCHEY, Admx.,
v.

WASHBURN CAR WHEEL CO.

In an action to recover damages for an injury sustained by plaintiff's intestate in his lifetime, where he was not found until ten minutes after the injury, and was then unconscious, but still alive, and died immediately thereafter, and there was no evidence of conscious suffering by the deceased, or of any expenses or loss incurred before death by reason of the accident,—*Held*, that the plaintiff was entitled only to nominal damages.

(Worcester—November 23, 1887.)

ON report. *Judgment on verdict.*

Action of tort to recover damages for an injury sustained by plaintiff's intestate, an employee of the defendant, in his lifetime, by the breaking of a piston rod of a steam hammer which he was engaged in operating. The evidence showed the hammer was a large and heavy machine with a "ram," which was elevated by steam, and which dropped together with the piston rod, which was attached to it, when the steam was allowed to rapidly escape.

The plaintiff's intestate worked upon a small platform half way up the frame of the hammer, and about six feet from the ground, and managed the lever by which the steam was let off and on and the machine was worked. The

accident consisted in the breaking of the piston rod in the ram, so that, when the steam was let into the cylinder, the piston head and rod blew upward and out, struck the beam overhead, and fell to the ground, injuring the deceased.

Evidence tended to show that the deceased was struck by the falling rod. There was no witness to the occurrence who could give any account of just how it happened. Evidence tended to show that, when the rod was blown out, the steam escaped into the building, filling all that part near the hammer with steam, so that nothing could be seen for the time. All who were near, and testified, ran out at once, and returned as they found it safe to do so. The first persons who saw the deceased went to him after the steam had cleared away. The time was described by witnesses as "five minutes" and "ten minutes" after the steam was shut off. Evidence tended to show deceased was carried into the office of the works, where he died in a few moments, without speaking or recognizing anybody. His bowels were crushed out; some limbs broken; had a slight wound on the temple; was breathing heavily, rather gasping. There was no evidence of consciousness of deceased after the accident.

At the conclusion of the evidence, the court ruled against the defendant's position and objection that there was evidence to warrant the jury in finding that a cause of action accrued to the deceased in his lifetime and survived to his personal representative, but was of opinion that there was no evidence in the case to warrant the jury in finding that the deceased endured any conscious pain or suffering, and that, upon the evidence, the plaintiff was only enabled to recover nominal damages of the defendant, if liable. The defendant, in view of this ruling, submitted to a verdict for nominal damages, the plaintiff excepting to the ruling of the court as to damages. The verdict was accordingly returned for \$1.

Mr. W. S. B. Hopkins, for plaintiff:

It is to be taken as established by the verdict, beyond question, that the death was not instantaneous. The ruling under consideration involves only the question whether he suffered consciously when injured.

During ten minutes no eye saw him through the steam. But when reached he was still alive, though fast dying. He was not dead, like the intestates in the cases *Corcoran v. Boston & A. R. R. Co.* 183 Mass. 504; *Nourae v. Packard*, 138 Mass. 307. He had become unconscious. That is all. When did his consciousness leave him?

We must get the answer to this question largely from the character of his injuries.

The rulings of the judge are inconsistent with each other.

Mr. Frank P. Goulding, for defendant:

It being necessary for the plaintiff to prove that her intestate endured suffering, the ruling was correct upon the question of damages.

Kennedy v. Standard Sugar Refinery, 125 Mass. 80; *Moran v. Hollings*, Id. 93; *Corcoran v. Boston & A. R. R. Co.* 183 Mass. 507; *Tully v. Fitchburg R. R. Co.* 134 Mass. 499; *Riley v. Connecticut R. R. Co.* 185 Mass. 292.

If it can be said the evidence does not exclude the possibility of brief conscious suffering on the part of the deceased, it still falls far short of the necessary proof.

A state of evidence that is equally consistent with two contradictory conclusions of fact tends to prove neither of them.

There is no presumption that a person whose body is crushed by a falling mass of iron or steel, and who is found, five or ten minutes after, exhibiting no signs of consciousness, but gasping and in his death struggle, was ever conscious after he was injured.

Consciousness may be inferred from a state of health and wakefulness. It may be proved by signs indicating it. It may be proved by evidence of experts who, from examination of the body, may state the cause of death, and whether such a cause would leave the victim in possession of consciousness for the time after the injury and before death.

Nourse v. Packard, 138 Mass. 307.

Devens, J., delivered the opinion of the court:

As the report of the presiding judge deals only with the question of damages, the evidence tending to make a case of negligence on the part of defendant, and to show that an action therefor accrued to the deceased in his lifetime, is not stated. It is assumed by the report that it would be sufficient to sustain a verdict. The plaintiff was justified in contending, upon the evidence that the body of the deceased was not found until some ten minutes after the accident, that, although then unconscious, he was still alive, and therefore that his death was not instantaneous. The ruling of the presiding judge was in accordance with this contention; but he further ruled that there was no evidence of conscious suffering by the deceased, and therefore that the plaintiff was entitled only to nominal damages. There was no evidence of any expenses or loss incurred before death, by reason of the accident, which in itself might afford ground for substantial damages. *Bancroft v. Boston & W. R. R. Corp.* 11 Allen, 34. The question is as to the correctness of the latter ruling. The plaintiff deems these rulings inconsistent each with the other. We do not perceive the inconsistency. Instantaneous death, and absence of conscious suffering after a fatal injury, are readily distinguishable, and have been distinguished in our decisions. The continuance of life after the accident, and not insensibility or want of consciousness, is the test by which it is determined whether a cause of action survives. *Hollenbeck v. Berkshire R. R. Co.* 9 Cush. 478. But, as the administratrix can only recover such damages as she can show were sustained by her intestate, if he became instantly insensible and so remained until his death nothing could be recovered for any physical or mental suffering sustained by him. Nothing can be recovered by the administratrix on account of the death which subsequently ensues. *Bancroft v. Boston & W. R. R. Corp.* *supra*.

In *Kennedy v. Standard Sugar Refinery*, 125 Mass. 90, where the intestate fell from a platform twenty feet in height, became unconscious on striking the ground, and, in one aspect of the evidence, remained so until his death, the plaintiff was allowed at the trial, by the judge *at nisi prius*, to recover for mental suffering endured during his fall. It was held in this court that the burden of proof was upon the

plaintiff to show that her intestate actually endured mental suffering during the fall, before she could recover damages on that account; that, as no proof was furnished of any mental suffering during the fall, and as the question whether he did suffer mental terror or distress was purely a matter of conjecture, no damages could be recovered on that account. Whether the person injured endured conscious suffering has sometimes depended upon the question whether his death was instantaneous, but the two inquiries are distinct. *Corcoran v. Boston & A. R. R. Co.* 138 Mass. 507; *Tully v. Fitchburg R. R. Co.* 134 Mass. 499; *Riley v. Connecticut R. R. Co.* 135 Mass. 292. That an adequate cause of the intestate's death, and one which must be held to have produced it, is found in the crushing of his body and disruption of his bowels, must be conceded. Viewed in the most favorable light for the administratrix, this certainly fails to show any conscious pain or suffering on the part of the intestate. When found, although breathing, he was unconscious. Upon this state of facts, even if it were possible that there was some brief conscious suffering, evidence of it is not afforded, and it is left purely conjectural. The presiding judge did not undertake to say, as the plaintiff urges, that, because, ten minutes after the accident, the victim of it could not speak and was unconscious, he might not have passed into that condition after brief but terrible suffering; but said, in substance, that the case did not afford evidence that he had suffered consciously. This was correct.

The plaintiff urges that the case at bar strongly resembles *Nourse v. Packard*, 138 Mass. 307, but the evidence here wanting was afforded in that case. The dead body of the intestate was there found under a heap of loose grain. There was expert testimony that he died from suffocation, and that a person situated as he was would retain consciousness from three to five minutes. It was a reasonable conclusion that he lived in a state of conscious suffering for a few minutes after the fall of the grain upon him which caused his death.

Judgment on verdict.

PUTNAM TOOL CO.

v.

FITCHBURG MUTUAL FIRE INS. CO.

1. **Special agents for an insurance company**, to receive and forward to it applications for insurance, and to receive from it and deliver policies of insurance, and to receive premiums, are **not authorized** to make or to vary contracts of insurance.
2. The word **"agents,"** printed on the calendar furnished to them by the insurance company, if held to be an advertisement of them as general agents, did not give them authority to waive the express provision of the contract of insurance, that notice of removal should be given in writing.

ON plaintiff's exceptions. *Overruled.*
Action upon a policy of insurance against loss by fire. The policy of defendant to plaintiff insured certain specified patterns of plaintiff contained in their storehouse, against loss by fire; and, among other things, the policy stated it should be void if, without the assent of the defendant in writing, "the said property shall be removed, except that if such removal shall be necessary for the preservation of the property from fire."

Subsequently to the patterns being insured, plaintiff decided to remove them to the warehouse of one G., and so informed one Allison, an agent of defendant, who replied: "All right, go and remove them, and I will accept notice for the company. Bring your policy, and I will have them indorsed," etc. Plaintiff did not bring the policy for indorsement, before they were burned, but did remove the patterns.

The whole question is, whether the verbal consent of the agent bound the defendant, the same not being brought to its knowledge and assented to by it.

The court ruled, on such facts and proof, the jury would not be warranted in finding for the plaintiff; and directed a verdict for defendant. To that the plaintiff excepted.

Mr. Frank P. Goulding, for plaintiff:
It was competent for the defendant to make a verbal contract, subsequently to the issuing of the policy, that the provision as to the effect of a removal of the property should not remain in force so far as it concerned a particular contemplated removal.

May, Ins. §§ 23, 24, 70 a, 401 a, 128; Wood v. Rutland & C. A. Mut. F. Ins. Co. 81 Vt. 552; West Chester F. Ins. Co. v. Earle, 38 Mich. 148; Emery v. Boston M. Ins. Co. 138 Mass. 398; Williamsburg F. Ins. Co. v. Cary, 83 Ill. 458; Lycoming County Ins. Co. v. Updegraff, 40 Pa. 811.

If the evidence failed in tendency to show that Lockey & Allison had authority to authorize the removal of insured property, there was evidence of such a holding them out as its agents, by the defendant, as to warrant a finding that the defendant was bound by their act in the premises. It is submitted that the facts were sufficient to require the case to be submitted to the jury.

Taft v. Baker, 100 Mass. 168; Ross v. Bliss, 110 Mass. 268.

The plaintiff had the right to go to the jury upon the question whether the defendant had not, by its acts subsequent to the fire, estopped itself to make the defense on the ground of the removal of the property.

Little v. Phoenix Ins. Co. 123 Mass. 880; Priest v. Citizens Mut. F. Ins. Co. 3 Allen, 602; Heath v. Franklin Ins. Co. 1 Cush. 257; Underhill v. Agawam Mut. F. Ins. Co. 6 Cush. 440.

Mrs. A. Norcross, H. C. Hartwell, and C. F. Baker, for defendant:

It will not be denied but that this removal of the property was such as to make void the policy, unless there was an assent thereto on the part of the defendant.

It is not claimed that the defendant company assented to the removal of the property in any manner, or even knew, or had any occasion to know, of the removal until after the fire, unless its agents had authority to give such assent and did in fact assent.

An agent to receive applications and issue policies is not, independently of any evidence showing that he has a much larger authority than this, empowered to waive conditions so important that the parties have seen fit to incorporate them into their contract. Additional evidence must be offered that the company has held out its agents as possessing such enlarged authority, or that the company has ratified similar acts.

Kyte v. Commercial Union Assur. Co. 2 Mass. (L. ed.) 280, 3 New Eng. Rep. 884, 144 Mass. 48; Tute v. Citizens Mut. F. Ins. Co. 18 Gray, 79; Harrison v. City F. Ins. Co. 9 Allen, 281; Lohnes v. North America Ins. Co. 121 Mass. 489; Shawmut Sugar Refining Co. v. People's Mut. F. Ins. Co. 12 Gray, 585; Walsh v. Hartford F. Ins. Co. 73 N. Y. 5; Mentz v. Lancaster F. Ins. Co. 79 Pa. 475.

The policy, moreover, prescribes that any assent to the removal must be in writing or print; so that, whatever may have been the authority of Lockey & Allison, the assent to the removal must have been in writing or print; none other would be effectual.

Kyte v. Commercial Union Assur. Co. supra; Hale v. Mechanics Mut. F. Ins. Co. 6 Gray, 169; Worcester Bank v. Hartford F. Ins. Co. 11 Cush. 265; Lee v. Howard F. Ins. Co. 3 Gray, 588; Mulvey v. Shawmut Mut. F. Ins. Co. 4 Allen, 116.

There was no written or printed assent to this removal, either by the defendant or anyone in its behalf.

The officers of the defendant had no power, after the loss had happened, to waive the acts of the plaintiff which had voided the policy.

Brewer v. Chelsea Mut. F. Ins. Co. 14 Gray, 203; Eastern R. R. Co. v. Relief F. Ins. Co. 105 Mass. 578; Hale v. Mechanics Mut. Ins. Co. supra.

This case does not come within that class of cases which hold that the officers of an insurance company may waive mere formalities in a preliminary proof of loss.

See *Blake v. Exchange Mut. F. Ins. Co. 12 Gray, 265; Underhill v. Agawam Mut. F. Ins. Co. 6 Cush. 440; Brewer v. Chelsea Mut. F. Ins. Co. supra.*

W. Allen, J., delivered the opinion of the court:

Lockey & Allison were special agents for the defendant, to receive and forward to it applications for insurance, and to receive from it and deliver to the parties policies of insurance, and to receive the premiums thereon. They were not authorized to make or to vary contracts of insurance. The word "agents," printed on the calendar furnished to them by the defendant, does not imply more than this; but if it were held to be an advertisement of them as general agents, it would not impart authority in them to waive the express provision of the contract, that notice of removal should be given in writing. *Kyte v. Commercial Union Assur. Co. 2 Mass. (L. ed.) 280, 3 New Eng. Rep. 884, 144 Mass. 48, and cases there cited; Eastern R. R. Co. v. Relief F. Ins. Co. 105 Mass. 570.*

It is not stated in the report that the officers of the defendant did anything, at the meeting of the adjusters of the companies in which the property was insured, which would amount to

a waiver of the provision in the policy, or estop the defendant from claiming the benefit of it. It is found that the amount of the loss was discussed at the meeting, and that the plaintiffs agreed to a reduction, on the supposition that the defendant would pay its share of the loss; but it is not found that the defendant's officers took part in the discussion or knew that the plaintiffs supposed that the defendant would pay its proportion of the loss, or said or did anything to create that supposition. No facts are found, and none can be inferred, which raise the question whether the officers had at that time authority, expressly or by their acts, to waive the provision.

Exceptions overruled.

Eugene TOMPKINS

v.

Noble H. HILL.

1. If a creditor, having an unliquidated or disputed claim against his debtor, accepts a sum smaller than the amount claimed, in satisfaction of the claim, he cannot afterwards maintain an action for an unpaid balance of his original claim.
2. The plaintiff, having a claim against defendant for one third of the net profits of an enterprise in which they were jointly engaged, requested defendant to render an account, and the latter, in reply, sent a letter enclosing an account in which he credited plaintiff with one third of the profits and charged him \$260 for defendant's services, and enclosed a check for the balance of the account thus stated; the plaintiff credited the check to the defendant on account, but refused to accept it in full satisfaction. *Held, that he is entitled to recover the balance—\$260—due him.*

(Suffolk—Filed December 5, 1897.)

APPEAL by defendant from a judgment of the Superior Court for Suffolk County in favor of plaintiff. *Affirmed.*

The facts are sufficiently stated in the opinion.

Mr. C. X. Sprague, for defendant:

1. The plaintiff knew, or should have known, when he received the letter, account, and check, that the defendant offered the check to the plaintiff in full settlement of the account and all items therein.

Donohue v. Woodbury, 6 Cush. 150; *Sutton v. Hawkins*, 8 C. & P. 259.

2. The plaintiff, having accepted the check, must be considered to have accepted it as was offered; that is, in full settlement of the account and all the items therein.

Tuttle v. Tuttle, 12 Met. 551; *McGlynn v. Billings*, 16 Vt. 329; *McDaniels v. Lapham*, 21 Vt. 222; *Reed v. Boardman*, 20 Pick. 441; *Riggs v. Hawley*, 116 Mass. 596; *Bull v. Bull*, 43 Conn. 455; *Towles v. Healey*, 39 Vt. 522; *Gordon v. Cox*, 7 C. & P. 172; *Cheminant v. Thornton*, 2 C. & P. 50; *Peacock v. Dickerson*, Id. 51.

3. As the account contained an item in dispute, the acceptance of the check was a final settlement of all matters in the account, even though the amount of the check was only that which the defendant admitted he owed.

Hastings v. Thorley, 8 C. & P. 573; *Scott v. Warner*, 2 Lans. 49; *Ogborn v. Hoffman*, 52 Ind. 489; *Potter v. Douglass*, 44 Conn. 541.

4. The principle involved and the policy of the law are the same in this case as in those cases where it is held that, "where a person pays a disputed claim, he cannot recover back the amount paid, though he did not owe it."

Mr. Lauriston L. Scaife, for plaintiff:

Plaintiff always intended to preserve his right to defend against defendant's claim for services. The law will give effect to this intention, unless the result is inequitable to defendant.

Gibson v. Crehore, 3 Pick. 475; *Hunt v. Hunt*, 14 Pick. 884; *Beane v. Kimball*, 1 Allen, 242; *New England J. Co. v. Merriam*, 2 Allen, 390.

As there was no consideration for plaintiff's alleged release of the balance of \$260, the plaintiff has not lost his right to recover in this action.

Harriman v. Harriman, 12 Gray, 341; *Jennings v. Chase*, 10 Allen, 526; *Grinnell v. Spink*, 123 Mass. 25. See *Tuttle v. Tuttle*, 12 Met. 551, 554; *Donohue v. Woodbury*, 6 Cush. 148.

Morton, Ch. J., delivered the opinion of the court:

If a creditor, having an unliquidated or disputed claim against his debtor, accepts a sum smaller than the amount claimed, in satisfaction of the claim, he cannot afterwards maintain an action for the unpaid balance of his original claim. *Tuttle v. Tuttle*, 12 Met. 551; *Donohue v. Woodbury*, 6 Cush. 148. This proceeds upon the ground that the parties have agreed to settle an unliquidated or disputed claim, or, in other words, have agreed to an accord and satisfaction of such claim.

In the case before us, the facts agreed do not show any such accord and satisfaction. The plaintiff had a claim against the defendant for one third of the net profits of an enterprise in which they were jointly engaged. He sent a letter requesting the defendant to render an account. The defendant in reply sent a letter enclosing an account in which he credited the plaintiff with one third of the profits and charged him with an item of \$260 claimed to be due for the defendant's services, and also enclosing a check for the balance of the account thus stated. The plaintiff credited the check to the defendant on account, but he did not agree to accept it in satisfaction of his claim. On the contrary, he forthwith demanded payment of the said amount of \$260 of the defendant, and, upon his refusal to pay, at once brought this suit. The case stands, in legal effect, the same as if the defendant had presented his account and check in a personal interview, and the plaintiff had refused to agree to the account or to accept the check in full satisfaction. It shows no agreement to compromise, or accord and satisfaction; and the plaintiff is entitled to recover the balance due him.

Judgment affirmed.

Robert P. BATH

v.

E. D. METCALF *et al*

1. In an action for false imprisonment, for arresting plaintiff without a warrant, on a charge of felony, if the original arrest was wrongful, those who made it are answerable for the subsequent detention of the plaintiff under it; but if the arrest was upon reasonable grounds of suspicion, the officers who made it cannot be held liable for the subsequent wrongful imprisonment in which they took no part.

2. A verdict may be found against several defendants jointly, some of whom wrongfully arrested plaintiff, and one of whom sent the plaintiff to the station in custody, and one of whom took him there after they had reason to believe him innocent and had concluded to release him,—but only released him when on the train and just before it started,—they having no right to prolong the imprisonment for the purpose of sending the plaintiff out of town.

3. A verdict cannot be found against two or more defendants in such action unless all such defendants participated in the same imprisonment and were parties to a joint wrong.

(Worcester—Filed November 23, 1887.)

ON defendants' exceptions. *Overruled.*

Action of tort against defendants for alleged false imprisonment.

The plaintiff, a traveling salesman selling goods to manufacturers by exhibiting small lots, or samples, was in the gentlemen's waiting-room at Springfield, with his ticket purchased, intending to take the 12.49 P. M. train for Worcester, in company with one Pierce, another salesman belonging in Providence. The plaintiff, at the time of his arrest, had with him three bundles or samples of ordinary size. While seated upon a settee, he and Pierce were approached by four of the defendants.—Hadd and Wheeler, police officers of Springfield, and Thornhill and Butler, detectives,—one of whom seized plaintiff, telling him he wished him to "go and see the chief." Plaintiff had returned from Hazardville about 12 M. that day.

These defendants took plaintiff and Pierce to the station-house in Springfield, where plaintiff exhibited his samples, bank book, pocketbook, letters and clothing, all with his name. There they were locked up by defendant O'Malley, in charge of the lockup that day. About 3 o'clock that day defendant Wright, deputy marshal, was notified of the arrest, and consulted with defendant Pettis, the marshal, whom he told that plaintiff and Pierce were "all right."

Soon after, Pettis came to the room where plaintiff was confined, and had a talk with him, and came again about 5 P. M., promising to release plaintiff and send him to Worcester on the 6.30 P. M. train; but did not release him till 8 P. M., when defendant Graves, by direction of the marshal, accompanied plaintiff to the depot, and did not release him till on board the train.

3 MASS.

The several defendants asked the court, among other things, to rule "that, from the evidence, plaintiff cannot recover against defendants Pettis, Wright, and Graves. If the jury find defendants Hadd and Wheeler, in arresting plaintiff, were acting as police officers of Springfield, plaintiff cannot recover against defendants Pettis, Wright, and Graves;" all of which were refused.

The defendants further asked the court to rule, "If the jury find the arrest was lawful, the subsequent detention of plaintiff would not render any of defendants liable," which the court gave, with the following addition: "That is true, unless the justification for the arrest ceased to exist by the discovery that probable cause did not exist therefor."

On substantially the foregoing, the jury, by order of the court, found in favor of defendant Metcalf; and the jury found in favor of defendant O'Malley, and against defendants Pettis, Wright, Graves, Hadd, and Wheeler.

Messrs. Gideon J. Wells and J. B. Carroll, for defendants:

The case was properly tried upon the assumption that plaintiff, if lawfully arrested upon suspicion, might be properly discharged by the officer having him in custody without bringing him before a magistrate.

McCloughan v. Clayton, 1 Holt, N. P. 478; 8 Eng. C. L. 478, cited in Archb. Cr. Pl. p. 26, note; 2 Hawk. P. C. chap. 12, § 19.

The reasoning of the court in *Phillips v. Fadden*, 135 Mass. 198, and *Brook v. Stimson*, 108 Mass. 520, show that, except for the peculiar provision of the statute under which these arrests were made, proper cause for arrest would have been a justification without the formality of bringing the party arrested before the court. When an officer arrests upon suspicion of felony committed, there can be no good reason why, upon that suspicion being removed, he should not discharge the arrested person out of his custody. It would be a needless hardship upon the arrested person to make it the duty of the officer to detain him after it was found there was no reason so to do, and submit him to the annoyance of detention in the lockup, and the disgrace of being brought into court as a suspected criminal. If this proposition is correct, there is nothing in the case which shows any illegal act on the part of either Pettis, Wright, or Graves. Pettis found the man in the lockup. He was under no obligation to discharge him. It is submitted that he was not bound to take plaintiff's statement of innocence. Finding him in the lockup, brought there by the proper officers, he could not have been held liable if he had let him remain there to be brought before the court. If he could have done this, he certainly cannot be charged as for tort, in yielding to the plaintiff's request in discharging him in the manner he did. There is still less ground for holding either Wright or Graves. Wright was the keeper of the lockup. The plaintiff was put there by proper officers. It was not his duty to inquire as to the propriety of the arrest. He did nothing in detaining them which it was not his duty to do. The court erred in making the duration of the time the officer might lawfully detain the plaintiff, after a legal arrest, to depend upon the finding of the jury at what time they ought

to have been satisfied of the plaintiff's innocence. After a legal arrest is made, it is a matter of discretion with the officer whether to discharge the prisoner or continue the arrest. He cannot be held liable for failing to properly weigh evidence. If Pettis and Wright are not liable for detaining the plaintiff in the lockup, they and Graves cannot be held liable for the continued surveillance of him after letting him out of the lockup. If it was a continuation of the arrest and imprisonment, it was, as above shown, a lawful imprisonment, and it lay in their discretion to terminate it at such time and place as they deemed the interest of the public required. The facts do not show that they, or either of them, were ever satisfied that the plaintiff was innocent. The most that can be inferred is that they thought he might safely be allowed to go if he immediately left the city, and continued his arrest for that reason. Defendant Graves cannot be properly held to a joint liability with Hadd and Wheeler. If he was guilty of any trespass, it was in accompanying plaintiff to the depot. It was no part of the original arrest. It was no part of any plan or scheme. It was an entirely independent act, and he cannot, with any propriety, be held liable for all that had gone before, of which he had no knowledge, and with which he had no connection.

Messrs. Blackmer & Vaughan, for plaintiff:

There was but one imprisonment, and the defendants were jointly liable.

The wrong to plaintiff was one entire wrong, and will be deemed in law to have been one continuous act, from the moment plaintiff was first taken hold of and restrained of his liberty, until he was set free by the officers who took him to the train,—though made up of individual acts of different persons; not a series of separate acts or wrongs. And all who participated in that wrong, from the first of the imprisonment to the last, are jointly liable.

Add. Torts, 802.

By "participating" is meant all who acted themselves in making or producing plaintiff's arrest, or assault upon and detention of him, and all who directed others to act, if such directions were carried out.

Vinton v. Weaver, 41 Me. 430; *Elder v. Morrison*, 10 Wend. 128; Pollak, Torts, *191.

Whether defendants did participate, upon the evidence given, became a question for the jury to determine upon proper instruction. The instruction given was proper, and the refusal to give the rulings asked by defendants was right.

The jury were warranted in finding Hadd and Wheeler participated in the imprisonment and were liable, and that Graves participated, by taking plaintiff to the station and into the car, and remaining upon the car until the train started,—which he did by direction of Pettis, received from Wright (*Vinton v. Weaver*, *supra*); that Wright participated by directing Graves and another officer to "go to the depot" with plaintiff, as Pettis required, which was done; that Pettis participated, by directing Wright to send someone to depot with them, which was done; and from his other acts and conduct (*Green v. Kennedy*, 46 Barb. 16; Pollak, Torts, *191).

The instruction that, "when the reasonable grounds of suspicion fail or are cleared up, the

right to continue the arrest and detention fails also; when probable cause no longer exists, by reason of the arrested person subsequently furnishing proofs or explanations, or evidence of such character as reasonably to remove suspicion, any subsequent continuance of imprisonment is unlawful, and all participating are liable,"—contains a necessary inference that an officer has authority to arrest and detain upon probable cause of having committed a felony.

1 Hale, P. C. 587; *Beckwith v. Philby*, 6 Barn. & C. 636; *Rohan v. Sawin*, 5 Cush. 281.

The fact that defendants are police officers of Springfield does not eliminate from personal liability such of them as took part in the arrest, assault, detention, or any portion of it, if there was no reasonable suspicion that plaintiff had committed a felony.

Holmes, J., delivered the opinion of the court:

This is an action for false imprisonment, against seven defendants, five of whom the jury have found guilty. Of these five, the defendants Hadd and Wheeler made the original arrest, without a warrant, on a charge of felony. We cannot say that the evidence, if believed, showed that Hadd and Wheeler had reasonable grounds to suspect the plaintiff of being a pick-pocket (supposing the justification to be well pleaded). Whether the question was properly one for the jury or was for the court, like other questions of reasonable cause,—compare *Rohan v. Sawin*, 5 Cush. 281; *Davis v. Russell*, 5 Bing. 354; *Hill v. Yates*, 8 Taunt. 182; *Mure v. Kaye*, 4 Taunt. 84; *Hawk*, P. C. bk. 2, chap. 12, § 18; 2 Co. Inst. 52; *Good v. French*, 115 Mass. 201. If the original arrest was wrongful, those who made it were answerable for the subsequent detention of the plaintiffs under it (*Murphy v. Counties*, 1 Harr. (Del.) 143; *Powell v. Hodgetts*, 2 C. & P. 432); and, although the officers who carried the plaintiff in custody from the lockup to the railroad station after they had determined to release him, would have been liable even if the previous imprisonment had been lawful, we do not think this continuation of the unlawful imprisonment so remote that the jury could not properly hold Hadd and Wheeler responsible for it.

The defendant Pettis was city marshal, and, whether responsible for the arrest and detention of the plaintiff in the lockup or not, sent the plaintiff to the railroad station in custody after he had reason to believe him innocent and had made up his mind to release him: the defendant Wright, the assistant marshal, took part in sending the plaintiff to the station; and the defendant Graves was the officer who took him there, only releasing him when on the train and just before it started.

As we have said, we think that, even if the arrest had been lawful, the officers would have had no right to prolong the imprisonment beyond the doors of the lockup, for the purpose of sending the plaintiff out of town, and would have been liable whether they had a right to release him without bringing him before a magistrate or not. See *McCloughan v. Clayton*, Holt. N. P. 478, 480; *Caffrey v. Dragan*, 2 Mass. (L. ed.) 809, 8 New Eng. Rep. 913, 144 Mass. 294; 1 Hale, P. C. 592; *Brock v. Stimson*, 108 Mass. 520; *Phillips v. Fadden*, 125 Mass. 198.

The only purpose for which an imprisonment without warrant can be justified in circumstances like the present is that future proceedings may be instituted in due form. *Rohan v. Sawin*, 5 Cush. 281. *A fortiori* these officers are liable if the original arrest was unlawful, for then the whole detention under it was unlawful. *Aaron v. Alexander*, 3 Camp. 35; *Griffin v. Coleman*, 4 H. & N. 265.

It thus appears that the evidence warranted a verdict against each of the defendants named, and against all of them jointly; and that the instructions asked to the contrary were properly refused.

If the arrest had been made upon reasonable grounds of suspicion against the plaintiff, the defendants Hadd and Wheeler could not have been liable for the subsequent wrongful imprisonment in which they took no part. On the other hand, Graves, at least, was not answerable for the imprisonment before the plaintiff was taken from the police station to the train, as he took no part in that. *Aaron v. Alexander*; and *Powell v. Hodgetts*, *supra*. It follows that a verdict could be found against the five defendants jointly, only for the imprisonment between the lockup and the train, and on the ground that the arrest was wrongful. We regret that it does not appear that these considerations were brought distinctly to the jury's attention. But we cannot say that they were not. The exceptions are only to the refusal of rulings, which were properly refused, and, as the jury were fully instructed that they could not find a verdict against two or more defendants, unless they found that all such defendants participated in the same imprisonment and were parties to a joint wrong, we must assume that the verdict went on the proper ground, and covered the proper time.

Exceptions overruled.

Job T. WILSON

v.

Charles WINSLOW *et al.*

1. Where the decree authorizes the assignee in bankruptcy to sell land to the bankrupt, and he requests that the deed should be made to his wife, the assignee's deed to the wife is valid, and such deed may be delivered to the bankrupt as his wife's agent.
2. The bankrupt cannot maintain an action for trespass to the land, against defendants, who are subsequent devisees of his wife.

(Bristol—Filed November 23, 1887.)

ON plaintiff's exceptions. *Overruled.*

Action of tort to recover from defendants the value of wood taken from, and for trespass upon, land which plaintiff claimed belonged to him by virtue of a certain deed of conveyance of those lands, made and delivered to him by his assignees in bankruptcy under decree of the United States District Court for a money consideration which was paid to the assignees, in which deed his wife, at his request, was named as grantee. This deed was never delivered to

his wife or recorded. The court found for the defendants.

Other facts are sufficiently stated in the opinion.

Mr. J. M. Wood, for plaintiff:

The facts stated include the payment of the \$20,000 to the assignees by Job T. Wilson (the plaintiff), and the court did not find any fact to the contrary. Where the husband pays the consideration, and takes the deed in the wife's name, the wife may be regarded as holding the estate in trust for the husband.

Heath v. Slocum, 3 Pa. (L. ed.) 698, 7 Cent. Rep. 648.

The assignees could not convey a title in this case to the plaintiff's wife, except through a third person, as in case of the husband conveying to wife. It cannot be done in the case of a deputy sheriff.

Stetson v. O'Sullivan, 8 Allen, 321.

Assignees in bankruptcy do not, like heirs and executors, take the whole legal title in the bankrupt's property.

Feld v. Gooding, 106 Mass. 810-812.

The mere fact that plaintiff was the wife's agent to receive the deed does not establish any fact of any negotiations or sale to the wife, or that the plaintiff was her agent, or acted as her agent in purchasing his property.

Messrs. Moreton & Jennings, for defendants:

1. The deed from the assignees to Deborah Wilson vested the title of the *locus* in her.

The exceptions show that the assignees intended the deed as a conveyance to Deborah Wilson, and parted with all control over it when they delivered it to the plaintiff, and that it was made and delivered by them to the plaintiff upon his request. The court found that it had fit words to convey the premises, and that the plaintiff received it as the agent of Deborah Wilson. This was a sufficient delivery to him, and it is immaterial that the deed never was in her manual possession and never was recorded.

Everett v. Everett, 48 N. Y. 218; *Worrall v. Munn*, 5 N. Y. 229; *Doe v. Knight*, 8 D. & R. 348; *Marsh v. Austin*, 1 Allen, 285, 288; *McLean v. Nelson*, 1 Jones, L. (N. C.) 396; *Read v. Robinson*, 6 Watts & S. 329; *Bryan v. Wash*, 7 Ill. 557.

The exceptions do not show that Deborah Wilson was ignorant of the transaction, but only that the plaintiff claimed that she never had actual possession of the deed.

The plaintiff, having induced the assignees to make the deed to Deborah Wilson, and having received it as her agent, cannot now be permitted to impeach the title of her trustees on the ground that the assignees did not make the deed to him or at his written request.

The fact that Deborah Wilson was the wife of plaintiff does not prevent the title from vesting in her.

Holmes, J., delivered the opinion of the court:

This is an action for the conversion of certain wood, and for trespass to land which had belonged to the plaintiff before he went into bankruptcy. The defendants claim title as devisees of the plaintiff's wife, to whom the plaintiff's assignees in bankruptcy conveyed the premises.

The first difficulty which the plaintiff has to encounter in the attempt to maintain an action at law is that, if the conveyance were void, the legal title would be in the assignees, not in him. *Bacon v. Abbott*, 187 Mass. 197. But the conveyance was valid. It was authorized by the decree giving the assignees leave to sell to the plaintiff; as the plaintiff requested that it should be made to his wife, after the price was paid as required by the decree. For the same reason the plaintiff could not set up that the conveyance was against the terms of the assignees' contract with him, if it was, and if that fact would make any difference on a question of legal title. The court found that the deed was delivered to the plaintiff as his wife's agent, and the exceptions state that there was evidence to support the finding. We see nothing in the case requiring discussion. The suggestion that a conveyance by assignees to the bankrupt's wife is void on the same grounds as a sale on execution to the debtor's wife is plainly unfounded. In the latter case the officer has only a power, and the title would pass direct from husband to wife. *Stetson v. O'Sullivan*, 8 Allen, 321. In the former, the assignees have title in themselves.

Exceptions overruled.

John W. FRENCH

v.

CONNECTICUT RIVER LUMBER CO.

1. Plaintiff owned and kept a public house and grounds on Mt. Holyoke, and, in connection therewith, owned a way to the Connecticut River and a landing-place on the river, by which persons had access to his house from the river. Defendant floated a large quantity of logs down the river, and plaintiff's landing was obstructed by sand caused to be deposited there by defendant's boom above, and by his logs stranded there while being floated down the river loose. Held, that defendant had no right to float logs down the river except in rafts.
2. The diminution in plaintiff's business and profits occasioned by obstructing the river at his landing-place, cutting off access to it from the river, and preventing patrons passing from the river to his house, constituted special and peculiar damage to the plaintiff, for which he could maintain an action.
3. Evidence of the diminution in number of visitors to plaintiff's house, and in the receipts and profits from them, caused by the acts of the defendant in obstructing the plaintiff's landing place, was competent upon the question of damages.
4. Plaintiff is not restricted in his recovery to what he expended in removing the obstructions, it not appearing that it was possible for him to have removed them, and he owed no duty to do so.

(Hampshire—Filed November 23, 1897.)

ON defendant's exceptions. *Overruled.*

Action of tort to recover from defendant damages for loss claimed to be sustained by plaintiff by the acts of defendant in obstructing the navigation of Connecticut River opposite plaintiff's premises. The jury found for the plaintiff.

The facts are sufficiently stated in the opinion.

Mr. D. W. Bond, for defendant:

Two questions are raised by the bill of exceptions: one as to the right of the defendant to float logs down the Connecticut River without forming them into rafts, and the other as to the rule of damages.

This right to float logs down the river without forming them into rafts, as claimed by the defendant, is only important upon the question of damages. If the defendant had that right then the floating of logs in that way would not be a violation of law, and therefore was not *prima facie* negligence on the part of the defendant.

Harrigan v. Connecticut R. L. Co. 120 Mass. 580.

As to the rule of damages: Two questions are raised by the exceptions upon the matter of damages. The defendant contends (1) that the damage to the Prospect House business cannot be recovered by the plaintiff; (2) that the damages recoverable are limited to the cost of removing the obstruction.

The damages to the business cannot be recovered.

The acts complained of were done in what is considered in law a public way.

See *Blood v. Nashua & L. R. R. Corp.* 2 Gray, 187.

So far as the acts of the defendant were an interference with the public use of the river, no damage can be recovered by the plaintiff; the only remedy is by indictment.

Blood v. Nashua & L. R. R. Corp. supra; *Lawrence v. Fairhaven*, 5 Gray, 110; *Brightman v. Fairhaven*, 7 Gray, 271; *Harvard College v. Stearns*, 15 Gray, 1; *Willard v. Cambridge*, 3 Allen, 574; *Fall River I. W. Co. v. Old Colony & F. R. R. Co.* 5 Allen, 221; *Blackwell v. Old Colony R. R. Co.* 123 Mass. 1; *Thayer v. New Bedford R. R. Co.* 125 Mass. 253; *Breed v. Lynn*, 126 Mass. 367.

It is only when the defendant interferes with the private right of the plaintiff that a recovery can be had. The plaintiff cannot recover for any damage sustained by him by reason of an obstruction to the navigation of the Connecticut River, caused by the defendant.

Blood v. Nashua & L. R. R. Corp. supra; *Brightman v. Fairhaven*; *Fall River I. W. Co. v. Old Colony & F. R. R. Co.*; *Harvard College v. Stearns*; *Blackwell v. Old Colony R. R. Co.*; *Thayer v. New Bedford R. R. Co.*; and *Breed v. Lynn, supra*.

An obstruction to the navigation of the Connecticut River may have caused a damage to the plaintiff, by reason of its making it necessary for him to use a more circuitous route in the prosecution of his business than he would but for the obstruction; but such damage is of the same kind as that suffered by all who may have occasion to use the river, differing only in degree. "It may affect those near the obstruction much more than the rest of the public, but

the damage sustained by those near it differs in degree only and not in kind."

Blood v. Nashua & L. R. R. Corp. 2 Gray, 187, 140. See also *Brightman v. Fairhaven*, *supra*.

The rule is the same with reference to an obstruction which prevents or hinders others coming to the plaintiff's place of business, and thereby causing an injury to his business.

Willard v. Cambridge, 8 Allen, 574; *Blackwell v. Old Colony R. R. Co.*; *Breed v. Lynn*; and *Brightman v. Fairhaven*, *supra*.

Nothing was done by the defendant upon the plaintiff's property, except as it was done in the Connecticut River. No noise, jarring, or dust was caused by the defendant, which reached the plaintiff's premises, as in—

Wesson v. Washburn Iron Co. 18 Allen, 95. Preventing access to the plaintiff's premises has been held insufficient to support an action.

Willard v. Cambridge; *Blackwell v. Old Colony R. R. Co.*; and *Breed v. Lynn*, *supra*.

If the plaintiff is entitled to recover any damage in this case, it is upon the second ground stated, *i.e.*, because the obstruction is against the front of his land and entirely cuts off his access to the stream, and thereby causes a direct and peculiar injury to his estate.

Haskell v. New Bedford, 106 Mass. 208; *Brayton v. Fall River*, 118 Mass. 218.

The plaintiff is a mortgagor in possession, and cannot recover damages for a permanent injury to the estate.

James v. Worcester, 141 Mass. 361.

When a person wrongfully removed a fence on the line of the highway, and the next year cattle went through and injured the crops, the rule of damage was held to be the cost of repairing the fence.

Loker v. Damon, 17 Pick. 284.

Mr. J. C. Hammond, for plaintiff:

Obstructing the landing-place of a summer resort is a natural and proximate cause of an ensuing loss of business at such summer resort.

Cooley, Torts, 68; *Lyon v. Fishmongers Co.* L. R. 1 App. Cas. 669; *Rose v. Groves*, 5 M. & G. 618; *Jewson v. Moor*, 12 Mod. 262; *Dobson v. Blackmore*, 9 Q. B. 991; *Hartley v. Her- ring*, 8 T. R. 180; *Marsh v. Billings*, 7 Cush. 323; *Doyle v. Dixon*, 97 Mass. 206, 213; *Brayton v. Fall River*, 118 Mass. 218; *Gould, Waters*, §§ 123, 124; *Ang. Watercourses*, § 567; *Stetson v. Faxon*, 19 Pick. 147; *Wesson v. Washburn Iron Co.* 18 Allen, 95.

This cause and this injury are not too remote the one from the other.

The special damage from preventing the plaintiff's access to his property, as distinct from the public right of river travel, is well illustrated in *Lyon v. Fishmongers Co.* L. R. 1 App. Cas. 675.

It is stated in *Cooley on Torts*, at page 77, that proximity of cause has no necessary connection with contiguity of space.

Loss of rent, desertion of a house by tenants, desertion of a public house by guests,—held competent evidence in *Stetson v. Faxon* and *Wesson v. Washburn Iron Co.* *supra*.

The driving of the logs down the river, loose, and not bound in rafts, was negligence, because forbidden by law.

2 Mass.

Harrigan v. Connecticut R. L. Co. 129 Mass. 580, 584; Pub. Stat. 94, § 5; Stat. 1882, chap. 274; Stat. 1883, chap. 88, § 2.

Nothing appears as to any acts done under Stat. 1882, chap. 274, 2; and the driving of logs loose remained an illegal act, as it had been for sixty-six years.

Pub. Stat. 94, § 5; Gen. Stat. 78, § 5; Rev. Stat. 52, p. 806, § 5; Stat. 1814, chap. 150.

The whole was repealed by Stat. 1883, chap. 184, leaving the plaintiff to his common-law rights.

Stat. 1871, chap. 362, does not enact that logs may be run loose, and not bound in rafts, and did not repeal Gen. Stat. 78, § 5.

Stat. 1862, chap. 274, expressly saved existing rights, and left the running of loose logs unlawful unless certain proceedings were had.

Stat. 1863, chap. 183, was not enacted until after the torts complained of were done.

W. Allen, J., delivered the opinion of the court:

The plaintiff owned and kept a public house and grounds on the summit of Mt. Holyoke, and, in connection therewith, owned a way to the Connecticut River and a landing-place on the river, by which persons had access to his house from the river. The defendant floated large quantities of logs down the river. The river, at the plaintiff's landing, was obstructed by sand which was caused to be deposited there by the defendant's boom above, and by logs which were stranded there while being floated down the river, loose, and not in rafts, by the defendant. The plaintiff contended, and the court ruled, that the defendant had no right to float logs down the river except in rafts. We think that this ruling was right. It may be assumed that the Connecticut River is a public highway in which the public have a right to float logs, either singly or connected together, unless prohibited by statute. To sustain the ruling, it must appear that some statute prohibited the floating of logs, except in rafts, for the whole time during which the acts relied on by the plaintiff were committed. The period alleged in the declaration, and to which the evidence applied, is from June 1, 1880, to February 5, 1883. Gen. Stat. chap. 78, § 5, and its re-enactment in Pub. Stat. chap. 94, § 5, was in force until May 27, 1882. That statute provided that "no person shall cause or permit to be driven or floated down the Connecticut River, any masts, spars, logs, or other timber, unless the same are formed and bound into rafts and placed under the care of a sufficient number of persons to govern and manage the same, so as to prevent damage thereby." A similar statute had been in force since 1815, Rev. Stat. chap. 52, § 5 (Stat. 1814, chap. 150). Stat. 1882, chap. 274, authorized the defendant to construct a boom between the confluence of the Chicopee and Connecticut rivers and the ferry next above, which is several miles below the lower of the booms before mentioned. The second section amended Pub. Stat. chap. 94, § 5, so that it should not apply to that portion of the Connecticut River above its confluence with the Chicopee River; the same section provided for proceedings before the county commissioners, by which the damages accrued to the owners of ferries and boats by the floating, by the de-

defendant, of logs, etc., not in rafts, should be determined; and provided that, "in case neither party petitions to have such damages fixed, any person floating or driving masts, spars, or logs upon said river, not formed into rafts and attended as provided in said § 5, shall pay all damages done by said floating or driving." It does not appear that any party has ever petitioned for damages. Stat. 1883, chap. 158, which modifies these provisions, did not take effect until after this action was commenced. To control the plain provisions of these Acts, the defendant relies upon Stat. 1871, chap. 362, by which the Holyoke & Northampton Boom & Lumber Company was incorporated, with authority to construct a boom where the defendant's boom next below the plaintiff's landing-place now is. The defendant contends that this statute gave, by implication, to the Holyoke & Northampton Lumber Company, the right to float logs not in rafts to its boom; and that it has acquired the right from that company. The court below ruled that the defendant could not justify its acts under authority which the former corporation may have had. As we think that this ruling was correct, there is no occasion to consider whether there is any ground for the contention that the statute gave any such right to the Holyoke & Northampton Lumber Company. The only ground on which it is contended that the defendant has succeeded to the right of the other corporation is that it has purchased the property which was used, though not owned, by that corporation; that it has purchased all the capital stock of that corporation, except enough to make stockholders for officers; and that the same persons are officers of both corporations. The court correctly left it to the jury to say whether the acts and business were those of the defendant, or of the other corporation.

The defendant further contends that said statute (1871, chap. 362) and Stat. 1871, chap. 285 (by which certain persons were authorized to construct a boom in the Connecticut River above Turner's Falls), repealed by implication Gen. Stat. chap. 78, § 5, because they required the booms to be constructed so as not to prevent the passage of boats and lumber of other parties, and also required the defendant to boom logs and lumber of other parties. We see nothing in these statutes inconsistent with the provision of the General Statutes; and the facts that the section of the General Statute remained unrepealed, and was re-enacted in the Public Statutes, and that Stat. 1882, chap. 274, when authorizing the construction of a boom lower down the river by the defendant, recognized the section as in force and applicable to the defendant, by amending it, and making new provisions, seem conclusive against the position taken by the defendant. See *Harrigan v. Connecticut R. L. Co.* 129 Mass. 580.

The plaintiff sought to recover for special and peculiar damages occasioned to him by the public nuisance. The verdict must have been rendered on the first count, of the amended declaration; and the special damages are alleged in the amendment to that count, as follows: "And thereby the way and access from said river thereto" (to the plaintiff's landing place) "was hindered and obstructed, and divers persons who would otherwise have resorted to the plain-

tiff's house and grounds, to the profit of the plaintiff, were hindered and prevented from so doing; and the plaintiff was injured in the use of his landing-place, and in the use of his Prospect House and grounds, for the purpose for which they were constructed and used." All the damages found by the jury were for damages to the business of the plaintiff. This renders immaterial the question whether the plaintiff, as mortgagor, could recover damages for diminution of the value of the mortgaged estate by the nuisance. The diminution in the plaintiff's business and profits occasioned by obstructing the river at his landing-place, cutting off access to it from the river, and preventing patrons from passing from the river to his house, constituted special and peculiar damage to the plaintiff, for which he could maintain an action. *Stetson v. Faxon*, 19 Pick. 147; *Harvard College v. Stearns*, 15 Gray, 1; *Blackwell v. Old Colony R. R. Co.* 122 Mass. 208; *Brayton v. Fall River*, 118 Mass. 218; *Haskell v. New Bedford*, 108 Mass. 208; *Lyons v. Fishmongers Co.* L. R. 1 App. Cas. 662; *Wilkes v. Hungerford Market Co.* 2 Bing. N. C. 281; *Rose v. Groves*, 5 M. & G. 618.

Evidence of the diminution in the number of visitors to the plaintiff's house, and in the receipts and profits from them, caused by the acts of the defendant in obstructing the plaintiff's landing-place, was competent upon the question of the loss occasioned to the plaintiff in his business.

The court properly refused to rule that the plaintiff could recover only for what he had expended in removing the obstructions. It did not appear that it was possible for the plaintiff to have removed them. Certainly he owed no duty to the defendant to remove the logs and sand with which the defendant continued to obstruct the river.

Exceptions overruled.

John O'CONNELL

v.

Patrick O'LEARY.

1. An action under Pub. Stat. chap. 100, § 24, to recover the penalty for sales of liquor to a minor, is barred, after a year, by the statute limiting actions for penalties, to one year. Pub. Stat. chap. 197, § 4.
2. Sales to children who were only messengers of their mother, and who delivered the whiskey to her, drinking none of its contents, are not such sales to a minor as will entitle the plaintiff to recover the penalty under the statute.

(Bristol—Filed November 23, 1887.)

ON defendant's exceptions. *Sustained.*
Action of tort to recover damages for causing the intoxication of plaintiff's wife, under the provisions of Pub. Stat. chap. 100, § 21, and to recover forfeitures of \$100 under § 24, given to a parent for sales or gifts of intoxicating liquor to minor children, commenced December 15, 1885.

There were 164 counts alleging sales on con-

secutive days from May 21, to November 15, 1884, to a minor son of plaintiff, and 323 counts alleging sales to a minor daughter of plaintiff on the same days, and 100 counts alleging gifts and deliveries to them,—the last not relied on at the trial; also one count that on each and every day of that time defendant sold intoxicating liquor to this minor daughter, claiming \$17,800; and a similar count, covering the same time, alleging sales to the son, and claiming a like sum.

Defendant denied each allegation and pleaded the Statute of Limitations; that the cause of action did not accrue within one year before suing out of plaintiff's writ; that the action was not commenced within one year next after the alleged offenses were committed.

It was admitted, on trial, defendant was licensed to sell intoxicating liquors at a certain place; that all the sales of liquor were made at that place by defendant or his agent during the time specified.

The testimony showed that defendant or his barkeeper made sales of intoxicating liquors to one of plaintiff's minor children, two or three times each day, during the time specified (except six days), being sent for it by the mother, to whom it was always delivered; she generally furnished the money to pay for it at the time; the children, or either of them, not making any use of it. The defendant put in evidence tending to show that about May 22, 1884, the plaintiff requested defendant to supply his family with liquor when called for, and he would pay for it, and this request was not countermanded till November 15, 1884; whereupon defendant asked the court to rule: "If such authority was given and was relied upon, plaintiff could not recover on either count." The court ruled, without objection by plaintiff, that "such fact found and relied upon would prevent recovery on the count claiming damages for causing intoxication of the mother; but would not avail defendant, nor affect plaintiff's right to recover for sales to the minor children;" to which defendant excepted.

The jury were directed to find a general verdict, and, if for plaintiff, to state the sum. They found a verdict for \$6,800, saying they found nothing for plaintiff on the certain count referred to; to all of which defendant excepted.

Mr. J. Brown, for defendant:

Pub. Stat. chap. 197, relative to the limitation of personal actions, provides by § 4 as follows: "Actions and suits for penalties or forfeitures under penal statutes, if brought by a person to whom the penalty or forfeiture is given in whole or in part, shall be commenced within one year next after the offense is committed, and not afterwards."

As it was admitted, and the evidence showed, that all the offenses declared on had been committed prior to November 16, 1884, and the writ was dated December 15, 1885, this action was not brought within one year next after the offense was committed.

Barnicoat v. Follis, 8 Gray, 184.

In this case, the court erroneously ruled that such transactions as were testified to were such sales as would entitle the plaintiff to recover the forfeiture he sought. The evidence showed that the child in each instance was sent to the defendant's licensed premises to buy intoxicat-

ing liquor for the mother's use; that it was delivered to the child there by the defendant or his agent, and the child carried it to the mother, the child making no use of it for itself. It has been held in a criminal case that such facts would not support a charge of sale to a minor, under Stat. 1875, chap. 99, § 6, cl. 4.

Commonwealth v. Lattinville, 120 Mass. 885; *St. Goddard v. Burnham*, 124 Mass. 578; *Commonwealth v. O'Leary*, 1 Mass. (L. ed.) 820, 8 New Eng. Rep. 198, 148 Mass. 95.

If the Legislature had intended that a parent could recover the \$100 penalty for a sale to a minor for the use of either of them, or for any other person, it would have been incorporated by amendment, in some form. The omission to do so, therefore, leaves § 24 to be governed by the same principles of law as laid down in *Commonwealth v. Lattinville*, *supra*. The decision in *Commonwealth v. O'Leary*, *supra*, in no way affects this case.

The court also erroneously ruled that, if the plaintiff told the defendant to supply intoxicating liquor to his wife and family whenever they send for it, it would not avail the defendant nor affect the plaintiff's right to recover on the counts for sales to either of the minor children. It is a familiar rule of law that a party cannot take advantage of his own wrong.

Folger v. Washburn, 137 Mass. 60.

Messrs. E. Avery and T. F. Desmond, for plaintiff:

The principal question presented by the bill of exceptions in this case is whether the plaintiff's right of action is barred by statutory limitation.

Pub. Stat. chap. 197, § 4.

The determination of that question involves the consideration of two propositions, viz.: (1) What is the true construction of the words "actions and suits for penalties or forfeitures under penal statutes?" (2) whether this action is such an "action" or "suit."

In the absence of express statutory authority, this punishment can be inflicted only by proceedings in the name of the Commonwealth,—in a criminal action or prosecution.

Smith v. Look, 108 Mass. 140; *Nye v. Lamphere*, 2 Gray, 297.

Under authority of the statutes of this Commonwealth, such punishment may be inflicted by courts in the exercise of civil jurisdiction.

Pub. Stat. chap. 217, § 2.

Consequently, actions upon penal statutes are usually classed as penal actions, prosecuted in the name of the Commonwealth, whether civil or criminal; popular actions, prosecuted by any such person or persons as will sue therefor.

Seward v. Beach, 29 Barb. 289; 1 Wait, L. & Pr. 757.

They must be brought in the county where the offense was committed.

Pub. Stat. chap. 161, § 11.

Prior to Rev. Stat. chap. 187, § 4, it was necessary, in civil as well as criminal pleadings, to allege that the offense was committed *contra formam statuti*.

Haskell v. Moody, 9 Pick. 162; *Nichols v. Squire*, 5 Pick. 168; *Levy v. Gowdy*, 2 Allen, 821.

Whatever the form of action, all penal statutes are to be construed strictly.

Potter's Dwarr. p. 246; *Cleveland v. Norton*, 6 Cush. 380.

"A *qui tam* action is a well-established remedy known to and regulated by the common law, as a mode of securing the execution of penal laws where it is expressly given by statute, and has its own rules."

Wheeler v. Goulding, 18 Gray, 542.

No action for a penalty can be maintained by a common informer unless power is given to him for that purpose by the statute.

Colburn v. Swett, 1 Met. 284; *Commonwealth v. Connecticut R. R. Co.* 15 Gray, 448.

Even then the Commonwealth may sue for and take the whole.

Commonwealth v. Howard, 18 Mass. 221.

"It is a settled and necessary rule in the administration of the criminal law that, where there are concurrent remedies and modes of proceeding to recover penalties, the first in time is first in right, and supercedes all others."

Commonwealth v. Fuhey, 5 Cush. 411.

Pub. Stat. chap. 217, § 2, "relates to fines and forfeitures to be prosecuted for in the forms adapted to criminal proceedings, where the suit is brought by the Commonwealth or by a common informer."

Wiley v. Yale, 1 Met. 554.

"In legislative proceedings a forfeiture is always to be regarded as a punishment inflicted for a violation of some duty enjoined upon the party by law."

Maryland v. Baltimore & O. R. R. Co. 44 U. S. 8 How. 584, 547 (11 L. ed. 714).

"The term 'penalty' involves the 'idea of punishment; and its character is not changed by the mode in which it is inflicted, whether by a civil suit or a criminal prosecution."

United States v. Chouteau, 109 U. S. 611 (26 L. ed. 246).

"The word 'fines' means forfeitures and penalties recoverable in civil actions, as well as pecuniary punishments inflicted by sentence."

Hanscomb v. Russell, 11 Gray, 875.

"We are to ascertain the true meaning of the Legislature in the use of the words of its statute; and we are to consider it, when legislating upon subjects relating to courts and legal process, as speaking technically, unless from the statute itself it appears that it made use of the terms in a more popular sense."

Merchants Bank v. Cook, 4 Pick. 411; Pub. Stat. chap. 8, § 3, cl. 3; *Commonwealth v. Stahl*, 7 Allen, 804; *Howard v. Harrie*, 8 Allen, 298; *Sparhawk v. Sparhawk*, 10 Allen, 156; Rev. Stat. chap. 2, § 6, cl. 1; *Bacon v. Charlton*, 7 Cush. 588; *Oakes v. Munroe*, 8 Cush. 287.

"In penal actions, as in the case of the accusation of a crime, strict proof is necessary, and we ought not to relax that rule unless when the Legislature has so enacted."

Dyer v. Best, 14 W. R. 836.

We submit, therefore, that "penalties or forfeitures under penal statutes" are pecuniary punishments for offenses, inflicted by courts in the exercise of civil or criminal jurisdiction.

In pursuance of a similar policy the Legislature of Massachusetts, nearly a century ago, adopted "An Act for the Ease of the Citizens, Concerning Actions upon Penal Statutes," providing that "all actions, suits, bills, or informations which shall hereafter be had, brought, sued, or commenced for any forfeiture, upon any penal statute, made or to be made, the benefit whereof, is or shall be, by said statute,

limited, in whole or in part, to the person or persons who shall inform and prosecute in that behalf, shall be had, brought, sued, or commenced * * * within one year next after the offense committed or to be committed against said statute; and, in default of such pursuit, then the same shall be had, brought, or prosecuted for the Commonwealth, at any time within two years after the offense committed."

Stat. 1788, chap. 12, § 1.

Excepting the provision as to "bills or informations" (omitted in subsequent statutes), this statute, stripped of unnecessary verbiage, is the law of this Commonwealth to-day.

Rev. Stat. chap. 180, § 21; Gen. Stat. chap. 155, § 20; Pub. Stat. chap. 197, §§ 4, 5.

The limitation of all actions by indictment ("bills or informations"), except for murder, is six years.

Pub. Stat. chap. 213, § 25.

Thus we have the limitation of all penal actions, not otherwise specially limited, whether the proceedings are by civil or criminal prosecution.

"The defendant, having obtained a verdict, is not now aggrieved by the ruling against him at the trial; and sustaining his exceptions could be followed by no judgment in his favor."

Hayden v. Stone, 112 Mass. 352; *Cushing v. Boston*, 124 Mass. 487.

The next question to be considered, therefore, is whether Pub. Stat. chap. 100, § 24, is a penal statute.

"A statute may be penal although a part of, or the whole, penalty is given to the party injured."

Atlas Bank v. Nahant Bank, 8 Met. 563; *Suffolk Bank v. Worcester Bank*, 5 Pick. 100.

But "a penal statute may also be a remedial law, and a statute may be penal in one part and remedial in another."

Potter's Dwarrr. p. 75.

"In one sense every law imposing a penalty or forfeiture may be deemed a penal law; in another sense, such laws are often deemed and truly deserve to be called remedial. The judge was therefore strictly accurate when he stated 'it must not be understood that every law which imposes a penalty is therefore, legally speaking, a penal law.'

Taylor v. United States, 44 U. S. 8 How. 197 (11 L. ed. 559).

"In the construction of a statute all its language is to be regarded, not only for the purpose of showing the general purpose and object, but also to ascertain if any private or special wrong is to be remedied, or injury to be redressed."

Moran v. Goodwin, 180 Mass. 158.

That the Legislature of this Commonwealth considered the sale or gift of intoxicating liquors to minors as a private or special wrong to be remedied, or an injury to be redressed, is beyond doubt.

The moment it was held by this court (*Commonwealth v. Lattinville*, 120 Mass. 385) that, under a proper construction, "the mischief which Stat. 1875, chap. 99, § 6, cl. 4, was designed to prevent, was the possession of intoxicating liquor by a minor for his own use and subject to his own control," the Legislature took immediate steps to rectify the error, and by words of unquestionable import, in the form

of an amendment, declared its intention thereafter to prevent the possession of intoxicating liquor by a minor,—“either for his own use, the use of a parent, or of any other person.”

Stat. 1880, chap. 289, § 3.

That Pub. Stat. chap. 100, § 24, does not provide the punishment for the offense committed by a sale or gift of intoxicating liquor to a minor, is apparent.

“Whoever violates any provision of his license or of this chapter shall be punished,” etc. “The mayor and aldermen of cities and the selectmen of towns shall prosecute to final judgment all violations of this statute.”

Pub. Stat. chap. 100, § 18.

No man can be twice punished for the same offense.

A conviction under § 18 would be no bar to an action under § 24. If it were, the defendant would have pleaded a former conviction in bar of the counts for alleged sales to Jane and William O'Connell on the 1st day of June, 1884.

Commonwealth v. O'Leary, 1 Mass. (L. ed.) 820, 8 New Eng. Rep. 198, 143 Mass. 95.

“It was the plain purpose of the Legislature to make a person, who, like the defendant, keeps a place for the sale of intoxicating liquor, responsible to the parent or guardian, if he, or his agent or servant in his employ, sells liquor to a minor.”

Roberts v. Burnham, 124 Mass. 277.

“The liability is incurred equally by any person, licensed or unlicensed, who sells or gives intoxicating liquor to a minor” contrary to the express provisions of the statute.

McNeil v. Collinson, 128 Mass. 318.

We submit, therefore, that Pub. Stat. chap. 100, § 24, is a remedial statute, “giving to a parent or guardian a mode of remedy for a wrong where he had none, or a different one, before.”

Consequently this action is a remedial and not a penal action or suit, and is not barred by the statute which limits the bringing of actions and suits for penalties or forfeitures under penal statutes.

When a right of action is given by statute to any private person in his own name, “generally such right of action appears to be given as an additional protection to private rights, rather than as a punishment for a public offense.”

Smith v. Look, 106 Mass. 141.

Pub. Stat. chap. 100, § 25, is clearly not a penal statute.

The language itself imports that the relations of husband and wife, parent and child, guardian and ward, employer and employed, are valuable relations; that they are themselves the subject of injury; that those relations may be so affected by the excessive use of intoxicating liquors as to constitute a substantial injury; and that the extent of such injury is a proper subject of judicial inquiry.

Moran v. Goodwin, 180 Mass. 158.

The \$100 which, under Pub. Stat. chap. 100, § 24, may be recovered for each offense, is not strictly a forfeiture, but is rather in the nature of fixed or liquidated damages, which may be recovered in an action of tort by the party injured.

Day v. Frank, 127 Mass. 497.

The ruling of the court, therefore, that Pub. Stat. chap. 197, § 4, did not “constitute a legal

bar to any cause of action, set forth in any count of the declaration and relied on by the plaintiff,” was right.

The court ruled that “the sales relied on by the plaintiff were such sales to a minor as would entitle him to recover if the evidence was believed.”

It was admitted that the defendant had a first and fourth class license to sell intoxicating liquors, “and all the sales proven were made by the defendant or his agent on the licensed premises during said period.”

Upon this evidence said sales were made to the minor “for the use of a parent.”

Pub. Stat. chap. 100, § 9, cl. 4.

Such sales are prohibited equally with sales for the use, and subject to the control, of minors themselves.

“In common speech, as well as by the words of the statute, the delivering of intoxicating liquors to a minor, under a contract of sale made with him as an agent of a disclosed or undisclosed principal, is a sale to the minor for the use of the principal. * * * As it is the same offense,—whether the liquor was sold for the use of the minor, or for the use of his parent, or for any other person,—and the gist of the offense is the unlawful sale of intoxicating liquor to a minor for the use of any person, we are of the opinion that the person for whose use the sale was made need not be alleged.”

Commonwealth v. O'Leary, 1 Mass. (L. ed.) 820, 8 New Eng. Rep. 198, 143 Mass. 95.

The ruling of the court upon this point was therefore right, and affords no ground of exception to the defendant.

It was objected by the defendant that, if each of the sales proved during the whole period were precisely alike in all matters that constitute a sale, so that the jury could make no distinction between them as a matter of fact, then they have no right to select certain of the sales to be applied to the fifth count exclusively, and certain of the other sales to the counts for sales to the minor children.

“Even if the evidence disclosed but one series of facts or transactions, and both counts had relation to the same house and time, and the same acts done in said house, the defendant could not demand that the prosecuting officer elect on which of the two counts he would go to the jury.”

Commonwealth v. Ismahl, 184 Mass. 201.

“It would be an extraordinary weakness of the law if a party could plead one violation of the law as an exemption from liability for other and different violations. It will be observed that more than one penalty cannot be recovered by reason of the commission of a single act, but such particular penalty is to be recovered only upon proof of the commission of a separate and distinct act or series of acts, differing from each other and independent of each other.”

McNeil v. Collinson, 180 Mass. 167. See *Kennedy v. Saunders*, 1 Mass. (L. ed.) 562, 2 New Eng. Rep. 512, 143 Mass. 9.

It was within the discretion of the court to allow the paper (duly filed in the case) to go to the jury.

Burghardt v. Van Deusen, 4 Allen, 374; *Commonwealth v. Wingate*, 6 Gray, 486; *Commonwealth v. Dow*, 11 Gray, 817.

The ruling that express authority from the plaintiff to the defendant to make the sales to plaintiff's children was not open to defendant under his answer, was right.

"The evidence offered by the defendant was to prove a substantive fact intended to be relied on by the defendant in avoidance of the action, and should therefore, under the provisions of the statute, * * * have been set forth in the answer. He, not having done so, has no right, upon the pleadings, to justify or avoid his acts under any authority derived from the plaintiff."

Snow v. Chatfield, 11 Gray, 12. See *Levi v. Brooks*, 121 Mass. 501; *Ward v. Bartlett*, 12 Allen, 419; *Hollenbeck v. Rowley*, 8 Allen, 478; *Multry v. Mohawk Valley Ins. Co.* 5 Gray, 541; *Reed v. Scituate*, 7 Allen, 141.

Holmes, J., delivered the opinion of the court:

This is an action under Pub. Stat. chap. 100, § 24, to recover for alleged sales of liquor to the plaintiff's minor son and daughter. The section is as follows: "Whoever, by himself or his agent or servant, sells or gives intoxicating liquor to a minor * * * shall forfeit \$100 for each offense, to be recovered by the parent or guardian of such minor in an action of tort." It was admitted that the sales took place more than a year before action brought. The court ruled that the action was not barred by Pub. Stat. chap. 197, § 4, limiting to one year actions for penalties or forfeitures under penal statutes, if brought by the person to whom the penalty or forfeiture is given. The defendant excepted.

The plaintiff's evidence showed that the children were only messengers of their mother; that they delivered the whiskey to her, drinking none of it themselves; and that sometimes the mother sent the money to pay for it, and sometimes the whiskey was charged—it did not appear to whom. The court ruled that the sales were such sales to a minor as would entitle the plaintiff to recover under the statute, if the evidence was believed. To this ruling, also, the defendant excepted.

We are of opinion that both exceptions must be sustained.

The statute reads, "shall forfeit * * * for each offense." These words are technical, and are to be construed according to their appropriate meaning. On their face they impose forfeiture—that is punishment—for an offense; not indemnity for a private wrong. The main purpose is manifestly to deter. Who shall have the money when recovered depends on construction, and, if the statute means indemnity, it leaves the question doubtful whose supposed wrong is to be made good. Sufficient provision for private injury would seem to be made by §§ 21, and 25, of the same chapter, where it is left to the jury either wholly or within limits to make the damages proportional to the harm. It is not readily to be supposed that the Legislature would undertake to declare an unchangeable sum the proper indemnity in all cases, even if, for extraordinary reasons, it might do so by language which could bear no other meaning. *Morris v. Crocker*, 54 U. S. 18 How. 429, 440 (14 L. ed. 210).

The sum is to be recovered by the parent or

guardian in an action of tort. But it is admitted by the plaintiff that an action for a penalty may be limited to certain persons. Indeed the Statute of Limitations seems to contemplate that case. Pub. Stat. chap. 197, § 4. See *Atlas Bank v. Nahant Bank*, 3 Met. 581, 588; *Cumberland & O. C. Corp. v. Hitchings*, 57 Me. 148. And the Legislature may as well make the sum recoverable in one form of action as in another. *Wilson v. McLaughlin*, 107 Mass. 587; Pub. Stat. chap. 17, § 2; *Commonwealth v. Connecticut R. R. Co.* 15 Gray, 447; *Smith v. Look*, 108 Mass. 139, 141.

Two cases cited for the plaintiff require notice. *Roberge v. Burnham*, 124 Mass. 277, decided that, in actions like the present, the jury need not be instructed that they must be satisfied beyond a reasonable doubt. The attempt to measure the degree of certainty necessary to a verdict, like the attempt to fix the quantity of evidence, although familiar to the civilians, is not consonant to the general practice of our law, and may well be confined to the limits set by precedent. There is no reason for making such an attempt in an action for money, which is so far remedial that it is given by or on behalf of a party aggrieved, even though the sum sued for is a penalty. A penal statute imposing a forfeiture may be remedial in a certain sense. See *Commonwealth v. Fahey*, 5 Cush. 408, 411. In *Day v. Frank*, 127 Mass. 497, it was held that the bond of a license under Stat. 1875, chap. 99, § 9 (Pub. Stat. chap. 100, § 13), conditioned to pay all damages recovered under the Act, applied to sums recovered under a section (§ 15) like the one now sued upon. The section (§ 9) fixed the form of the bond, and, at the same time, interpreted it by providing that it should be for all costs, damages, and fines incurred by violation of the provisions of the Act. Clearly the bond was intended to recover forfeitures to a party aggrieved, even if they are not described accurately in the opinion as liquidated damages.

We are of opinion that this is an action for a penalty or forfeiture within Pub. Stat. chap. 197, § 4, and that it is barred by that section; and we do not regard the case mentioned as inconsistent with our decision.

We are also of opinion that the second ruling which we have mentioned was wrong. If there had been any suggestion that the sales purported to be sales to the children as principals or as agents of undisclosed principals, there might have been a question for the jury. But, on the evidence, it could not have been assumed against the defendant that they did purport to be such sales; and evidently the ruling proceeded, as did the argument for the plaintiff before us, on the opposite assumption, that it was known to the defendant that the children were buying for their mother. In *Commonwealth v. Lattinville*, 120 Mass. 385, it was held that a sale to a minor for his parent's use was not within Stat. 1875, chap. 99, § 6, cl. 4; and § 15, which is the same as the § 24 now sued upon, was referred to as showing clearly that what the statute meant to prevent was "the possession of intoxicating liquor by a minor for his own use and subject to his own control." In *St. Goddard v. Burnham*, 124 Mass. 578, it was held that § 15 of the Act of 1875 did not apply to a delivery to a minor, of

whiskey ordered and paid for by a third person. *A fortiori* it did not apply to a delivery to an errand boy.

After that decision, the former section was amended by Stat. 1880, chap. 239, § 3 (Pub. Stat. chap. 100, § 9, cl. 4), so that licenses are now conditioned against sales to minors either for their own use or that of any other person; and the penalties affixed to violations of the provisions of the license would be incurred by sales like the present. *Commonwealth v. O'Leary*, 1 Mass. (L. ed.) 820, 3 New Eng. Rep. 198; 143 Mass. 95. But § 15 of Stat. 1875 was left untouched, as it was, and as it still stands in the Public Statutes. If before the amendment of the other section the plain purpose and scope of § 15 was to prevent sales to minors for their own use, that is still its purpose. The words still mean what they meant when they were first enacted; and, if any inference is to be drawn from the subsequent action of the Legislature, it is that they were contented with the construction given to this section by the court.

Assuming that the amendment does not affect the construction of this section, it cannot be argued seriously that, because a sale made or attempted to be made to a parent through the agency of a minor child is illegal, it therefore becomes a sale to the minor (*Rodliff v. Ballinger*, 1 Mass. (L. ed.) 162, 1 New Eng. Rep. 508, 141 Mass. 1), even if it were true that the illegality would prevent the title passing when there is a delivery and the sale is fully executed. *Meyers v. Meinrath*, 101 Mass. 366.

Exceptions sustained.

COMMONWEALTH

v.

James F. MOORE.

1. **Persons** who go into an inn for the mere purpose of procuring and drinking liquor are not guests within the meaning of the statute.
2. If defendant placed or maintained curtains in his windows in such a way as to interfere with the view of the business conducted upon the premises, or with the view of the interior of the premises, it was a violation of his license, and it is immaterial for what purpose he maintained them.
3. The **credibility of witnesses** on either side is a matter entirely for the jury, and the court has no right to instruct the jury not to believe a witness.

(Bristol—Filed November 22, 1887.)

ON defendant's exceptions. *Overruled.*

This was a complaint for a liquor nuisance. The defendant was a licensed innholder, and also held a first-class liquor license, during the time charged in the complaint, which liquor license contained the provision of the statute in regard to innholders.

Defendant requested the court to instruct the jury as follows:

1. That an innholder, under a license to sell
- 2 Mass.

intoxicating liquor, has a right to sell at any part of the Lord's Day—night as well as day—in any part of his inn, to a guest.

2. That he has a right to sell to a guest any part of any day of the week.

3. A guest is one who has resorted to his house for either food or lodging, as lodger or boarder, or lunch.

4. That one is a guest who goes into such a place for food alone, or for lodging alone; and he would be a guest if only for a lunch or for an hour's rest; and to such a person the innholder may sell intoxicating liquor under his license.

5. If one goes to an inn for food, and gets it, he may be furnished with liquor under a license to an innholder.

6. Upon Sunday a licensed innholder has a right to have screens or curtains up to the windows on his premises, to the room in which intoxicating liquor is usually sold; and that the law does not apply on that day to an innholder.

7. That curtains to a window that were up would not cut off a view of the premises, or the business done within the room, to a passer-by, because they were so high one could not see in, or for any other case, then the license would not be void or the sale illegal.

8. That if the curtains were up, but not for the purpose of preventing persons passing by in the street to a view within the rooms or the view of the business done therein, then it would not make the license void, or the sale for that cause illegal.

9. The defendant also asked the court to instruct the jury that persons employed by an association or league to induce the defendant and others to sell liquor, for the purposes of prosecuting the defendant and others for violations of their license, were not such persons as were entitled to belief, and that a jury should not convict upon the testimony of such hired witnesses; which the court declined to do.

The jury returned a verdict of guilty, and defendant alleged exceptions.

Further facts are sufficiently stated in the opinion.

Mr. E. L. Barney, for defendant:

It is clear that the defendant would have a right to supply intoxicating liquor to his guests "who had resorted to his house for food and lodging" on Sunday.

Pub. Stat. chap. 100, § 9, cl. 2.

The question, Who were and what are guests in an inn?—was involved in the issue in this case.

I. The first, second, third, fourth, and fifth instructions asked by the defendant should have been given. The case properly required instructions defining who were guests, and their rights in an inn. The court refused to give such instructions, and did not give sufficient instructions of who were guests, or the rights of guests. This was error in the court.

II. The sixth, seventh, and eighth instructions in regard to curtains ought to have been given.

III. The ninth instruction, in regard to the evidence of Giquel and Partridge, who were the only government witnesses, and squarely contradicted by the defendant and another witness, ought to have been given, or some equivalent. The court never alluded to the

defendant's request, nor in any way advised that such testimony was not safe to convict. Never in any like cause did any judge, upon a like request for instructions, refuse to give, or fail to give, any instructions upon the position of witness, in like cause.

In *Commonwealth v. Downing*, 4 Gray, 31, it was held "that such testimony was to be received with the greatest caution and distrust."

In *Commonwealth v. Putnam*, 2 Allen, 301, it was said "that the jury should look with great caution and distrust upon his evidence."

In *Commonwealth v. Graves*, 97 Mass. 115, "it should be examined with the greatest care and caution."

In this case the presiding justice did not regard the requests of the defendant, or make any reference to the position of the witnesses Giquel and Partridge. The jury's attention was not in any way directed to their evidence. This was wrong.

IV. The instructions given were not adequate or sufficient, and did not meet the issue in the case.

What the court meant by the instruction, "The license of defendant as innholder would be violated, etc.," is very indefinite. It does not meet the issue fairly presented by the defendant.

Mr. Andrew J. Waterman, Atty-Gen., for the Commonwealth:

The first ruling requested by the defendant was rightfully refused, as not being justified by the evidence; the sales in this case were made about noon.

Commonwealth v. Sargent, 129 Mass. 128.

The second ruling requested was sufficiently covered in the instructions given.

The third, fourth, and fifth rulings asked for by the defendant were properly refused, and the instruction of the court upon the question of who is a guest was clearly in accordance with the statute.

Pub. Stat. chap. 100, § 9, cl. 2; *Commonwealth v. Hagan*, 1 Mass. (L. ed.) 59, 1 New Eng. Rep. 215, 140 Mass. 289. See *Berkshire Woolen Co. v. Proctor*, 7 Cush. 423; *Hall v. Pike*, 100 Mass. 495.

The sixth, seventh, and eighth rulings asked for by the defendant were properly refused. By Pub. Stat. chap. 100, § 12, as amended by Stat. 1882, chap. 259, § 1, all licensees, irrespective of class, are prohibited from maintaining screens, no matter why, how, or for what purpose they are used.

Commonwealth v. Worcester, 1 Mass. (L. ed.) 350, 2 New Eng. Rep. 88, 141 Mass. 59; *Commonwealth v. Casey*, 134 Mass. 194; *Commonwealth v. Auberton*, 133 Mass. 405; *Commonwealth v. Costello*, Id. 192; *Commonwealth v. Ferden*, 1 Mass. (L. ed.) 331, 1 New Eng. Rep. 911, 141 Mass. 28; *Commonwealth v. Rourke*, 1 Mass. (L. ed.) 404, 2 New Eng. Rep. 142, 141 Mass. 321.

The ninth and last instruction asked for by the defendant could not properly be given by the presiding justice.

Morton, Ch. J., delivered the opinion of the court:

The instructions given were appropriate and sufficient. The case made by the government was that the defendant sold intoxicating liquors,

on the Lord's Day, to several persons who went into his premises for the purpose of procuring and drinking liquor. Such persons were not guests within the meaning of the statute, and there was no occasion to instruct the jury, as requested by the defendant, as to the rights of an innholder to sell to his guests. *Commonwealth v. Hagan*, 140 Mass. 289.

The instructions requested as to curtains were properly refused. If the defendant placed or maintained curtains in his windows in such a way as to interfere with a view of the business conducted upon the premises, or with a view of the interior of the premises, it was a violation of his license, and it is immaterial for what purpose he maintained the curtains. *Commonwealth v. Worcester*, 1 Mass. (L. ed.) 350, 1 New Eng. Rep. 218, 141 Mass. 59; *Commonwealth v. Rourke*, 1 Mass. (L. ed.) 404, 2 New Eng. Rep. 142, 141 Mass. 321.

The last request of the defendant was properly refused. The court had no right to instruct the jury that the government witnesses were not entitled to belief. The credibility of the witnesses on either side was a matter entirely for the jury, and the instruction would have been erroneous.

Exceptions overruled.

Edmund J. FREEMAN

v.

Lewis T. FOSS.

A contract which is within the Statute of Frauds cannot be enforced; nor can defendant avail himself of such a contract to avoid liability upon a quantum meruit.

(Suffolk—Filed November 23, 1887.)

ON defendant's exceptions. *Overruled.*

This was an action of contract brought to recover for the services of Fred Freeman, minor son of the plaintiff. The court found, upon the evidence, the facts to be substantially as follows:

The plaintiff agreed that his son should go to work for two years in the dental office of the defendant, and receive instruction in dentistry. The defendant thereupon agreed to take him into his office, instruct him, furnish him with books and the use of tools, stipulating that the defendant should so remain in his office working and gaining instruction for the space of two years, when he would pay to the authorities of the Boston Dental College the tuition fees of said Freeman through that institution. That on the 31st day of March, 1884, said Fred Freeman went into the office and remained there till March 18, 1885, when, by reason of illness, he left, and remained away until October 5, 1885, when he returned, and remained until January 4, 1886, when he expressed his unwillingness and inability to remain, and declined to remain longer, under the original agreement, but requested that he be paid the sum of \$3 per week thereafter. This was agreed to, and thereafterward for some weeks that sum was paid to him. None of the agreements were in writing. The plain-

tiff claimed that by the Statute of Frauds the contract set up in the answer (said contract not being in writing) could not be used in evidence in defense to this action. The court permitted the evidence to be heard, but ruled that the plaintiff could maintain his action upon *quantum meruit*, notwithstanding said contract, and that by reason of the Statute of Frauds the defendant could not set up the contract in defense of this action; to which the defendant excepted, and asked the court to rule that, upon the facts proved, the contract was executed on both sides up to the time of the new agreement to pay \$3 per week for services, January 4, 1886, and that *quantum meruit* could not be maintained when the plaintiff had received from the defendant, on January 4, 1886, all the considerations due and payable at that time under the original contract for services theretofore performed. The court refused so to rule, and found for the plaintiff.

Defendant excepted to the ruling and refusal to rule, and alleged exceptions.

Messrs. Charles W. Bartlett & Gage, for defendant:

The Statute of Frauds is to be strictly construed, and the party objecting to the use in evidence of a contract as being within the statute must bring such contract clearly within it.

If the special contract in this case, otherwise within the statute, was sufficiently performed and executed, then it was competent and admissible for the defendant.

Sufficient part-performance is enough.

Ransom v. Bell, 46 Ga. 19; *Rosser v. Harris*, 48 Ga. 512.

The performance in this case was more than any partial performance.

A contract under which the considerations moving from the respective parties are concurrent, and which is fully executed so far as it goes, so far as the parties act under and elect to receive and accept the mutual benefits of it, is believed on principle to be taken out of the statute as a "fully executed" contract. The closing portion of the court's language in *King v. Welcome*, 5 Gray, 41, confirms the position here taken.

"If a person enters into a verbal contract to labor for more than one year, and quits before the end of the term without a sufficient legal excuse, and the other party was willing to perform on his part, the former can recover nothing for the services rendered."

Swansey v. Moore, 22 Ill. 68; *Mack v. Bragg*, 30 Vt. 571.

The Statute of Frauds must not be used to work a fraud.

Mr. C. P. Weston, for plaintiff:

The question presented by this bill of exceptions was settled in *King v. Welcome*, 5 Gray, 41,—a case parallel to the one at bar in every essential particular.

This decision has been cited and approved in *Williams v. Bemis*, 106 Mass. 98, and *Russell v. Barry*, 115 Mass. 808.

The following cases and authorities are equally clear to the same effect:

Comes v. Lamson, 16 Conn. 246; *Bernier v. Cabot Mfg. Co.* 71 Me. 506; *Browne*, Fr. § 118; *Wood*, Fr. § 276.

The ruling requested by the defendant was rightly refused.

2 Mass.

It asked for a ruling, as a matter of law, upon what was a question of fact, and assumed the existence of facts not proved.

Salomon v. Hathaway, 126 Mass. 484; *Stone v. Sanborn*, 104 Mass. 326; *Clough v. Whitcomb*, 105 Mass. 485.

The first half of the request was for a ruling that was immaterial to the issue; and the latter half was covered by the ruling already made.

These exceptions were evidently intended for delay, and that should be overruled with double costs.

Knowlton, J., delivered the opinion of the court:

The defendant seeks to avoid liability for services of the plaintiff's son, by showing that they were rendered under an express contract, and that he did all that he agreed to do, so long as the boy remained in his service. The contract which he sets up was within the Statute of Frauds; it was entire and indivisible, and was not fully performed by either party. A large part of the consideration for the plaintiff's agreement was not payable by the defendant until after the end of the term of service, and no part of it was applicable to any particular portion of the term. As the plaintiff could not have enforced this contract against the defendant, so the defendant cannot avail himself of it to avoid liability upon a *quantum meruit*.

This case cannot be distinguished from *King v. Welcome*, 5 Gray, 41. See also *Bernier v. Cabot Mfg. Co.* 71 Me. 506; *Comes v. Lamson*, 16 Conn. 246.

Exceptions overruled.

COMMONWEALTH

v.

Benjamin F. SHAW.

1. In an indictment for embezzlement, the description of the property as a certain number of "pairs of shoes" is sufficient. The word "shoes" must be taken to mean shoes for the feet of human beings.
2. The defendant in such indictment, testifying on his own behalf, may be asked, on cross-examination, if he had not spent considerable sums of money in stock-gambling, or in anything else, and also how he obtained the money; but such questions should be confined to a period of time subsequent to that of the embezzlement.

(Essex—Filed November 23, 1887.)

ON defendant's exceptions. *Overruled.*

In the indictment the defendant was charged with embezzling "thirteen hundred and twenty pairs of shoes, each pair of the value of one dollar."

Before the jury was impaneled, the defendant moved to quash said indictment:

1. Because there is in said indictment no sufficient allegation or description of the property alleged to have been embezzled.

2. Because the said indictment is in other respects uncertain, informal, and insufficient.

This motion was overruled, and the defendant thereupon excepted.

The only question raised on the motion to quash was that there was no sufficient description of the property alleged to have been embezzled.

At the trial it appeared in evidence that Warren D. Hill, one of the persons from whom it was alleged the said goods were embezzled, after the time of the alleged embezzlement, charged the defendant, in a certain conversation, with having spent the money he had collected from the sales of said embezzled property in gambling in stocks; the defendant, in testifying in his own behalf, denied that such a conversation took place; and on cross-examination, among other things, he was asked if he had been engaged in stock-gambling at J. P. Welsh's office, in Lynn. He was also asked if he had been engaged in stock-gambling at Wood's office, in Boston. The defendant objected to said questions severally, and the objection in each case was overruled; and the defendant thereupon excepted to the rulings of the court permitting said questions to be put to defendant, and requiring defendant to answer the same.

The jury returned a verdict of guilty, and defendant alleged exceptions.

Mr. James H. Sisk, for defendant:

The description of the property which defendant is charged with having embezzled is indefinite and uncertain, and does not fairly inform him of a material part of the indictment.

Commonwealth v. Hall, 15 Mass. 240; *Commonwealth v. Brown*, 15 Gray, 189; Archb. Cr. Pl. 846; 1 Chitty, Cr. L. 171. See *Commonwealth v. Chase*, 125 Mass. 202.

In an indictment for larceny, the property stolen must be stated in quantity, number, quality, description, and value, with certainty to a common intent.

People v. Jackson, 8 Barb. 641, and cases cited.

The same particularity of description is requisite in an indictment for embezzlement, as in one for larceny.

Commonwealth v. Butterick, 100 Mass. 8. See *State v. Longbottoms*, 11 Humph. 39; *Reg. v. Jewett*, 2 Cox, C. C. 227; *Stollenwerk v. State*, 55 Ala. 142; *Potter v. State*, 39 Tex. 888; *State v. Morey*, 2 Wis. 494; Whart. Cr. Pl. 206-208.

The case at bar falls within the principle and reasoning of *Commonwealth v. Chase*, 125 Mass. 202.

Assuming that to speak of a pair of shoes it would be understood to refer to the covering for the foot of a human being, yet the varieties of shoes are so numerous that the kind must be mentioned in order to know what is meant; viz., men's, women's, youths', misses', and children's shoes.

The second question submitted is whether certain questions put by the district attorney to the defendant, who was testifying in his own behalf, and which he was required to answer, were competent. If both the questions asked were confined to a time subsequent to the date of the alleged embezzlement, they would have been competent; but to ask the defendant generally if he had engaged in stock-gambling at either of the offices mentioned was improper. The manner in which the defendant made or disposed of his money previous to the date of the alleged embezzlement could not

properly be inquired into, and the nature of the questions were such that they necessarily prejudiced the jury against the defendant.

Mr. Andrew J. Waterman, for the Commonwealth:

The only question on the motion to quash was as to the sufficiency of the description of the property alleged to have been embezzled. The offense was fully, formally, and substantially set forth.

There should be the same certainty in cases of embezzlement as in cases of larceny.

1 Whart. Cr. L. § 1044.

That is, "there should be such certainty as will enable the jury to decide whether the chattel proved to have been stolen is the very same with that upon which the indictment is founded, and show judicially to the court that it could have been the subject-matter of the offense charged, and enable the defendant to plead his acquittal or conviction to a subsequent indictment relative to the same chattel."

Stark. Cr. Pl. 193.

Under this rule an indictment charging a theft of "nine printed books" was held good in *Rez v. Johnson*, 8 M. & S. 540. (See 2 Archb. Cr. Pl. 856, note.) So, also, it was held in *State v. Logan*, 1 Mo. 532, that the description, "one book" of given value, was sufficiently certain, the title not being given. So also, in an indictment for stealing a handkerchief, it was not necessary to state material or quality.

The complaint follows the form given in charging the theft of "twenty-two pairs of shoes" in 3 Chitty's Criminal Practice, 961.

The defendant, having offered himself as a witness, was subject to be examined as shown in the record.

Field, J., delivered the opinion of the court:

The property alleged to have been embezzled is described as "thirteen hundred and twenty pairs of shoes, each pair of the value of one dollar, the property," etc. This is a sufficient description. The word "shoes" must be taken to mean shoes for the feet of human beings, and a description of a chattel by its proper and special name is sufficient. *Commonwealth v. Butterick*, 100 Mass. 8; Chit. Cr. L. 961.

We do not clearly understand what is meant by stock-gambling in the exceptions; but the point of the inquiry is shown by the statement that there was evidence that Hill had "charged the defendant, in a certain conversation, with having spent the money he had collected from the sales of said embezzled property, in gambling in stocks." The defendant, testifying in his own behalf, could be asked, on cross-examination, if he had not spent considerable sums of money in stock-gambling or in anything else, and could be asked how he obtained the money. Such an examination should be confined to a period of time subsequent to that of the embezzlement. The questions asked were general; but it does not appear that the defendant was compelled to answer questions concerning any stock-gambling in which he was engaged before the time when the evidence tended to show that he had embezzled the property described in the indictment.

Exceptions overruled.

MAINE.

SUPREME JUDICIAL COURT.

Inhabitants of WELLS

v.

COUNTY COMMISSIONERS.

1. A highway may be laid out wholly within the limits of one town when it connects with another highway.
2. Such a highway may be located over and upon a previously-existing town way.
3. When objections involving questions of fact are made to the acceptance of the report of a committee on location of a highway, and they are overruled, and the report is accepted and exceptions taken to that ruling, the exceptions must show that the facts were found in favor of the excepting party.
4. An Act which provides that "a highway may be laid out, constructed, and maintained, in the manner provided in Rev. Stat. chap. 18, across the tide-waters of the Ogunquit River," confers jurisdiction on the county commissioners to make the location.

(York—Decided November 22, 1887.)

ON exceptions by the plaintiffs, appellants. Overruled.

The opinion states the case and material facts.

Messrs. Nathan and Henry B. Cleaves, and George C. Yeaton, for plaintiffs, appellants:

The case of *King v. Lewiston*, 70 Me. 406, is the leading authority relating to the powers of the commissioners in laying out highways under the provisions of chapter 18. It is cited with approval in *Acton v. York County*, 77 Me. 128.

In the case of *King v. Lewiston*, *supra*, the commissioners of Androscoggin County laid out a county way entirely within the limits of the city of Lewiston, but leading from one county road to another, and across a third. The court held that the commissioners possessed the authority, because here the new road became a part and parcel of a system of county roads; and the court remarks that "the defendants do not contend that county commissioners have jurisdiction to lay out, within a town, an isolated way, having no connection with other county roads at either terminus."

Smith v. Cumberland County, 42 Me. 395; *Heron v. Penobscot County*, 39 Me. 558.

The road referred to in the legislation of 1885 has no connection with a county road at either terminus. The legislation of 1885 was not intended to enlarge the provisions of Rev. Stat. chap. 18, but that chapter and the powers of the commissioners under it were to remain the same as before. The state of facts was not the same as existed in *Harkness v. Waldo County*, 26 Me. 353, or in other cases cited. The difficulty arises from the language of the Act; it does not, in terms or by implication, confer original jurisdiction on the county commissioners.

In 1846 the Legislature authorized the county commissioners of Waldo County to lay out and establish a road over Fish River, in the town of Belfast. Here the authority is delegated to the county commissioners by express statute; they are the tribunal selected by the Legislature to determine the question. An Act was passed January 21, 1870, authorizing the county commissioners to lay out a highway across the Kennebec River, between the towns of Waterville and Winslow. The authority is direct to the commissioners; their provisions are not curtailed by reference to the provisions of law applicable to the location of highways.

59 Me. 80; 53 Me. 478.

As said by the court in the case of *Hall v. County Comrs.* 62 Me. 827, in discussing the location of a private way by the county commissioners from one county road to another county road in the town of Newcastle: "In this case the private way, as laid out, merely connects two county roads; it is not laid across either of them, but only to them; nor could it be, as one way could not be laid over another." In *West Boston Bridge v. Middlesex County*, 10 Pick. 370, it was held that a highway could not be laid along a turnpike, because the land had "already been taken and appropriated to public use."

The record shows that the county commissioners do not adjudge the way to be of common convenience and necessity before proceeding to locate the same. The record says: "After a full hearing of all the facts, testimony, and arguments by them presented, and having maturely considered the same, we were of the opinion, and adjudged, and do hereby adjudge and determine, that common convenience and necessity do require, and, in pursuance of the foregoing adjudication, we, the county commissioners aforesaid, proceeded to make said location as follows." The fact that the commissioners proceeded to make the location was not a sufficient determination of the fact that common convenience and necessity required such location.

As said by the court in *Cushing v. Gay*, 28 Me. 15, it has often been adjudged "that the want of a preliminary adjudication that the road prayed for is of common convenience and necessity is fatal to the laying out of a way; it is always safest and advisable to follow the language of the statute in such cases."

If it is said in this case that the record does not show a want of jurisdiction, we claim that, if the record neither shows a jurisdiction nor a lack of jurisdiction, it is clearly fatal.

Inhabitants of Penobscot, Petitioners, 8 Me. 271; *State v. Oxford*, 65 Me. 210.

A way can be located across tidewaters only by authority of the Legislature; and our court has frequently held that this authority must be strictly pursued,—that the authority must be shown by the record of the tribunal undertaking to exercise it.

Cape Elizabeth v. Cumberland County, 64 Me. 456.

The committee, in its report, has undertaken to relieve the commissioners of the error into which they have fallen, and report: "We affirm the judgment of the county commissioners on the aforesaid petition, except as to so much of the location of said highway across Ogun-

quit River as lies below the southerly line of the town road leading from the county road, near C. H. Littlefield's store, to said river; which we reverse." Its action was based upon its own view of the law. It was illegal.

Bryant v. Penobscot County, 1 Me. (L. ed.) 348, 3 New Eng. Rep. 883.

All objections that may be made on the petition for writ of *certiorari* may be taken on this appeal.

Goodwin v. Sagadahoc County, 60 Me. 328; *Hodgdon v. Lincoln County*, 68 Me. 228.

The record in this case shows that the county commissioners had no jurisdiction, and their doings may be impeached collaterally.

Small v. Pennell, 81 Me. 267; *Scarborough v. Cumberland County*, 41 Me. 604; *State v. Oxford*, 65 Me. 210.

But if this be not so, then, assuredly, whether or not the location or any part of it is "below the southerly line of the road" named in the Act of 1885, being a jurisdictional fact on this appeal and the question of acceptance of the committee's report, any statement made by it—even if it were of the solemn character of a record, which it is not yet—may be qualified, modified, and even contradicted. Otherwise this court might find itself in the ridiculously helpless plight of being compelled to suffer three committee men to finally interpret and construe statutes for it, and even fabricate facts, without redress. All the cases, everywhere, we have ever found forbid such a conclusion, and support our contention as to the entire competency of the evidence offered by appellants on this subject.

See Pow. App. Proc. chap. 4, §§ 6-11, and cases cited; Freem. Judg. § 180 *et seq.*

It cannot be maintained that, however illegal the attempted location may be in some parts, the other parts may be sustained for the reasons given in *Commonwealth v. West Boston Bridge*, 13 Pick. 195, that the illegal points are "so independent of and disconnected with each other that a part may be questioned and leave the remainder an entire, beneficial, and available judgment, to the purpose for which it is intended." The case at bar rather falls within the principles announced in *Acton v. York County*, 77 Me. 128, 131, which cites the foregoing from *Commonwealth v. West Boston Bridge*, *supra*, and adds: "But here the proceedings were all had at one time, relate to the same subject-matter,—to location of the way,—and are an entirety."

Mr. R. P. Tapley, for defendants, appellees:

The contention of the appellants is that the commissioners have no authority to lay out a highway over and upon a town way.

In *Waterford v. Oxford County*, 59 Me. 450, the question came distinctly before the court whether a town way was "substantially the same thing" as a highway, and the court held it was not. The differences in many points are there alluded to, and are here referred to.

The case of *Sanger v. Kennebec County*, 25 Me. 291, is much in point. The joint boards of commissioners from the counties of Somerset and Kennebec had determined the location of a way extending into both counties. A portion of the way thus determined was over and upon a highway already in existence in the

county of Kennebec. When the several boards came to locate in their several counties, the commissioners in Kennebec County did not locate that portion which had been ordered over and upon the existing highway, but did the remainder. It was held to be the duty of the commissioners to lay out that portion which was over and upon the existing way, and that the commissioners, upon proper application, were liable to a peremptory *mandamus* so to do.

In the recent case in this State of *Heald v. Moore*, 1 Me. (L. ed.) 392, 4 New Eng. Rep. 398, the location was over and upon a town way, covering the town way and one-half rod more on each side. The court found no difficulty in sustaining the location; and held that it became a "new road," and the use of that where the town road existed was a use of the whole of the new road.

At the hearing before the committee, the appellants cited the case of *Hall v. County Commrs.* 63 Me. 825. That was a case involving the right to lay out a private way, in which it was said in the discussion that a private way could not be laid out over a public way. But it by no means follows that the reverse proposition may not be true. It would be new doctrine, we think, in this State, to hold that a public way could not be laid out over a private way.

The road commences at a county road, and the authority in such instances is now well settled.

King v. Lewiston, 70 Me. 406; *Acton v. York County*, 77 Me. 128.

This court, in making the appointment of the committee, and issuing its warrant to it, took jurisdiction of the matter; and it could not do so rightfully if the county commissioners had no jurisdiction. In the appointment of the committee was involved the question of the jurisdiction and authority to act in the premises, by the county commissioners. The committee had no authority over that question. That was a question of law not submitted to them, and already passed upon by a court of competent jurisdiction.

Bryant v. Penobscot County, 1 Me. (L. ed.) 348, 3 New Eng. Rep. 883.

The Special Law of 1885, chap. 497, confers the power of locating, constructing, and maintaining a highway across Ogunquit River, in the manner provided in Rev. Stat. chap. 18. It is to be a highway. That can be done by county commissioners only. Chapter 18 provides the mode.

As is said of a similar provision in the case of *Belfast v. Waldo County*, 58 Me. 437, "the object and effect of the statute was simply to enlarge the jurisdiction and power of the commissioners over tidewaters. * * * The Legislature intended to give them power to lay out a road over this creek in the same manner and by the same proceedings that are required in the laying out of other highways."

In *Inhabitants of Limerick, Petitioners*, 18 Me. 166, the court says: "It is still a town way, when brought before the commissioners by appeal from the action of the town, and they are required to pass such judgment only as the town should have done."

Virgin, J., delivered the opinion of the court: Sometime prior to 1835 a town road or way

was made from the county road, near C. H. Littlefield's store, to Ogunquit River. The Legislature of that year enacted a special Act which provided: "A highway may be laid out, constructed, and maintained, in the manner provided in Rev. Stat. chap. 18, across the tidewaters of Ogunquit River, in the town of Wells; but not below the southerly line of the road leading from the county road, near C. H. Littlefield's store, to said river." Spec. L. 1885, chap. 497.

After this special Act took effect, certain inhabitants of York and of Wells duly petitioned the county commissioners to locate a "highway" from the county road, near Littlefield's store, extending easterly to and over Ogunquit River, to highwater on the ocean beach. Accordingly, after due preliminary proceedings had, the commissioners, at their October Term, 1885, reported in favor of and located the highway as prayed for.

From this location the inhabitants of Wells duly appealed; a committee was appointed, who, after a hearing, made their report, wherein they "affirmed the judgment of the commissioners, except so much of the location of said highway across Ogunquit River as lies below the southerly line of the town road leading from the county road, near C. H. Littlefield's store, to said river, which we reverse," specifying the portion intended to be reversed, extending from highwater mark 194 feet toward the channel of the river.

To the acceptance of the committee's report the appellants, at the September Term, 1886, filed three written objections, and introduced evidence which they contended supported their allegations. The presiding justice overruled the objections and ordered the report to be accepted; to which rulings the appellants alleged exceptions which are now before us for decision.

1. The first objection is, in substance, that the location affirmed by the committee covers the identical territory of the town road, and does not otherwise connect with any county road. The answer is that the commissioners had authority to locate a highway over and upon a previously existing town road, when either terminus of such location connects with a county road or highway, although the whole of such location is within the limits of one and the same town. *Harkness v. Waldo County*, 26 Me. 858; *Windham v. Cumberland County*, 26 Me. 406, 410; *King v. Lewiston*, 70 Me. 406; *Acton v. York County*, 77 Me. 128.

2. That a part of the highway located by the commissioners and affirmed by the committee is below the southerly line of the town road mentioned in the Special Act. The answer is that the presiding justice did not so find the facts. The case comes up on a bill of exceptions, and not on report. The report of the evidence is not legitimately before us, and we cannot revise the finding of facts at *nisi prius*.

3. That the commissioners had no original jurisdiction to locate a highway from the county road, near Littlefield's store, to Ogunquit River and across the tidewaters thereof, nor do the provisions of the Special Act of 1885 confer such jurisdiction; and that the committee had no authority to affirm such unauthorized location.

1 Mr.

Answer: As already seen, the commissioners had authority to locate a highway to the river, inasmuch as one terminus was at a county road or other highway. Of course the commissioners could not locate across tidewaters without the authority of the Legislature; and this authority the Special Act of 1885 confers. To be sure it does not contain the words "county commissioners," and hence does not in direct, express terms authorize that board *eo nomine* to make the location, as the Spec. Stat. 1846, chap. 865, authorized the county commissioners of Waldo County to locate a highway across Fish River, or as the Spec. Stat. 1870, chap. 282, authorized the county commissioners of Kennebec County to build a bridge across the Kennebec River. Nevertheless, the special statute of 1885 did authorize "a highway" to be located across the Ogunquit "in the manner provided by Rev. Stat. chap. 18." And "highway may include a county bridge, county road, or county way." Rev. Stat. chap. 1, § 6, cl. 6. It never means a town way in the statute. *Cleaves v. Jordan*, 84 Me. 9, 13. As it authorized a "highway" to be located, and that, too, "in the manner provided by Rev. Stat. chap. 18,—" and as highways can only be located by county commissioners, under Rev. Stat. chap. 18, § 1,—we perceive no difference, in the authority conferred, between an Act authorizing county commissioners *in totidem verbis* to locate a highway, and an Act authorizing a "highway" to be located "in the manner provided in Rev. Stat. chap. 18."

It is also further urged, under the third objection, that the commissioners did not, in their report, "judge the way to be of common convenience and necessity," as required by Rev. Stat. chap. 18, § 4; and that the omission is fatal to their jurisdiction.

Answer: If this question was raised at *nisi prius*, and is open now, we are of opinion that it is not maintainable, for, when properly construed, the report expressly recites that the commissioners "do hereby adjudge and determine that common convenience and necessity do require * * * said location,"—said location being the object of "require" as well as of "made."

Exceptions overruled.

Peters, Ch. J., Walton, Libbey, Foster, and Haskell, JJ., concurred.

William W. BIRD
v.

John F. SWAIN.

1. An action can not be maintained on the promise of a minor, unless it has been ratified in writing after he arrived at the age of twenty-one years, except for necessities or real estate of which he retains the title.
2. Where the promise is of the soundness of a horse which he sold, and took a note in part payment, reciting that the title of the horse should remain in the seller till the note is paid, an indorsement upon the note, after attaining his majority, by the holder, "the within note being paid, I hereby

discharge the property thereby secured,"—would not be construed as a ratification in writing of the promise as to soundness.

(Oxford—Decided November 30, 1887.)

ON exceptions by the plaintiff. *Overruled.* The opinion states the case and material facts.

Mr. S. F. Gibson, for plaintiff:

In *Boody v. McKenney*, 23 Me. 525, the court tells us what is a ratification or affirmation of a contract like this one, when the minor has during his infancy sold and delivered personal property: "When the contract was executed by his receiving payment, it is obvious that he can receive no benefit by acquiescence; and it alone does not confirm the contract. When the contract remains unexecuted and he holds a bill or note taken in payment for the property, if he should collect or receive the money due upon it, or any part of it, that would affirm the contract."

See 8 Me. 405; 1 Me. 11; 6 Me. 89; 34 Me. 594; 56 Me. 102.

In 70 Me. the court says: "Without a further citation of authorities it seems to be established as a general rule that, when an infant enters into a contract, and, after becoming of age, receives the benefit from it, or by virtue of it does an act which is an injury to the other party, he thereby ratifies it."

The court, in *Robinson v. Weeks*, 56 Me. 102, says that, in order for a minor to avoid his contracts that are voidable by him, he should be held to place the party with whom he deals substantially *in statu quo*.

Messrs. Bearce & Stearns, for defendant:

The case of *Boody v. McKenney*, 23 Me. 517, cited by plaintiff, undoubtedly states the common law upon the question of satisfaction, and if that case were to-day the law of the State this defendant would make no further contest; but the decision in 23 Me. 517, was made before the meeting of the Legislature of 1845, and, in Pub. Laws 1845, chap. 166, we find our present statute (Rev. Stat. chap. 111, § 2) in substantially the same language as it exists to-day.

Virgin, J., delivered the opinion of the court:

The plaintiff counted on an alleged verbal contract whereby the defendant warranted a horse, which he bargained and delivered to the plaintiff, on November 12, 1884, to be "all right and good to work."

The defendant pleaded infancy.

By agreement, the action was referred by rule of court. The referees reported in substance that, on the day named, the defendant, being then more than twenty, but less than twenty-one, years of age, bargained and delivered to the plaintiff a horse, receiving therefor a cow, a pair of steers, and the plaintiff's note for \$65, on six months, in which it was stipulated that the horse should remain the defendant's property until the note was fully paid. After maturity the note was paid to the defendant, who then had attained his majority.

The referees made an alternative report that, if the action is maintainable, they find a prom-

ise, and assess damages at \$25; otherwise no promise. The referees find no ratification in writing. The report of the referees was accepted and judgment ordered for the defendant, whereupon the plaintiff alleged exceptions.

We are of opinion that the exception must be overruled. Rev. Stat. chap. 111, § 2 provides that no action shall be maintained on any contract made by a minor, unless he or some person lawfully authorized, ratified in writing after he arrived at the age of twenty one years, except for necessities or real estate, etc.

No fact found by the referees brings the case within the provisions of the statute. The early authorities cited by the plaintiff declare the common-law rule of ratification, and the cases were decided before the statute above mentioned was enacted in 1845. *Davis v. Dudley*, 70 Me. 238, related to real estate which is an exception expressly mentioned in the statute.

Even if the indorsement on the note,—"the within note being paid, I hereby discharge the property thereby secured,"—was signed by the defendant after he became of age, it cannot be construed as a "ratification in writing" of the alleged warranty of the horse.

Exceptions overruled.

Peters, Ch. J., Walton, Libbey, Foster, and Haskell, JJ., concurred.

Samuel K. LITTLEHALE

v.

Stephen P. LITTLEFIELD.

A new trial will not be granted, on motion of the plaintiff, for an alleged error in a surveyor's report in the case, when the surveyor was a witness for the plaintiff at the trial, and testified to the same fact, and the proposed correction of the alleged error is inconsistent with the declaration in the plaintiff's writ.

(Androscoggin—Decided November 30, 1887.)

ON motion for new trial by the plaintiff. *Overruled.*

The following is the special motion referred to by the court:

Motion for a new trial on the following reasons: Frederic Danforth, the surveyor appointed by the court to make a survey and draw a plan of the land in question between the plaintiff and defendant, and surrounding lands, made the following mistakes, to wit: that the course of the line as claimed by the plaintiff is south 50½ degrees east, when in fact it is south 50 degrees and 50 minutes east. And Mr. Danforth, on the stand, stated that the distance from Plummer's fence to the centre of a stone in the centre of a 40-foot street was 21 feet and 5 inches, when in fact it is only 20 feet and 4½ inches. And Mr. Danforth, on the stand in court, gave the distance of all the posts, east of stone and posthole and between the corner post in the southeast corner of plaintiff's land, relative to the blue line, when in

lect Mr. Danforth did not measure but 8 of the posts relative to the blue line.

S. K. Littlehale.

Mr. Samuel K. Littlefield, plaintiff, *pro se*.
Messrs. Savage & Oakes, for defendant:

Per Curiam:

The question presented to the jury was: Where is the true line between the adjoining lots of the parties? The original line was created in 1882, and that and the subsequent deeds bound the lots by the respective abutters. In 1871 the defendant erected a brick building. The owner of the adjoining lot made no claim that any part of the building was on any land other than its owner's. The plaintiff purchased in 1884, and thereupon claimed that a few inches of the defendant's building was over the line, and soon commenced this action. He had a fair trial with able counsel to try it. He takes no exceptions to the rulings of the presiding justice. We have patiently listened to and appreciated his lengthy argument, and carefully re-examined the report of the evidence. And, while we do not feel entirely sure that the verdict is right, we are satisfied that it is supported by the evidence on the part of the defendant, and that the general motion must be overruled.

The special motion, pardoning its want of form and substance to the inexperience of the plaintiff, and considering it as if properly made, must also be overruled. The alleged error as to the course of the line claimed by the plaintiff is inconsistent with the amended declaration, to which the defendant pleaded, and on which the case was tried. Moreover, the witness by whose testimony the alleged error is proved under the motion was a witness for the plaintiff at the trial, and testified to the same fact, and the remaining facts set out in the motion seem to have been known to the plaintiff at the time of the trial.

Motion overruled. Judgment on the verdict.

John E. PALMER

v.

John S. MORSE.

1. When the defense to an action on a promissory note is the statute of limitations, the time during which the defendant resided outside of the State will be deducted from the whole number of years the note has run, and if the balance is less than six years the action will be maintained.
2. Facts stated upon which the court held that the defendant had resided in another State.

(Cumberland—Decided November 30, 1887.)

ON report. Judgment for plaintiff.

Assumpsit on a promissory note dated at Portland, Maine, January 1, 1877, for \$57.25, and interest. The writ was dated October 5, 1886. The plea was general issue and brief statement setting up the Statute of Limitations. The plaintiff by counter brief statement alleged that the defendant had resided in Boston, Mass., from January 1, 1877, till March 1, 1886.

1 Me.

The report stated the following facts:

John S. Morse, the defendant, an unmarried man who had boarded with his parents in Portland, and had been in the employ of the plaintiff, prior to January 1, 1874, between said date and January 1, 1877, left Portland, and went to Boston to enter into the employ of Bowditch & Skillings, of Boston, wholesale milliners.

He was hired by them by the year, working a part of the time in their store in Boston, and the rest of the time traveling as a salesman for them in Massachusetts, New Hampshire, and Maine.

In 1879 he left their employ and went to work for Moore, Spaulding, & Co. of Boston, in the same business and in the same way, and under substantially the same arrangements as with Bowditch & Skillings. He was in the employ of Moore, Spaulding, & Co. continuously, in their store and on the road, until February 1, 1886. He then left them and went into the employ of Plympton & Fiske, of Boston, same business, same arrangements, and same duties as with the two firms above named. He worked for them a few months, then left them and went into business for himself in Lewiston, Me.

Said Morse has never married and has no family. He is thirty-three years of age, was not emancipated prior to obtaining his majority, but had obtained his majority when he left Portland and went to Boston.

During the ten years or more that he was in business in Boston continuously, he had a room there which he hired furnished, which he retained constantly, leaving in it his personal effects, clothing, and ornaments, whenever he was absent from Boston. He had no furniture of his own in this room.

The name of the defendant, John S. Morse, has never, since the time of the signing of this note, January 1, 1877, been given to the assistant assessors of Portland, as a resident of Portland, in answer to their inquiries of his parents at their home in Portland for the names of all residents of Portland who lived or boarded at their house. Said Morse has never voted or paid a tax in either Portland or Boston, nor has his name ever been upon the voting lists or upon the assessors' book in the city of Portland.

The defendant was assessed a tax in the city of Boston in the years 1877, 1878, 1880, 1881, 1883, 1884. In 1877 he was notified that he had been assessed, went to the assessors and freed himself from the tax which had been assessed. It is admitted, if the court rules that it is competent, that at this time he claimed to the assessors at Boston that he was not a resident.

When he has been traveling, during the time since he first went to work for Boston firms, he has invariably registered at hotels as of "Boston." It is admitted that it is the habit of commercial travelers to register as of the place where their employers are located, and that defendant would testify that he so registered in accordance with that custom.

In his father's house is a room which has all the time been set apart as his, in which he has always kept clothing and furniture.

He went to Boston, when he went to enter into the employ of Bowditch & Skillings, to engage in business as aforesaid, and without any definite intention of returning to Portland. He

would testify that he continued to regard Portland as his home.

He has not always stayed at his father's house when he has been in Portland during said time, but has stayed frequently at the Preble House, a hotel in said city, where he has invariably registered as John S. Morse, Boston. He so stopped there when going through the city,—generally at night, if not always; and if in the city for any length of time he went to his father's house.

He has been accustomed to spend his vacations at his father's house at Portland.

Mr. F. V. Chase, for plaintiff:

Under this statute the word "residence" is not synonymous with the word "dwelling-place" or "home."

Drew v. Drew, 37 Me. 393.

"Inhabitaney" and "residence" do not mean precisely the same thing as "domicile" when the latter term is applied to succession of personal estate; but they mean a fixed and permanent abode, a dwelling-place for the time being, as contradistinguished from a mere temporary locality of existence."

Ibid., citing 8 Wend. 184.

In *Corinth v. Bradley*, 51 Me. 540, a pauper case, the instructions required that the jury should find, in order to retain the residence left, that the pauper should form and retain the intention of leaving for such temporary purpose, and of returning.

See *North Yarmouth v. West Gardiner*, 58 Me. 210.

A single naked intent to retain one's former home is not sufficient. There must be some outward *indicia* of that intent, something by which others interested might have some proof of his residence.

Holmes v. Greene, 7 Gray. 299.

In *Whitney v. Sherborn*, 12 Allen, 111, it is held sufficient to break up one's residence, or acquire a new one, if he resides in the new place, with the intention of remaining there, an indefinite time, and without any fixed purpose of returning to his former place of abode.

See also *Thorndike v. Boston*, 1 Met. 246; *Sears v. Boston*, Id. 250; *Mead v. Bowborough*, 11 Cush. 363; *Carnoe v. Freetown*, 9 Gray, 360; *Hill v. Fuller*, 14 Me. 121.

If a man is unmarried, that is generally deemed the place of his domicile where he transacts his business, exercises his profession, or assumes and exercises municipal duties or privileges.

Story, Conf. L. § 47; *Somerville v. Somerville*, 5 Ves. 750.

If one's residence out of the State was but temporary, yet, if the time of his proposed return is indefinite, he retained no domicile in the State, and therefore, even upon the strictest construction of the statute, was absent from and resided out of the State.

Sleeper v. Paige, 15 Gray, 350. See *Putnam v. Johnson*, 10 Mass. 501.

Hallett v. Bassett, 100 Mass. 170, was a case on the Statute of Limitations. See also *Greene v. Windham*, 13 Me. 227; *Wilbraham v. Ludlow*, 99 Mass. 591; *West Boylston v. Sterling*, 17 Pick. 128.

The plaintiff objects to the admission of the evidence that Morse claimed to the assessors of Boston that he was not a resident, on the ground

that it was a mere declaration in his own interest, and did not accompany any act which would be admissible,—that it was not a part of the *res gesta*.

Wright v. Boston, 126 Mass. 161; *Thorndike v. Boston*, 1 Met. 247.

The burden of proof is upon the defendant since he claims that his residence was elsewhere than where he actually was.

North Yarmouth v. West Gardiner, 58 Me. 210; *Ennis v. Smith*, 55 U. S. 14 How. 42 (14 L. ed. 482).

Messrs. Savage & Oakes, for defendant

Where did the defendant consider his residence or home to be during the time when he was a clerk in Boston?

In construing the Maine statutes these words "residence" and "home" are held to be synonymous.

26 Me. 61; 37 Me. 389; 43 Me. 406; 48 Me. 332; 51 Me. 540; 53 Me. 207.

This case comes very nearly under the same condition as that of the contractor who left the State for some months, to fulfil certain contracts, returning afterwards; and it was held that he did not change his residence.

38 Me. 171.

The burden is on the plaintiff in this case to show a change of residence.

37 Me. 339.

The residence of the defendant is admitted to be originally at Portland. This residence continues until another is acquired, and it is for the plaintiff to establish his claim that a new residence in Boston took the place of that which he had in Portland.

36 Me. 428; 50 Me. 475; 53 Me. 165; 55 Me. 117.

To constitute this change there must be shown both (1) actual change; (2) intention to change. Simply going from a place without definite intention when one will return is not sufficient.

58 Me. 207; 61 Me. 457; 66 Me. 198; 62 Me. 229; 78 Me. 377.

Even so grave an act as the description of oneself in a will as "of the city and State of New York," has been held not to be sufficient to fix the domicile of the party there.

52 Me. 165.

As to his statement to the assessors at Boston in 1877, in regard to his residence at that time, as a fact, showing what he actually had in mind at the time, it is admissible. This was before this suit was in contemplation, and at that time could have apparently had no effect upon the plaintiff's rights. So far as this suit is concerned, it was not, that time, a declaration in the defendant's interest.

78 Me. 377; 58 Me. 216; 47 Me. 97; 21 Me. 357.

Per Curiam:

On a careful examination of the report in this case, we have come to the conclusion that the plaintiff has sustained the allegations in his replication, and that the defendant did "reside" in Boston within the meaning and intent of Rev. Stat. chap. 81, § 103. Deducting the number of years during which he there resided, the action is not barred by the Statute of Limitations.

Judgment for plaintiff for amount of the note sued on.

Roscoe PERLEY

v.

Edward C. CHASE *et al.*

The mortgagor of land has no right to cut and sell the hay after foreclosure, though in possession.

(Cumberland—Decided November 30, 1887.)

ON exceptions by defendants. *Sustained.*
The opinion states the case and material facts.

Mr. George M. Seiders, for defendants:
Among others, there are two points around which the reasons for the exceptions to the judge's charge cluster, to wit: (1) the tenancy of the mortgagor, Perley, after the foreclosure process by publication was completed; (2) the rights of a tenant at sufferance to crops.

1. Under the first point to be considered, there is no question as to the kind of tenancy Perley held after the foreclosure by publication had run out and the time for redemption had expired. He was a tenant at sufferance, as the presiding justice correctly ruled.

5 B. & A. 604; Sharsw. Bl. bk. 2, p. 149, note 14.

2. The law as to the rights of a tenant at sufferance is clear. He has no rights. He is simply there. He has no legal right to dispose of the crops; he cannot dictate to the owner of the property the time of his holding, not for an instant, except that he may have reasonable time to get his goods away from the premises, after foreclosure has been completed; and he is not entitled to a notice to quit. If he plows, sows, and plants, he does it at his own risk, and he can find no fault if the owner of the premises steps in and gathers.

Virgin, J., says in *Gilman v. Wills*, 66 Me. 275: "The relation of mortgagor and mortgagee is not that of landlord and tenant."

Reed v. Edwell, 46 Me. 270-279.

Emblements do not include grass, except when it is sowed annually. It is a part of the freehold.

Sharsw. Bl. bk. 2, § 122, and notes; 1 Cruise, Dig. 263; 1 Washb. Real Prop. § 102, and cases cited.

Where one by his labor on another's property wrongfully or by mistake changes its form, he thereby gains no title to it in its new shape.

Betts v. Lee, 5 Johns. 348; *Silsbury v. McCoon*, 4 Den. 332; *Eaton v. Lynde*, 15 Mass. 243.

The refusal to correct the error, as pointed out to the court by the attorney for the defendants, is good grounds for exceptions.

Stephenson v. Thayer, 63 Me. 143.

Verdicts for excessive damages will be set aside when it appears the jury acted under some bias or improper influence.

Kimball v. Bath, 38 Me. 219.

Perley was a deeply interested party to this suit, and the only witness on whose testimony the verdict could have been rendered. Such being the case the verdict should not stand.

62 Me. 93.

The preponderance of evidence is greatly in favor of the defendants, and for that reason the verdict should not stand. There is a moral certainty that the jury erred in its verdict.

1 Me.

52 Me. 128.

Where the verdict is clearly against the weight of evidence, it should be set aside, although evidence was given on both sides.

Miller v. Baker, 20 Pick. 285; *Curtis v. Jackson*, 13 Mass. 507.

When a verdict is clearly against the weight of evidence, it will be set aside, and a new trial granted.

Maynell v. Sullivan, 67 Me. 814.

Messrs. Frank & Larrabee, for plaintiff:

The instructions of the presiding judge as to the right of a mortgagor in possession, undisturbed, to the crops when harvested, were correct.

See *Teal v. Walker*, 111 U. S. 242 (28 L. ed. 415), and cases therein cited; *Noyes v. Rich*, 52 Me. 115; *Wilder v. Houghton*, 1 Pick. 87; *Boston Bank v. Reed*, 8 Pick. 459; *Taylor, Land. & T. § 64*; 1 Jones, Mort. §§ 667, 670, 672; *Tucker v. Keeler*, 4 Vt. 161.

Virgin, J., delivered the opinion of the court:

Assumpsit for the stipulated price of a certain quantity of hay which the plaintiff sold and delivered to the defendants in the spring of 1886.

The hay was cut and harvested by the plaintiff in the haying season of 1885, on land once held by him as mortgagor, and which he continued to occupy until after the sale and delivery of the hay, although his right to redeem the premises on which it grew had been forever foreclosed in March, previous to the cutting. After the delivery to the defendants, they were forbidden by the holder of the foreclosed mortgage to pay any person other than himself, he claiming title thereto.

One of the disputed questions of fact at the trial was whether the plaintiff, when he commenced to cut the hay, at some place other than the farm on which it grew, agreed with the holder of the mortgage to cut it for him at a stipulated price.

The judge instructed the jury, in substance, that when the mortgagee simply allows the mortgagor to continue in possession after the right of redemption has expired, then the mortgagor while thus in possession, in the absence of any agreement to the contrary, and of any taking possession by the mortgagee, has the right to gather the annual crops and dispose of them as he sees fit. But if, before the hay was cut, the plaintiff agreed that it should belong to the holder of the mortgage; or if he agreed to cut it for him; or if the holder of the mortgage claimed it, and the plaintiff acceded to the claim and cut it in pursuance thereof,—then it became the property of the holder of the mortgage.

The jury found for the plaintiff, and the defendants challenge the soundness of the ruling.

Eliminate the fact of foreclosure from the instruction, and the defendants could not be aggrieved; for the authorities generally concur in holding that, so long as the mortgagor is allowed to remain in possession without an entry by the mortgagee, although there has been a breach of the condition of the mortgage, the mortgagor is entitled to receive the rents and profits to his own use, and is not liable to account therefor to the mortgagee. *Noyes v.*

Rich, 52 Me. 115; *Teal v. Walker*, 111 U. S. 249-250 (28 L. ed. 415).

But this proposition, unlike the instruction complained of, is predicated of a subsisting mortgage, and of the consequent relation of mortgagor and mortgagee before foreclosure. For, when the foreclosure becomes perfected, the mortgage, if the premises are of sufficient value, thereby becomes paid (*Hurd v. Coleman*, 42 Me. 182; *Morse v. Merritt*, 110 Mass. 458), ceases to exist, and the title of the mortgagor becomes extinguished, leaving the title in the mortgagee absolute and indefeasible. "Until foreclosure or possession taken by the mortgagee," says Jones (Mort. § 697), "the mortgagor is entitled to emblements,"—implying that, after the happening of either foreclosure or possession by the mortgagee, the emblements belong to the latter. 1 Washb. Real Prop. 120, § 21, and cases there cited.

As before seen, when the right of redemption has become "forever foreclosed," the relation formerly existing has become extinguished; and if, without any agreement, express or implied, the former mortgagor continues in possession after the determination of the particular estate by which he originally gained it, he thereby brings himself within the definition of a tenant at sufferance (4 Kent, Com. 116; 1 Co. Litt. 650; 2 Bl. Com. 150; 1 Washb. Real Prop. 534, § 2; *Livingson v. Tanner*, 12 Barb. 484); and, if a tenant at sufferance, he is not entitled to emblements (*Doe v. Turner*, 7 Mees. & W. 226; 1 Washb. Real Prop. 121, § 4); and, if he were, emblements do not include the grass, which is not an annual crop (1 Washb. Real Prop. 119, § 4).

But if we take the view which is the most favorable to the plaintiff,—that, inasmuch as the plaintiff was allowed to continue in possession for more than one year after the foreclosure had become absolute, and to cultivate and harvest the crops for the season of 1885, and that (as suggested by Parke, B., in *Doe v. Turner*, *supra*) "slight evidence would probably satisfy a jury that a tenancy by sufferance, in which the tenant is not entitled to the fruits of his own industry, as he has no right to emblements, would not long be continued;" and that a tenancy at will might be inferred by a jury from the acts of the parties,—still the plaintiff would not then be entitled to the hay, it being no part of the annual crops. Or, if we adopt the view of the court in *Allen v. Carpenter*, 15 Mich. 38, and hold that, where a purchaser under a foreclosure sale suffered the mortgagor to occupy the premises without interruption for three months, and in the meantime to go on and manage the premises and plant crops, he had a right to claim them as emblements, still he would gain no right to sell the hay off the land.

In the absence of any express or implied agreement for holding over, the plaintiff has no reason to complain, for he pays no equivalent by way of rent. He has taken the crops which he raised, and no question is raised as to them.

Exceptions sustained.

Peters, Ch. J., Walton, Libbey, Foster, and Haskell, JJ., concurred.

Howard W. GAMAGE

v.

Susie A. HARRIS *et al.*

1. **Equity can not be maintained by one not in possession, to remove a cloud from his title, held by the tenant by virtue of a levy of a judgment alleged to be fraudulent and collusive, if the complainant fails to prove the fraud.**
2. **In such a case the bill will be dismissed without prejudice.**

(Androscoggin—Decided December 2, 1897.)

ON report on bill in equity. *Bill dismissed.* The opinion sufficiently states the facts. *Messrs. Savage & Oakes*, for plaintiff: To all mere formal defects, the demurrer must be special.

Laughton v. Harden, 68 Me. 208.

The decisions are divided as to whether this defect is demurrable.

1 Dan. Ch. Pr. 562, note 5.

It is clearly amendable, and has been amended by leave of court.

As to the allegation that complainant has plain, adequate, and complete remedy at law. That he has such a remedy cannot be presumed in a case of fraud, especially when a discovery is prayed for.

Dwinal v. Smith, 25 Me. 382; *Taylor v. Taylor*, 74 Me. 539.

In *Taylor v. Taylor* it is pointed out that the decisions in Massachusetts are somewhat different on account of the restrictive clause in their statute giving equity jurisdiction. But, *contra*, the United States courts maintain the doctrine of the English courts, notwithstanding a like restrictive clause in the Judiciary Act.

In *Hartshorn v. Eames*, 31 Me. 96, the complainant charged that he "had been defrauded by a voluntary conveyance of real and personal property from one defendant, his debtor, to the other, pending a judgment in his favor on an award." Defendants demurred, on the ground of want of equity and complete and adequate remedy at law. The court says: "It would seem to be too clear at this day to need argument to show that the demurrer is not well taken. The allegation of fraud brings the case within one of the specifications of the statute, conferring equity jurisdiction upon this court."

In *Corey v. Greene*, 51 Me. 114, it is written: "If the debtor at any time has had the legal title to the estate, and, after the debt was contracted, conveyed it for the purpose of defrauding his creditors, such deed is void in contemplation of law, and the creditor may still levy his execution upon it, and then establish the fraud by proceedings in equity."

If the creditor makes a levy, he may then resort to equity to complete his title.

Call v. Perkins, 65 Me. 439. See also *Bolcher v. Arnold*, 1 R. I. (L. ed.) 1, 1 New Eng. Rep. 15, 14 R. I. 613.

If a person having the legal title to real estate incur a debt, and subsequently convey his estate, in fraud of his creditor, to his wife, who makes a similar conveyance thereof to her brother in trust for herself, the creditor thus defrauded may extend his execution issued

upon the judgment recovered upon his debt, upon the land thus fraudulently conveyed, and perfect his title by a bill in equity against the wife and her grantee.

Wyman v. Fox, 59 Me. 100.

The case *Wyman v. Richardson*, 62 Me. 295, referring to *Wyman v. Fox*, lays down this doctrine: "A fraudulent conveyance is no transfer of the title as against creditors. The demandant by his levy acquired a legal estate. The bill in equity was for the purpose of removing any possible cloud resting upon the title thus acquired."

In *Egery v. Johnson*, 70 Me. 260, it was alleged that complainants were the creditors of one of the defendants, who then owned certain real estate, which he conveyed, without adequate consideration, to the other defendant, to defraud and hinder the complainants; that they recovered judgment against the grantor, and levied their execution upon the land so conveyed; and complainants prayed that the defendants should release all their apparent title to the land levied upon, to the complainants. The bill was sustained and decree made as prayed for.

As to making the judgment debtor a party, it was done in *Hartshorn v. Eames*, 81 Me. 98; *Egery v. Johnson*, *supra*.

Where one claims under an officer's sale in *ritum*, though not bound to do it, he is certainly justified, in asserting his right against other persons, in making the execution debtor a party.

Richards v. Pierce, 52 Me. 562.

This case was heard on demurrer to the bill, and it was held that it should not be dismissed for misjoinder of parties.

In *Laughton v. Harden*, 68 Me. 208,—a bill to set aside a fraudulent conveyance,—the court says that *Smith v. Orton*, 62 U. S. 21 How. 241 (16 L. ed. 104); *Whitmore v. Woodward*, 28 Me. 392; *Dockray v. Mason*, 48 Me. 178; *Richards v. Pierce*, 52 Me. 560, decide that the fraudulent grantor could properly have been joined, but that it was not necessary to join him. If joined, the bill would not have been dismissed on that account.

A demurrer cannot be good as to a part which it covers, and bad as to the rest; the whole must stand or fall. And if a demurrer to a part of a bill be not good as to the whole of that part, it is not good for any part of it.

Burns v. Hobbs, 29 Me. 277; *Laughton v. Harden*, 68 Me. 208; 1 Dan. Ch. Pr. 564.

The English rule that plaintiff shall only have discovery of what is necessary to his own title, and shall not pry into title of the defendant, held not applicable in this country.

Adams v. Porter, 1 Cush. 170.

Mr. C. Record, and Messrs. Frye, Cotton, & White, for defendants:

Why did not the plaintiff, having "information" of the fraud as he says, interpose equity proceedings by way of injunction, to prevent a judgment being rendered in that suit, as he might have done?

1 Pom. Eq. Jurisp. § 221, pp. 224, 225.

A writ of entry would have settled this whole controversy. Indeed, it would have been more appropriate, and a more successful remedy.

1 Me.

Rev. Stat. chap. 76, § 14, and authorities cited in note c; also chap. 104, §§ 1, 6.

In cases of fraud, equity is the only ample remedy where the debtor never held the legal title to the land in controversy.

Here the equity powers of the court could reach the land thus held in virtual trust, while the law could not. And this is one of the cases that illustrates the rule of concurrent jurisdiction between law and equity.

Corey v. Greene, 51 Me. 114.

In *Dwinal v. Smith*, 25 Me. 382, cited by plaintiff's counsel, the court evidently intended to say that, in cases of fraud, it would not be possible to discover the alleged fraud, in a suit at law, from the parties engaged in the fraud; as they could not, at that day, be compelled to testify as witnesses upon the stand, but could be reached by bill in equity, by way of answer. But no such reasons exist in our courts of law to-day.

It is claimed by the other side that our court has concurrent jurisdiction as a court of equity or as a court of law. This is true in some cases, while it is not true in others. This concurrent jurisdiction is clearly and accurately summed up by an able and well-recognized law-writer, by the statement that the equity jurisdiction "depends upon the inadequacies of the remedies which the party could obtain from a court of law, owing partly to the form of those remedies themselves, and partly to the imperfection of the legal mode of procedure."

1 Pom. Eq. Jurisp. § 222, p. 227.

Where the debtor never held the legal title to the property to be reached, equity is the only effectual remedy, because a suit at law could not reach the debtor's equitable interest in the land.

Coll v. Perkins, 65 Me. 439.

In *Robinson v. Robinson*, 73 Me. 170, which was a bill in equity alleging fraud, the court lay down this rule, which we believe to be the only true rule: "As to the other defendant, there is no allegation that the complainant is in possession of the premises. If, therefore, the allegation of fraud is relied upon, the law affords a complete and adequate remedy. It is not the purpose of equity to try titles to real estate, and put one party out of possession and another in. This must be done under the forms and principles of law, which are sufficient for that purpose." The cases cited by the court in that case fully sustain the doctrine thus laid down by the court.

See *Lewis v. Cocks*, 90 U. S. 23 Wall. 466 (23 L. ed. 70), in which fraud was charged.

In the case of *Coombe v. Warren*, 17 Me. 404, *Weston, Ch. J.*, says: "If, then, the matters alleged in the bill, as a ground for a specific relief, would otherwise fall within the range of the chancery powers of this court, it is very manifest that the plaintiff has a plain, adequate, and sufficient remedy, by the rules of the common law. Where this exists, the chancery jurisdiction of this court does not attach."

In the case of *Murston v. Marston*, 54 Me. 476, which was a writ of entry, *Appleton, Ch. J.*, in delivering the opinion of the court, uses this language: "If the conveyances referred to were fraudulent and void as to creditors, the plaintiff might impeach them. Being void, the

title is regarded as remaining in the fraudulent grantor; and the judgment creditor, by a levy, acquires such seisin as enables him to maintain a real action against the fraudulent grantor or grantee."

The case of *Spofford v. Bangor & B. R. R. Co.* 66 Me. 51, was a well-considered case, and the principle here contended for was fully enunciated and sustained.

The facts in the case of *Taylor v. Taylor*, 74 Me. 582, were materially different from those in this case, and warranted the judgment of the court which was rendered therein. Clearly a suit at law in that case would have been inadequate. That case does not conflict with the ground taken here, nor was it intended to overrule the case of *Robinson v. Robinson*, *supra*, which was decided only a year prior to the case of *Taylor v. Taylor*.

Haskell, J., delivered the opinion of the court:

Bill to remove a cloud from the title of the orator to two several parcels of land.

The orator claims to have acquired the right to redeem both parcels from a mortgage, by virtue of a sale of the equity to him on execution.

Three of the respondents—sisters—claim title to one parcel by virtue of a levy upon it, on execution, in their favor; and to the other parcel by virtue of a sale to them, on execution, of the right to redeem the same from mortgage; both the levy and the sale were made to perfect a lien upon the land, created by an attachment made earlier than the attachment in the orator's favor under which he claims title.

The orator, not being in possession of the land, seeks to avoid the respondents' levy for irregularity, and to avoid their purchase of the equity because there was none and because the sale was irregular and invalid.

Failing in these particulars, the orator seeks to have both the sale and the levy annulled, because the judgment whereon the execution issued upon which the sale and levy were made was fraudulent, collusive, and void.

The bill invokes two specific grounds for relief: one the invalidity of certain judicial conveyances, the validity of which can as well be determined in an action at law as in equity; the other a fraudulent and collusive proceeding at law under which the three respondent sisters claim title.

The second cause for relief is properly within the jurisdiction of a court of equity. The orator charges that three of the respondents—daughters of the other respondent—fraudulently and collusively procured a judgment and execution against their father, the other respondent, upon a fictitious and groundless claim, and that the title which they claim under the levy and sale on the execution is colorable only and invalid.

The orator called for an answer to his bill upon oath, to search the conscience of each daughter, and of their father as well. They all answer fully, and no doubt satisfactorily to the orator, as he has no exception to any suggested insufficiency or evasiveness in the answers. The answers, so far as responsive, are evidence on the part of the defense, and must

be taken to be true unless overcome by evidence that outweighs them. They deny all fraud and collusion between the three respondents claiming title and their father, touching the judgment in question.

A careful consideration of the evidence fails to prove that the judgment in controversy is fraudulent or collusive. The orator and the three female respondents had suits pending at the same time in the same court, against the same defendant, wherein the same land was attached, the attachment of the respondents having been first made; and it is improbable that the orator did not then know of the respondents' suit and attachment. If he then believed that the respondents' suit was upon a fictitious claim, or for a sum too large, he might have defended the same as a subsequent attaching creditor. Rev. Stat. 1871, chap. 82, § 89; 1883, chap. 82, § 46. But this he omitted to do. He might then have compelled the respondents to prove their damages, and have prevented expensive litigation in a court of equity. He who asks equity must not only do equity, but come into court free from laches himself.

The three female respondents, scarcely beyond their majority, believed that they had a claim against their father for wood cut by him upon land that they had inherited from their mother, and, fearing lest their father might become unable to pay them, consulted a counsellor whom the court has no reason to distrust, and by his direction prosecuted their claim by suit, and recovered judgment and execution. The testimony of their counsellor clearly proves good faith in the proceeding, and the orator has no reason to complain of the result. Had he been more diligent in collecting overdue notes running at 8 per cent interest, his attachment might have been the earlier one.

The orator, failing to prove the fraud charged in his bill, cannot farther maintain the same for a cause giving a plain and adequate remedy at law.

The rule is that, when a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill without prejudice. *Russell v. Clark*, 11 U. S. 7 Cranch, 69 (3 L. ed. 271); *Price's Patent Candle Co. v. Bauvoen's Patent Candle Co.* 4 Kay & J. 727; *Bailey v. Taylor*, 1 Russ. & M. 78; *French v. Howard*, 3 Bibb, 301; *Robinson v. Gilbreth*, 4 Bibb, 183; *Nourse v. Gregory*, 3 Litt. 378; *Dowell v. Mitchell*, 105 U. S. 430 (26 L. ed. 1142).

The orator, not being in possession of the land, cannot in equity test the validity of the levy and sale set up against him. A writ of entry will afford him a plain and adequate remedy. *Spofford v. Bangor & B. R. R. Co.* 66 Me. 51; *Briggs v. Johnson*, 71 Me. 237; *Robinson v. Robinson*, 73 Me. 176; *Russell v. Barstow*, 144 Mass. 180.

Bill dismissed, but without prejudice as to matters not decided in this opinion. Respondent to recover one bill of costs.

Peters, Ch. J., Walton, Virgin, and Emery, JJ., concurred.

CONNECTICUT.

SUPREME COURT OF ERRORS.

Jefferson D. BLAKESLEE

v.

Henry TYLER.

1. In **laying out a road**, it is **not necessary** that the selectmen should find in terms the road to be of **common convenience** and necessity. Such a finding is involved in the action of the selectmen in laying the road out.
2. A **payment of damages** to the owner of land taken for a public road will be conclusively **presumed after** the road has been maintained by the town and used for nearly **seventy years**.
3. The character of a road as a **highway** is not qualified by the authorization of **gates** upon it, and those using it are entitled to the protection of the statute against **unauthorized obstructions** upon it.
4. A **prescriptive right** by the defendant to **maintain bars** across a highway is not established, where it appears that the bars were kept there by common consent, during the summer, and sometimes in the winter, and without any **claim of right**, and defendant had applied to the selectmen for permission to keep the bars there, which was not given.

(Filed November 19, 1887.)

A PPEAL from a judgment of the Court of Common Pleas for New Haven County in favor of plaintiff in a *qui tam* action upon the statute against nuisances. *Affirmed*.

The facts are stated in the opinion.

Mr. T. E. Doolittle, for defendant:

This is a *qui tam* action brought on a penal statute.

Rev. Stat. 258, § 1.

Therefore it is to be construed strictly, liberally for the citizen, and strictly against the public.

State v. Brown, 16 Conn. 57; Sedg. Stat. & Const. L. p. 280 *et seq.*

The word "highway" as used in this statute does not mean a "pent road" upon which are placed obstructions, such as gates and bars, by the authority laying out said pent road.

The statutes, *passim*, clearly point out and recognize the distinction between a highway and a private way.

Rev. Stat. p. 285, § 28, is as follows: "The selectmen of each town may lay out necessary highways or private ways;" one for public convenience, the other for private convenience,—i.e., for all persons who may have occasion to use it incumbered with gates and bars as it may be.

The following sections of the Revised Statutes clearly show that the word "highway" does not include a private way:

Rev. Stat. p. 286, §§ 29, 33; p. 287, § 35; p. 289, § 46; p. 234, § 19; p. 235, §§ 24-26; p. 324, § 81; p. 488, § 3; p. 509, § 5.

This highway has never been laid out as, or found to be, of public convenience and neces-

sity. Very little light would be shed upon this case by an examination of the statutes of other States; yet in *Commonwealth v. Low*, 8 Pick. 408, it was held to be no violation of a statute to put a fence across a private way.

Wolcott v. Whitcomb, 40 Vt. 40.

The pretended layout is void for uncertainty. *Windsor v. Field*, 1 Conn. 279; *Reynolds v. Reynolds*, 15 Conn. 84.

Said pent road has never been legally laid out, as it has never been found by any authority, either selectmen or town, that it was of either private or public convenience or necessity.

Peter Tyler probably consented to waive some claim, and kept his bars up; at all events he kept them up, and his heirs, for more than sixty years after 1818; and, if the public ever had any right to have this pent road opened, they acquiesced during this long period in the maintenance of the bars at this point, and lost their right if they ever had any.

Ang. High. 274, note; *Beardslee v. French*, 7 Conn. 125; *Brownell v. Palmer*, 22 Conn. 119-121; *Cady v. Fitzsimmons*, 50 Conn. 214.

The object of this statute is to impose a punishment upon the person violating its provisions.

State v. Brown, 16 Conn. 57, 59.

The statute of 1869 (Rev. Stat. p. 417, § 9) has reference only to the ordinary actions to recover damages for a tort; and does not embrace, and was not intended to embrace, an action to recover a penalty prescribed by statute as a punishment for the commission of a crime, and to obtain an order of the court to remove an alleged obstruction, and, on the defendant's failure so to do, to send a constable to remove the same, and report to court and have the defendant come again to the court and have the expense taxed.

The twelfth reason of appeal is as follows: "The court erred in ruling, in conformity to the claim of the plaintiff, that this action was for a tort, and could be sustained, under the provisions of Rev. Stat. 417, § 9, against the wife alone, without the joinder of her husband as a party to said action."

The difficulty with this claim is that the plaintiff begs the question when he says this action is for a tort, and can be sustained under Rev. Stat. 417, § 9. The defendant's claim, it is respectfully submitted, is the correct one, that the action is for a penalty, and is based upon Rev. Stat. 258, § 1.

The fourteenth reason of appeal is as follows: "The court erred in overruling the claim of the defendant that the putting up of a part of the bars by her in the manner stated in the finding, in the presence of and by the direction of her husband, was under such coercion as to excuse her from any liability of this action."

If there is any distinction between coercion and actual coercion, it must be this: When a wife commits a tort in the presence of her husband, the common law implies coercion, and the wife is excused; but if the wife is commanded by her husband to do an act, that is actual coercion, in contradistinction to implied or constructive coercion, as it is her duty to obey. Mental coercion may be much more powerful than physical coercion. She can stand a few

bumps on the head, but the happiness of her whole life and her children may depend upon her obedience.

Reeve, Dom. Rel. 73 *et seq.*; Schoul. Dom. Rel. p. 101 *et seq.*

This action cannot be maintained against the wife alone, and the court should have so ruled, as requested in the twelfth request.

Pom. Rem. Rights, p. 367, § 320.

Messrs. William B. Stoddard and Seymour C. Loomis, for plaintiff:

Three questions are raised: 1. Is this road a highway within the meaning of the statute? 2. Are these bars in question an illegal obstruction or incumbrance? 3. The admissibility of the evidence.

The existence of a highway may be proved by long usage by the public, and by the fact that it has been maintained and repaired by the town.

Sherwood v. Weston, 18 Conn. 32.

Chief Justice Hinman, in *Sherwood v. Weston*, 18 Conn. 51, said: "It has been long settled that the existence of a highway may be proved by immemorial usage, or by dedication of the road to the public use, as well as by the record of the original laying out. 2 Greenl. Ev. § 662, and authorities cited. And we know of no more satisfactory proof of acceptance, where there is no record evidence of it, than the fact that the public have worked and kept the road in repair, and constantly traveled over it as a way. We believe this is the ordinary proof resorted to in such cases. In 2 Starkie, on Evidence, ed. 1834, p. 381, it is said that proof of the repair of a road by a parish is strong evidence to show that it is a public highway," etc.

"Every road is a highway, which has been used as such for fifty years, and repaired within that time by the town."

6 Wait, Act. & Def. p. 299; *Noyes v. Ward*, 19 Conn. 269; *Reed v. Northfield*, 18 Pick. 94; Ang. Highw. §§ 131, 132; *State v. Merrit*, 35 Conn. 315; *Townsend v. Hoyle*, 20 Conn. 1; *State v. Tuff*, 37 Conn. 392.

That this road has been used by the public for nearly seventy years, and repaired during all that time as a public highway, proves conclusively that it is a highway within the meaning of the statute on which the suit is brought. And this view of the case disposes of all questions as to the legality of the laying out or the admissibility of the exhibits, because they are immaterial. And the defendant is not entitled to a new trial, or a judgment, even if the exhibits were improperly admitted.

Pub. Acts 1882, p. 146, § 8.

But further than this we claim that the road was legally laid out by the selectmen and accepted by the town in 1819, and that the exhibits were properly admitted to prove this.

The selectmen of 1818 acted under the statute which was then in force.

Gen. Stat. Rev. 1808, p. 378, § 13.

This statute was passed in 1773, and is practically the same now.

Gen. Stat. 1875, p. 235, § 28.

Part of the expense of opening highways is now put by statute upon persons specially benefited.

Gen. Stat. 1875, p. 238, § 38.

In 1849 it was decided that private individu-

als could make these promises, and it would be binding upon them.

See *Townsend v. Hoyle*, 20 Conn. 7.

It is presumed that Calvin Eaton carried out his agreement with the selectmen and paid half the expense. Exhibit 4 goes to show it, in which the record of the expense of this road is given: "One half damages and expenses laying out, \$33.74."

Whether it could be fixed or not this road has had a precise location for nearly seventy years, and it is presumed that the location was made certain.

Hicks v. Fish, 4 Mason, 310.

We think they (the selectmen) are entitled to the presumption of having acted correctly until the contrary is shown.

Brownell v. Palmer, 22 Conn. 122.

But we have in Exhibit 4 the old record of the expense of this highway to the town.

1818-1819. Expense of pent road, Northford:	
Attorney's bill,	\$15
One day New Haven,	1
One half damages and expense laying out,	33.74
	<hr/>
	\$49.74

The claim was made in the lower court that, because this road had gates upon it, it was therefore a private way, and Gen. Stat. 1875, p. 234, § 19, was cited in support of that claim.

It was argued by the defendant that, because this road had gates upon it, it was a private way. But the statute was not passed until 1822, four years after the layout of this road. So it could not be under this Act that the gates were authorized.

Windsor v. Field, 1 Conn. 283; *Davies v. Stephens*, 7 Car. & P. 570; Ang. Highw. p. 177, § 152.

Cost of fencing is proper evidence in estimating damages incurred by an adjacent proprietor by reason of the opening of a new road.

Stone v. Heath, 135 Mass. 561.

Windsor v. Field, *supra*, is a case where the selectmen reserved certain privileges to the owners.

This highway is as much a highway as any other; it is free to all persons to travel over it at all times.

Ang. Highw. p. 4, § 3; *Reg. v. Saintiff*, 6 Mod. 255; *Madox's Case*, Cro. Eliz. 63.

From all the decisions, it may be pretty clearly deduced that the term "highway," in England, extends to all public ways.

Ang. Highw. p. 5, note 8; *Allen v. Ormond*, 8 East, 4; *Logan v. Burton*, 5 Barn. & C. 518; *Rez v. Salop Co.* 13 East, 95.

In *Commonwealth v. Wilkinson*, 16 Pick. 175, the question was whether a turnpike road is a highway; and whether an action would lie against a person for keeping an obstruction thereon, on the ground that it was a public nuisance.

Holt, Ch. J., in *Reg. v. Saintiff*, *supra*; Ang. Highw. p. 19, § 24, and cases cited.

In the case of *Whittingham v. Bowen*, 23 Vt. 317, Redfield, J., in giving the opinion, says: "The only question in this case is whether a pent road is to be construed to be a highway within the meaning of the Revised Statutes.

Those highways which are permitted to be pent are as much public highways as any others, free to all persons who may have occasion to pass along them."

See also *Wolcott v. Whitcomb*, 40 Vt. 40; *Lowland v. Berlin*, 27 Vt. 713; *Denham v. Bristol County*, 108 Mass. 204.

"There is no such thing as a prescriptive right to maintain a public nuisance."

4 Wait, Act. & Def. p. 782; *State v. Franklin Falls Co.* 49 N. H. 252; *Cross v. Morristown*, 18 N. J. Eq. 310; *Ogdensburg v. Lovejoy*, 2 Thomp. & C. 86. See *Beardslee v. French*, 7 Conn. 125; 2 Greenl. Ev. § 539.

According to the statute (Gen. Stat. Rev. 1906, p. 378, § 13), the layout (Exhibit 2) was to be made "a survey in writing, under the hands of the selectmen, containing a particular description of such ways being made; accepted by the town; and recorded in the land records."

All this was to be done before the road became a highway.

Brownell v. Palmer, 22 Conn. 108; *Townsend v. Hoyle*, 20 Conn. 1; 2 Greenl. Ev. § 662; Gen. Stat. 1875, p. 436, § 21.

The suit is brought on the statute (Gen. Stat. 1875, p. 253, § 1) against nuisances.

It is no new cause of action, but simply a new remedy for an old one.

The suit is a civil action.

Swift, Dig. p. 586; *Canfield v. Mitchell*, 43 Conn. 169.

Canfield v. Mitchell is a case like the one at bar, brought on the same statute.

See 3 Greenl. Ev. p. 11, § 7, note 1.

Bouvier in his Law Dictionary defines coercion as follows:

"It is positive or presumed.

"1. Positive or direct coercion takes place when a man is by physical force compelled to do an act contrary to his will; for example, when a man falls into the hands of the enemies of his country, and they compel him, by a just fear of death, to fight against it.

"2. It is presumed where a person is legally under subjection to another, and is induced, in consequence of such subjection, to do an act contrary to his will."

When she commits torts in connection with her own estate, it is not even implied coercion.

Roue v. Smith, 45 N. Y. 280; *Baum v. Mul-len*, 47 N. Y. 578; *Flake v. Bailey*, 51 N. Y. 150.

But the evidence is not admissible for the purpose of proving implied coercion, that defense not having been in the defendant's answer.

The answer in this case it was agreed should be the same as that in the case against the husband of this defendant. That is a general denial, and under that this defense cannot be made.

Pr. Act, p. 16, § 6, Rules.

Beardsley, J., delivered the opinion of the court:

This is a *qui tam* action brought upon the statute against nuisances. The statute is as follows: "If any person shall place, or suffer to remain, anything in a highway, or dig up the ground therein, by which the passage of travelers shall be obstructed or endangered, or the highway incumbered, the same shall be deemed

a common nuisance," etc. Rev. Stat. 253, § 1.

It was admitted that the defendant obstructed the way in question, by placing bars across it, but the parties were at issue upon the question whether such way was a highway within the meaning of the statute quoted. The plaintiff claimed that it was laid out as such in the year 1819; and offered in evidence a petition by Calvin Eaton and others, to the selectmen of the town of Branford, for a highway from the Northford Road, etc., dated the 20th of September, 1817, and a survey and layout by the selectmen of a way between the points named in the petition, to be incumbered by three gates—one at each end and one intermediately,—and described in the layout as a pent road, and again as a pent highway. It is stated in the layout that "said pent highway" is laid out at the joint expense of Calvin Eaton and the town of Branford, and appended to the layout is a certificate by Calvin Eaton of his acceptance of the location and conditions of the above-described "pent highway."

The plaintiff also offered in evidence a vote of the town of Branford, passed April, 1819, approving this "pent highway, provided that Calvin Eaton pays one half the expense of it;" and the following extract from the town records: "1818, 1819. Expense of pent road Northford * * * one half damages and expense laying out— \$38.74."

It is found that the road so laid out is the one in question.

The defendant objected to the layout, claiming it was void for uncertainty respecting the eastern terminus of the road. By the survey the eastern initial point is fixed near Peter Elwell's house, and thence the road is to run by given courses 24 rods to a heap of stones. It is apparent that, by running the line back on the given courses from the heap of stones, the place of beginning could be accurately fixed.

The defendant claims that it does not appear that the selectmen found the road to be of common convenience and necessity. Such a finding in terms is unnecessary, as it is involved in the action by the selectmen in laying it out. *Townsend v. Hoyle*, 20 Conn. 7. The defendant also claims that it does not appear that damages have been paid to the owners of land taken. The court has failed to make any specific finding on the question, but it appears that Eaton agreed to pay one half the damages, which he has presumably done, in view of the fact that the road has been maintained by the town and used for nearly seventy years; and the extract from the records is evidence that the town has paid the other half. If there was no evidence on the subject, such payment should be conclusively presumed after such a lapse of time. The court finds, as already suggested, that, "since the establishment of said pent road in 1819, the same has been free to all persons desiring to use it, but has been mostly used for farm purposes, and for the carting of wood and charcoal, and occasionally by other persons;" and that it has been maintained by the town and repaired as a public highway" from the time when it was laid out and established.

Upon these facts the defendant claims that the road was not a highway within the meaning of the statute referred to, by reason of the

gates upon it erected and maintained by authority of the town.

Pent roads or pent highways are not provided for by the statutes of this State. Provision is made for two kinds of ways only,—highways and private ways; one for public and the other for private use. The defendant suggests that this way is a private one, but there is nothing in its layout or history to characterize it as such.

The selectmen are now empowered to authorize the erection of gates or bars across private ways. Rev. Stat. 234, § 19. But the statute giving them this power was first passed in 1822, some years after the road was laid out.

It is clear that the selectmen attempted to lay out this road as a highway, and, if they failed to do so, it is because of the provision for gates upon it. Irrespectively of such layout, the use which has been made of the road by the public for nearly seventy years, and the action of the town regarding it, would afford sufficient evidence that it is a highway, unless they are controlled by the fact of the gates. It is apparent that the gates were authorized merely to save expense of fences next to the road, upon the idea that, in view of the kind and amount of travel likely to pass over it, they would not be a serious impediment to it. If they were so in fact, a question might arise whether the selectmen or town, acting as they do in behalf of the State in the laying out and maintenance of highways, would have power to authorize them. But assuming that, in the present case, they had such power, the character of the road as a highway was not qualified by the authorization of gates upon it; and those using it were entitled to the protection of the statute against unauthorized obstructions upon it. Ang. Highw. p. 19, § 24; *Whittingham v. Bowen*, 22 Vt. 817, in which case, the question being whether a pent road authorized by the statutes of Vermont was a highway, Judge Redfield says: "Those highways which are permitted to be pent are as much public highways as any others, free to all persons who may have occasion to pass along them."

The defendant claims that he has acquired by prescription the right to maintain the bars complained of, across the highway. The finding is conclusive against him on this point. It is found that he and his ancestors, from whom he has derived title to his land adjoining the highway, have maintained bars at the place in question, during the summer and sometimes in winter, from 1818 or 1819 down to 1879, but that the bars were so kept there by common consent, and without any claim of right so to do; and that in 1874 the defendant applied to the selectmen for permission to keep the bars there, which was not given.

Under such circumstances, if the injury had been to individual property, no presumption of a grant of the right to maintain the bars would arise. Certainly it cannot be presumed that he has acquired from the public the right to obstruct this highway. 2 Greenl. Ev. § 589.

Sherman W. DAVIS

Town of GUILFORD.

1. **Variances** between the pleadings and 524

proof are not fatal, which, although they magnify the injury and misstate attendant circumstances, neither raise any doubt in the mind of the defendant as to the charge which he is required to meet, nor induce him to omit any matter of preparation for defense.

2. Where, about **thirty days** prior to the accident complained of, actual notice of the defect in the highway was given to a selectman, that the plaintiff also gave evidence tending to impute knowledge by the town of such defect is no reason for a new trial.
8. The law enforces upon the town **reasonable supervision of the highway**; and a want of knowledge, by its selectmen, of a defect does not constitute a legal excuse for inaction, if ignorance is the result of negligence in supervision.
4. If the defect was plain to the eye, and has existed for a great length of time, the court may impute negligent ignorance to the town in reference to it, or culpable delay in reparation after actual knowledge.
5. Where the defect had existed **two months** previous to the injury, the court can lawfully impute knowledge and negligence.
6. A town owes more of care to a road used much than to one used little. As to neither is it an insurer; as to both its duty is to keep them in a condition of reasonable safety.
7. Where evidence rejected is afterward supplied, the rejection is no ground of error.

(Filed November 20, 1887.)

A PPEAL by defendant from a judgment of the Court of Common Pleas for New Haven County in favor of plaintiff in an action to recover for injuries occasioned by a defect in a highway. *Affirmed*.

The facts are stated in the opinion.

Messrs. H. G. Newton, C. K. Bush, and Charles Kleiner, for defendant, appellant:

The proof does not support the complaint.

The declaration must contain a full, regular, and methodical statement of the injury which the plaintiff has sustained, with time, place, and other circumstances, etc.

1 Chitty, Pl. 255, quoted in *Taylor v. Keeler*, 50 Conn. 349.

Every allegation essential to the issue must be proved in the form stated.

Shepard v. New Haven & N. Co. 45 Conn. 56; *Lund v. Tyngsboro*, 11 Cush. 567; *Shaw v. Boston & W. R. R. Corp.* 8 Gray, 45. See *Zeigler v. Danbury & N. R. R. Co.* 52 Conn. 548.

If the plaintiff has needlessly described the tort and the means adopted in effecting it, with minuteness and particularity, and the proof varies substantially from the statement, there will be a fatal variance.

1 Chitty, Pl. *407, and cases there cited.

So held in cases similar to present.

Chicago v. Dignan, 14 Bradw. 128; *Bloomington v. Goodrich*, 88 Ill. 559, and see cases there cited.

Complaint did not show wherein negligence consisted. Insufficient.

Doolittle v. Clark, 47 Conn. 316.

The court imposed upon the defendant a duty greater than required by law.

It is matter of law that, if the defendant uses the road in an unusual manner, or for an unusual purpose, he assumes all risks.

Wilson v. Granby, 47 Conn. 73.

If any person undertakes to use or travel upon a public highway in an unusual or extraordinary manner, he takes every possible risk of loss or damage upon himself, and can have no remedy against the town for injuries, although they be the direct result of defects in a way for which it would be responsible to individuals in the lawful and proper use of it.

Wilson v. Granby, *supra*; *Gregory v. Adams*, 14 Gray, 242.

If the plaintiff chose to take the risk of using the road in an unusual manner because the distance was short, he has no right to throw this risk and the responsibility of it upon the town.

Parker v. Union Woolen Co. 42 Conn. 402; *Pittsburgh S. R. Co. v. Taylor*, 104 Pa. 313, 317; *Holman v. Townsend*, 13 Met. 297.

The defect found is an excellence, not a defect.

In *Munson v. Derby*, 87 Conn. 311, what is a defect in a highway is considered as a matter of law, and several Massachusetts and New Hampshire cases are quoted where the question is so considered.

In *Landolt v. Norwich*, 87 Conn. 615, whether certain ice makes a road defective seems to be considered as a matter of law.

The injury was not caused by the pretended defect. The finding ought to show that the injury was caused by the defect. Whether it does show it is matter of law.

In *Lancaster v. Kissinger*, 12 Rep. 685, the court considers the question whether the injury was caused by the defect, as a matter of law, and decides that it was not so caused. So in *Parker v. Union Woolen Co. supra*.

In *Oreany v. Postville*, 59 Iowa, 62, it considers and decides from what cause the injury resulted. So in *Simmonds v. New York & N. E. R. R. Co.* 52 Conn. 270.

Unless the injury must be the natural and probable consequence of the defect, there is no liability.

Pittsburgh S. R. Co. v. Taylor, 104 Pa. 315.

If the defect was likely to produce such an accident, it became the duty of the plaintiff to take special precaution to secure his load; and such precaution he has failed to take.

Tufts v. State Center, 57 Iowa, 583.

We subjoin the following rulings as to matters of law and facts:

"No dispute as to any of the facts. They should have been held to amount to contributory negligence."

Pittsburgh S. R. Co. v. Taylor, 104 Pa. 317.

"Suffering a road to remain blockaded with snow for three months would not, of itself, show that the town was guilty of negligence to such an extent as to render it liable for an accident for that cause alone. It is a physical impossibility in many towns to keep the road in winter free from a snow blockade."

Burr v. Plymouth, 43 Conn. 469.

"Where admitted facts show want of proper care on part of plaintiff, it has frequently been held, as a conclusion of law, that there was no legal cause of action."

Ang. Highw. § 290, note 2, citing cases from Massachusetts, Vermont, New York, New Jersey, United States, Pennsylvania, and England.

"Where verdict of jury would be set aside by the court, court can instruct," etc.

1 Whart. Neg. § 420; *Wilds v. Hudson R. R. Co.* 24 N. Y. 488, 489.

"Too well settled to be brought in question, that it may become duty of court to instruct jury that plaintiff has no case, or defendant no defense," concerning negligence.

Brooks v. Somerville, 106 Mass. 271.

The following have been held negligence as matter of law:

Leaving car while in motion.

6 Gray, 70.

Going between two cars in motion.

16 Gray, 507.

Crossing track without looking for train.

10 Allen, 532.

Horse and cart left in the street with no one to watch.

Illige v. Goodwin, 5 Cow. & P. 190; *Hoboken L. & I. Co. v. Lally*, 1 N. J. (L. ed.) 897, 6 Cent. Rep. 313; *Dudley v. Camden & P. F. Co.* 45 N. J. L. 373.

Signing application without reading it.

Ryan v. World Mut. L. Ins. Co. 41 Conn. 163.

In *Strouse v. Whittlesey*, Id. 560, the performance of duty and no negligence is inferred from the facts.

Driving upon road covered with water.

Bronson v. Southbury, 87 Conn. 201.

In *Toll Bridge Co. v. Langrell*, 47 Conn. 229, on motion for new trial on the ground that the finding showed contributory negligence,—precisely the present situation,—the court considers the facts, and passes on the question as matter of law.

In *Peck v. New York, N. H. & H. R. R. Co.* 50 Conn. 390, the superior court found no contributory negligence, except as inferred from facts found. Negligence was inferred. See also cases there cited.

In *Nolan v. New York, N. H. & H. R. R. Co.* 1 Conn. (L. ed.) 112, 1 New Eng. Rep. 826, 53 Conn. 471, the court discusses the speed at which trains may run; whether the engineer had exercised due diligence; the practicability of fencing the track so as to keep boys out; and they held that the rate of speed, the meeting of trains, the arrangement of tracks, and the absence of a fence, did not constitute negligence.

A new trial will be granted, on finding by court, when it would have been granted for a verdict against evidence.

Riley v. Boyer, 76 Ind. 153.

Messrs. D. Ward Northrop and Hobart L. Hotchkiss, for plaintiff, appellee:

It being the duty of the town to keep this highway in repair, and at the very least to make it safe for such use as might be expected of it, it became a question of fact for the court whether the highway was out of repair, or whether the plaintiff, by his negligence, materially contributed to the injury.

Beers v. Housatonic R. R. Co. 19 Conn. 566, 569; *Williams v. Clinton*, 28 Conn. 266; *Isbell v. New York & N. H. R. R. Co.* 37 Conn. 402;

Park v. O'Brien, 23 Conn. 339; *Zeigler v. Danbury N. R. R. Co.* 1 Conn. (L. ed.) 21, 1 New Eng. Rep. 273, 52 Conn. 552; *Dexter v. McCready*, 1 Conn. (L. ed.) 220, 2 New Eng. Rep. 883, 54 Conn. 171; *Congdon v. Norwich*, 37 Conn. 420.

Under the circumstances the court would have been justified in finding a presumptive knowledge of these defects.

Manchester v. Hartford, 30 Conn. 121; *Dooley v. Meriden*, 44 Conn. 119.

The mere fact that the plaintiff knew of the defects will not excuse the defendant's negligence.

Congdon v. Norwich, 37 Conn. 420.

It will be further observed that, whatever claims may be made by the defendant upon the pleadings or record, nothing in the finding justifies any assumption that the road was not defective, or that there was any contributory negligence on the part of the plaintiff.

Congdon v. Norwich, *supra*.

The use by the plaintiff was not unusual, and so does not come within the case of *Wilson v. Granby*, 47 Conn. 49, cited by the defendant.

"While, on the one hand, a party shall not recover damages for an injury which he has brought upon himself, neither shall he be permitted to shield himself from an injury which he has committed because the party injured was in the wrong, unless such wrong contributed to produce the injury; and even then, it would seem, a party is bound to use common and ordinary caution to be in the right."

New Haven S. B. & Trans. Co. v. Vanderbilt, 16 Conn. 430; *Churchill v. Rosebeck*, 15 Conn. 385; *Congdon v. Norwich*, *supra*.

"Of course it is understood that there must be a degree of negligence on the part of the party who ought to keep the bridge in repair, but the statute seems to infer this negligence, in the first instance, from the mere fact that it is found to be out of repair or defective, and to throw upon the defendant the burden of rebutting this presumption."

Beecher v. Derby B. & F. Co. 24 Conn. 499.

The exceptions taken by the defendant are entirely immaterial.

In any event, being cross-examination, it was within the discretion of the court.

Chapman v. Loomis, 36 Conn. 459; *Burns v. Fredericks*, 37 Conn. 92.

All the evidence was clearly inadmissible.

Seger v. Barkhamsted, 22 Conn. 296; *Todd v. Munson*, 1 Conn. (L. ed.) 107, 1 New Eng. Rep. 821, 53 Conn. 579.

But even then the court immediately admitted evidence to prove the same facts; so the defendant could not complain.

Redfield v. Buck, 35 Conn. 329; *Seofield v. Lockwood*, Id. 425.

As to any other claims of variance that the defendant may make, no particular claim appears of record.

Pr. Act, p. 15; *Shepard v. New Haven & N. R. R. Co.* 45 Conn. 57; *Zeigler v. Danbury & N. R. R. Co.* 1 Conn. (L. ed.) 21, 1 New Eng. Rep. 273, 52 Conn. 551; *Allen v. Jarvis*, 20 Conn. 47; *Rice v. Almy*, 32 Conn. 305; *Morris v. Bridgeport Hydraulic Co.* 47 Conn. 289.

Upon the whole record there should be no new trial.

Pardee, J., delivered the opinion of the court:

This is a complaint for injuries occasioned by a defect in a highway. The case, was tried to the court, and judgment rendered for the plaintiff. The defendant has appealed for the following reasons: That the court erred in holding the plaintiff entitled to recover on the facts found; in imposing upon the defendant a duty greater than that required by law; in holding that on the facts found there was a defect in the highway for which the defendant was liable; in holding that the plaintiff's injury was caused by a defect in the highway for which the defendant was liable; in holding that the complaint was sufficiently proved and supported by the facts found, to entitle the plaintiff to judgment; in holding that the plaintiff was not guilty of such negligence as would defeat his right to recover; in admitting the evidence as to the condition of the road being the subject of conversation among the neighbors; in excluding each of the defendant's cross-questions to the plaintiff; and in admitting the testimony as to the gentleness of the plaintiff's horses.

The plaintiff was injured while descending a steep hill. The defendant had constructed two bridges or water-breaks diagonally across the way near the top of the hill, for the purpose of turning water into gutters. Such breaks properly made and repaired were found to have been necessary at the place in question, because rocks prevent the making of gutters above. The finding also is that during June and July, 1886, the water had washed over the top of the hill and down to the first break, making runs through it where the wagon wheels and the horses feet had broken it away; and from the first break had washed down in the centre of the road to the second break, the base of which had been washed away, and the height of the break increased, by the water which at this point had turned off to the side of the road. In the afternoon of July 29, 1886, the plaintiff started to cart his last load of hay from his meadow, using therefor the same horses and wagon he had been using all this season. The load consisted of meadow grass placed upon the wagon in the same manner as loads of hay which the plaintiff had carted down the hill during previous years and during the same summer, except that a place was left on the back part of the load, upon which was placed about two hundred pounds of rye-straw rakings; the straw lapping a little over the top and centre of the load. The entire load weighed about two thousand pounds. In driving, the plaintiff was seated upon the top of the load, as was his custom in carting hay, and as is the custom of farmers in the neighborhood.

The stake in front of the wagon was intended to prevent the load from sliding when descending the hill, but the load was not bound to the wagon, the plaintiff having never bound a load of hay or straw in carting down the hill to his barns.

On reaching the top of the hill, the plaintiff caused an iron shoe to be attached to the wagon and placed under the rear wheel, to check the speed of the wagon in descending the hill. The plaintiff had carted loads of hay down this hill for about thirty years, and had carted nearly

fifty loads down the hill during the summer of 1886, but had not before carted hay and grain or straw raking upon the same load. In attempting to avoid the stones at the top of the hill, the wagon-wheels slipped into a part of the road washed by the rains through the upper break, causing the weight of the load to be thrown forward, and giving a greater impetus to the wagon, so that, when the forward wheels of the wagon struck the second and lower break, which had been made abrupt by washing, it was with so great a shock that the plaintiff was thrown forward to the ground, by the side of his horses, and directly in front of his forward wheels. He held on by the driving lines and was dragged a distance of ten or twelve feet before the horses were stopped. By this fall the plaintiff's knee, back, and neck were injured, and he was incapacitated from work for a number of weeks, and had not fully recovered at the time of the trial in January, 1887. When the wagon struck the second break, throwing the plaintiff to the ground, about a hundred pounds of hay and straw came off the load with him. The load was properly placed upon the wagon, and the accident was caused by the washing of the highway on the hill, and at the base of the lower break.

We cannot assent to the claim that there is a fatal variance between allegations and proof. The complaint points out to the defendant its duty in the premises, when, where, and where-in it failed in performance; the order of the events which terminated in the injury to the plaintiff; and the character and degree of that injury. Of course in such a matter it is impossible that the proof should be a literal and exact reproduction of the allegations; therefore the law forgives variances which, although they may magnify the injury and misstate attendant circumstances, neither raise any doubt in the mind of the defendant as to the charge which he is required to meet, nor induce him to omit any matter of preparation for defense. The complaint states that the plaintiff was riding upon a load of hay; that a wheel dropped into a hole; that the wagon was overturned; and that he and the hay were thrown upon the ground. The proof is that the wheel dropped into a hole, and that he was thrown to the ground; but that the wagon was not overturned, and only a portion of the load was thrown off. But all questions of importance to either party arise upon the allegations that the way was dangerously defective because of the hole; that the defendant is responsible for all resulting injuries; that the dropping of the wheel into the hole threw the plaintiff from the load to the ground; and that thereby he was hurt. These state a complete cause of action. The additional descriptive statements, that the wagon was overturned, and that the whole rather than a part of the load was thrown off, are unnecessary. The plaintiff might himself safely disprove them and yet establish his right to receive, and the defendant's obligation to pay, damages. They neither increase nor change the burden of defense.

The plaintiff was injured in July, and instituted this action for damages in September, 1886. In the intervening August he, with others, made their complaint to the county com-

missioners, to the effect that the highway in question was out of repair, and asked that it might be repaired. The commissioners denied the request, giving, as the reason, that a portion of it had been repaired, and that the use of the remainder was so rare as not to call for any repair. Upon the trial the plaintiff testified that, at the time of the hearing, he determined to sue the town if it did not treat him fairly and repair the road. Upon cross-examination, he was asked if he intended to say that he should not have sued the town if he had succeeded before the commissioners. The question was excluded upon his objection; and properly. Of course it was the privilege of the plaintiff to refrain from suing the town for his injuries, if it would furnish him a safe highway for the future; of course, too, his legal right to redress remains to him, even if revenge is an element in his effort to enforce it. The defendant's right in this part of the case is limited to proof, either that the plaintiff suffered no injury, or, if any, less than he claimed; that he was more solicitous concerning the judgment than concerning the truth. But, without effort, the defendant had the benefit of the fact that the witness was also plaintiff. His interest and bias were open and unlimited. Neither party to a cause is entitled to a new trial because he is not permitted to prove that his adversary is interested in the result. If the evidence was offered for the purpose of proving that, in the opinion of the plaintiff, success in his effort before the commissioners, to compel the defendant to repair the road, would have been full and adequate compensation for the injuries to his person, it was properly rejected. By no possibility could it assist the court in properly measuring those injuries in money. The road was not repaired, and the money value of the combined pleasure and material benefit which would have resulted to the plaintiff if it had been repaired must, of necessity, remain unknown.

Upon the finding the defendant asks us to decide that the plaintiff brought this injury upon himself by negligence. But we are unable to declare that a judgment for him, based upon such finding, is erroneous; cannot say that he transcended the limits of care and prudence which might reasonably have been required of a person in his situation, by driving, along the highway in question, a pair of horses hitched to a wagon having a chained wheel, while sitting upon a load partly of hay and partly of straw, over a ton in weight. We cannot say that contributory negligence resides in the combination of the facts, namely, that the ton of hay was surmounted by two hundred pounds of loose straw, and that the whole was unbound,—in presence of the finding that the load was "properly" (that is, carefully and prudently) "placed," in view of all surrounding circumstances; and that the unsafe state of the way was wholly responsible for the injuries. We cannot say that, as the result either of experience or observation or of both, it has come to be generally believed by men of ordinary intelligence and prudence, that a man cannot safely drive as the plaintiff did over a road in reasonably good condition.

Notwithstanding the objection of the defendant, the court permitted the plaintiff to testify

that he had heard some of his neighbors say to others of them, during the five months preceding the injury, that the way was out of repair, as tending to prove that the defect was a matter of general knowledge, and as laying the foundation for an inference by the court that therefore there had been knowledge and negligence upon the part of the selectmen. For this the defendant appeals.

We are not called upon to justify the reception of this testimony. The finding is that, about thirty days prior to the accident, actual notice of the defect was given to a selectman. The record affords no ground for the supposition that the defendant made any claim to the contrary. The plaintiff's case stood upon the solid foundation of actual notice. That he availed himself of the permission of the court to weaken it by attempting to impute knowledge should not be a reason for a new trial. The actual notice remains, and must in any event control the case upon this point. Again, although it is true that a safe highway may be made unsafe in the space of a few minutes, by an unusual rainfall; that a traveler may therefore receive injuries before knowledge could by any possibility come to any selectman, and therefore before any responsibility for such injuries could rest upon the town; and that the law allowed a reasonable time for knowledge, and further reasonable time for action,—yet the law imposes upon the town reasonable supervision of the highway; and a want of knowledge, by its selectmen, of a defect, does not constitute a legal excuse for inaction, if ignorance is the result of negligence in supervision. If the defect was plain to the eye of any person who would look, and had existed for a great length of time, the law would permit the court to impute, either negligent—and therefore culpable—ignorance to the defendant in reference to it, or culpable delay in reparation after actual knowledge. The finding is that the defect had existed during the space of about two months previous to the injury. Upon this, without more, the court could lawfully impute knowledge and negligence; and, in view of this, testimony as to what individuals said about the defect during the lapse of time must be quite without effect in the matter of imputed knowledge.

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The finding is to the effect that, since the construction of a new road, a large part of the travelers who theretofore passed over the road in question have passed over the former, but that the old one is still used for business purposes to some extent, and in the summer to a considerable extent by parties driving for pleasure. It is the claim of the defendant that the court wrongfully imposed upon it the duty of keeping an almost disused road in such repair that the plaintiff could safely drive over it in the manner undertaken by him. Of course a town owes more of care to a road used much than to one used little. As to neither is it an insurer; as to both, its duty is to keep them in a condition of reasonable safety. With less than this it may not invite one traveler or many to pass over any road. Every traveler is entitled to a road along which he may pass in safety by the use of a reasonable degree of care and prudence, having in view his manner of use and the condition of the way. The import of the finding is that, in view of the degree of use of the way, the defendant failed to keep it in a reasonable degree of safety. There was use of it, both for business and pleasure, to a "considerable" extent; it was "unsafe for travel." Upon this we cannot say that most men of intelligence and prudence would unite in the belief that the defendant reasonably and properly adjusted the degree of care to the degree of use.

The plaintiff was asked if the defendant paid him in repairing the road upon the hill in May, 1886. Upon objection this was excluded. Immediately thereafter the defendant was permitted to prove all work done by the plaintiff upon the road upon the hill, and all payments to him therefor during the five years immediately preceding July, 1886. If it should be conceded that the court erred in the rejection, it would seem that ample reparation immediately followed; and it is both the privilege and the duty of the trier to correct a mistake if he can do it so speedily and completely as that no injury remains to anyone.

There is no error in the judgment complained of.

In this opinion the other Judges concurred.

1 CONN.

RHODE ISLAND.
SUPREME COURT.

George J. ADAMS

v.

David S. BAKER, *Admr.*

All that is required, to entitle the plaintiff to recover upon a lost note, is proof that the defendant can pay the note without the hazard of being required to pay it a second time. Where a future action on a lost note would be barred by the Statute of Limitations, the loser is entitled to recover. Where an action is brought under Pub. Stat. chap. 186, § 15, against the insolvent estate of the maker of a negotiable note, dated July 23, 1857, payable two months after date, alleged to have been lost, after the claim had been filed and commissioners appointed, who allowed the claim; and the allowance was stricken out,—a demurrer on the ground that an action at law will not lie on such a note so indorsed and lost—the only remedy being in equity—was overruled.

(Decided October 14, 1887.)

ASSUMPSIT on a lost note. On demurrer to the declaration. *Overruled.*

The facts are stated in the opinion.

Mr. W. R. Perce, for defendant:

Under the facts pleaded, an action at law cannot be maintained. The remedy is in equity only. This is the doctrine of England.

2 Pars. N. & B. ed. 1870, p. 296.

In this country the weight of authority is in harmony with the English rule.

1 Wait, Act. & Def. p. 165.

Where the common-law and equity tribunals are separate and distinct, the common-law courts steadily refuse to take jurisdiction of suits upon such cases.

1 Wait, Act. & Def. p. 166.

As the two jurisdictions in this State are separate and distinct, we should follow the English rule and the weight of American authority in accordance therewith.

Jordan v. Donahue, 12 R. I. 199.

The rule at *nisi prius* in *Aborn v. Bosworth*, 1 R. I. 401, maintaining an action at law on a lost bill of exchange, where the question of jurisdiction was not raised or decided, will not weigh against the great number of cases in which the courts have denied the jurisdiction at law.

At common law no protection can be afforded to the maker of the lost note. In equity, indemnity can be required for the maker's protection.

As to the negotiability of the note in question and the presumptions concerning the same, see—

2 Pars. N. & B. p. 291.

For a full discussion of this subject see—

Story, Prom. N. §§ 107-111, 447, 448, 450; 2 Pars. N. & B. ed. 18 0, pp. 291, 295-298, 300, 302, 304, 305, 307.

Mr. Rollin Mathewson, for plaintiff:

Pub. Stat. chap. 186, § 15, expressly settles 1 R. I.

the question presented by the demurrer; it declares "the claimant may bring his action at common law," etc. This means he must bring his action at common law. The remedy, where commissioners have allowed the claim against an estate, and the defendant has the claim stricken out of the commissioner's report under this section, is "his action at common law."

But if this statute does not compel or allow the plaintiff to bring his action at common law, it is now settled that such action lies, "except in the case of negotiable instruments, negotiated while current."

1 Story, Eq. Jurisp. § 86; 1 Wait, Act. & Def. 166.

Courts will not presume that the note was negotiable or negotiated, but the defendant must show this affirmatively.

Edw. Bills, 296, 302; 2 Pars. N. & B. 290; *Pintard v. Tackington*, 10 Johns. 104; *McNair v. Gilbert*, 3 Wend. 344; *Blader v. Noland*, 12 Wend. 173; *Lazell v. Lazell*, 12 Vt. 448.

An action at law lies, whether the note is negotiable or not, if the Statute of Limitations can be pleaded to an action brought on the note afterwards by a *bona fide* holder,—which is this case.

Torrey v. Foss, 40 Me. 74; *Hopkins v. Adams*, 20 Vt. 407.

An action at law lies also by the owner of a negotiable note lost after maturity, on the ground that such note is only transferable subject to the equities between the original parties.

Jones v. Pales, 5 Mass. 101; *Pales v. Russell*, 16 Pick. 315; Story, Notes, § 450, note 2; *Thayer v. King*, 15 Ohio, 242.

The subject of remedies upon lost notes is fully considered in—

Tuttle v. Standish, 4 Allen, 481; *Savannah Nat. Bank v. Haskins*, 101 Mass. 370; *McGregory v. McGregor*, 107 Mass. 543; *Moore v. Fall*, 43 Me. 450; 2 Ames, Cas. B. & N. 62, 64, note 10.

Durfee, Ch. J., delivered the opinion of the court:

This case comes before us on demurrer to the second count of the declaration, which count sets forth that the defendant's intestate, at Providence, on July 23, 1857, made his promissory note for \$500, payable to James A. Requa, or order, two months after date; and that said Requa then and there indorsed and delivered it to the plaintiff; that it was not paid at maturity; that after maturity, and before any part of it was paid, it was lost by the plaintiff; that after the loss the plaintiff demanded payment of the defendant, and the defendant refused payment. The ground of demurrer is that an action at law will not lie on such a note so indorsed and lost, the only remedy being in equity.

There is a conflict of decision on the question. The English doctrine is that the only remedy on a lost negotiable note or bill is in equity; the reason alleged being that the maker, upon paying the note, is entitled to have it surrendered to him for his protection against suit thereon by any other person coming into possession of it, and a court of equity can afford protection by exacting an indemnity bond, whereas a court of law cannot. In this country the Eng-

lish doctrine has been adopted in several States, but in others it has been materially modified or rejected. In this State, in *Aborn v. Bosworth*, 1 R. I. 401, which was an action on a bill of exchange lost, tried to the jury in 1850, this court instructed the jury that the drawee was entitled to recover upon proof either that the bill was destroyed or surrendered, or so indorsed that no third person could recover it. The counsel for the defendant disparages the authority of this case because it was determined at *nisi prius*; but it should be remembered that, at the time it was tried, the full court were required to sit in the trial of cases to the jury, and the court, when so sitting, was accustomed to listen to very thorough discussions of legal questions on both principle and precedent. We think that the case has been, and should continue to be, accepted as settling the law, so far as it goes, for this State. The ground of decision was that the loser is entitled to recover in an action against the maker whenever the recovery will put the maker in no worse position than he would have been in if the loss had not occurred.

The averment here is that the note was lost after indorsement, but also after maturity. The averment of the loss was not necessary to the maintenance of the action; and, in our opinion, it is competent for the plaintiff to prove, not only the loss, but also the destruction of the note. 2 Pars. B. & N. 309. In *Peabody v. Denton*, 2 Gall. 351, the note was lost after maturity; and in action thereon by the indorsee against the maker, tried eighteen years after the loss, the court held that after so great a lapse of time it was incumbent on the defendant to show either that the note existed or had been demanded of him, or that it must otherwise be presumed that no demand would ever be made. In the case at bar, for anything that is averred, the note may have been lost thirty years ago. In *Swift v. Stevens*, 8 Conn. 431, the note disappeared some six years before the trial. The cashier of a bank to whom it had been delivered for safe keeping testified that he had made diligent search for it, but was unable to find it; that he had never delivered it to any person; and that he verily believed it had been accidentally destroyed. And on motion for new trial, after verdict for the plaintiff, the court held that the evidence was proper to go to the jury, to prove the destruction or nonexistence of the note. The circumstances in the case at bar, for anything that appears, may be equally or more cogent to prove the destruction or nonexistence of the note.

Moreover, all that is required, to entitle the plaintiff to recover, is proof that the defendant can pay the note without the hazard of being required to pay it a second time. Accordingly it has been held that the loser is entitled to recover when any future action on the note will be barred by the Statute of Limitations. *Torrey v. Foss*, 40 Me. 74; *Moore v. Fall*, 42 Me. 450. Any future action on this note would be barred, so far as appears; and, if so, the defendant will be protected. And furthermore, the action here is not against the maker personally, but against his administrator; and it has been stated that the maker's estate was represented insolvent; that commissioners were appointed, who allowed the plaintiff's claim; and that the

allowance was stricken out by the defendant, and this action brought under R. I. Pub. Stat. chap. 186, § 15. If this be so, the estate, if really insolvent, will be protected without any indemnity bond, since no creditor who has not presented his claim to the commissioners can maintain any action upon it against the estate, unless there is a surplus remaining after all the debts allowed have been paid. We think, therefore, that the demurrer must be overruled, since it does not appear but that the plaintiff is able to show that the defendant can pay the note to him without risk of being obliged to pay it again to any other person.

The plaintiff contends that he is entitled to recover because, though the note was lost after indorsement, it was overdue when lost, and therefore any person taking it would take it subject to the equities, and could get no better title than the person had from whom he took it. A number of cases support this view. *Thayer v. King*, 15 Ohio, 242; *Sloo v. Roberts*, 7 Ind. 128; *Elliott v. Woodward*, 18 Ind. 183; *Smith v. Walker*, 1 Smed. & M. Ch. 432, 435; *Chaudron v. Hunt*, 8 Stew. (Ala.) 31; *Fales v. Russell*, 16 Pick. 315, 317; *Renner v. Bank of Columbia*, 22 U.S. 9 Wheat. 581 (6 L. ed. 166). But against this view it is urged that the holder of the note, by simply producing it and verifying the signature, makes a *prima facie* case for himself, throwing on the defendant the burden of proving that the note was lost before maturity,—a burden involving a risk which he ought not to be exposed to. 2 Pars. B. & N. 295. We do not find it necessary to decide the point now, and therefore leave it undetermined.

Demurrer overruled.

Harley E. MATHEWSON, *Appt.*,

v.

Elizabeth T. MATHEWSON.

The court of probate has no jurisdiction to allow and set off to the widow such portion of the real estate of her deceased husband as is authorized by Pub. Stat. chap. 185, § 4, until after assignment of dower. The statute provides for distinct proceedings, with distinct appeals, upon the assignment of dower and upon setting off the real estate under § 4, when both proceedings originate in the court of probate.

(Providence—Decided October 22, 1887.)

APPEAL from the Court of Probate of Johnston. *Sustained, and proceedings to set off the real estate to widow dismissed.*

The facts are sufficiently stated in the opinion.

Mr. Louis L. Angell, for appellant.
Messrs. Stephen A. Cooke, Jr., and Robert W. Burbank, for appellee:

Durfee, Ch. J., delivered the opinion of the court:

This is an appeal from a decree of the Court of Probate of the Town of Johnston, setting off to Elizabeth, widow of Benoni Mathewson, late of said town, all the real estate which he

had at his decease. The decree was made on petition of the widow under Pub. Stat. chap. 185, § 4. which provides that if there be no children or their descendants living at the decease, "the court of probate shall allow and set off to the widow such portions of the real estate of her deceased husband, which shall not be required for the payment of debts, as may be suitable for her situation and support, and be in accordance with the circumstances of the estate; and such widow shall hold such real estate, in addition to her dower, upon the same terms and conditions and for the same period as she holds her estate of dower." The decree, —after reciting that there were no children or their descendants, that none of the real estate will be required for the payment of debts, and that the whole of it is suitable for the situation and support of the widow, etc.—orders and adjudges that the whole "be and is hereby allowed and set off to said Elizabeth T. Mathewson in addition to her dower upon the same terms and conditions and for the same period as she holds her estate of dower." The case is before us now on motion of the appellant to dismiss the proceeding on the ground that the court of probate has no jurisdiction in the premises until after an assignment of dower to the widow.

We think the motion must be granted. The language of the statute is that the court shall set off "such portions of the real estate," etc., and "such widow shall hold such real estate in addition to her dower upon the same terms," etc "as she holds her estate of dower." The widow cannot hold such portion "in addition to her dower" on the same terms as "she holds her estate of dower" until her estate of dower has come into existence by assignment. Her dower, until assigned, is a mere right of action, and previous to the assignment it cannot be known what part of the estate will remain out of which the additional portion can be set off. It is argued that it is unnecessary to have the dower assigned and the portion set off by distinct proceedings, when the whole estate is going to be awarded to the widow as dower and as "suitable portion" in addition to dower. There might be force in this argument if the statute did not provide for distinct proceedings, with distinct appeal therefrom, when both proceedings originate in the court of probate; but, such being the statute, the argument cannot avail. If the dower were first assigned it may be that the heir would abide by the assignment without appeal, his only objection being to the portion subsequently set off in addition; and he is entitled not to have the two matters complicated by confounding them together.

The proceeding is dismissed as premature.

John M. O'ROURKE *et ux.*

v.

Hugh B. BAIN, Town Treasurer of the Town of Cranston.

In an action to recover for injury to the realty from causing water, gravel, etc., to be turned upon the estate of the plaintiffs, where, for anything that ap-

pears in the declaration, the injury may have been caused merely by such changes of grade by the town as were necessary to fit the roads for use as highways, and such as were contemplated in the layout, a demurrer will be sustained.

(Providence—Decided November 21, 1887.)

ON defendant's demurrer to a declaration for injuries from accumulation of surface water on land. *Sustained.*

The declaration sets out that plaintiffs have been and are "the owners of and possessed of a certain tract of land * * * with six dwelling-houses and other buildings and improvements thereon, on the northerly side of Cranston Road, and on the easterly side of Rocky Hill Road, in said town of Cranston; yet the said town of Cranston * * * has, during said time, by the grading, regrading, and making of the Rocky Hill Road and Cranston Road and Webster Avenue in said town of Cranston, wrongfully and illegally caused, and still continues to cause, large quantities of water, sand, gravel, mud, and filth to be turned into and upon said estate of the plaintiffs, whereby said estate has been incumbered with water, mud, sand, gravel, and filth, and the said buildings defaced, injured, flooded, and undermined; by reason whereof, during said time, the plaintiffs have been unable to use their said estate to as good advantage as they might otherwise have done," etc.

Mr. Z. O. Slocum, for defendant:

1. Declaration charges, "by the grading, regrading, and making of the Rocky Hill Road, * * * wrongfully and illegally caused * * * large quantities of water, sand, * * * to be turned into and upon said estate of plaintiffs," and does not set out a cause of action.

2. The defendant is entitled to have the facts alleged on which the wrongful and illegal acts of the town, or duty to plaintiffs, is predicated. 6 R. I. 211; 12 R. I. 75; 13 R. I. 152.

3. This declaration is clearly distinguishable from case in 11 R. I. 520.

Mr. E. Metcalf, for plaintiffs:

The declaration sets out a cause of action substantially like that declared upon in *Inman v. Tripp*, 11 R. I. 520, and on the authority of that case should be sustained.

Per Curiam:

The court is of opinion that the declaration demurred to is insufficient under the authority of *Wakefield v. Newell*, 12 R. I. 73, and *Smith v. Tripp*, 13 R. I. 152.

The declaration does not allege that the injury was caused by accumulating surface water from distant points by change of grade, and discharging it upon the plaintiffs' land; but, for anything that appears, the injury may have been caused simply by such changes of grade as were necessary to fit the roads for use as highways, and such as may be presumed to have been contemplated in the layout.

In *Inman v. Tripp*, 11 R. I. 520, there was no question in relation to the form of the declaration, but the case was heard under an agreement between the parties.

Demurrer sustained.

Re Annie C. SPENCER et al.

1. Where the testatrix, by the **codicil** to her will, **confirms the appointment of the executors**, and declares it to be her will that "they shall have **five years in which to settle my estate**," the **legatees**, taking under the will, can only take according to its terms, and are therefore **not entitled to enforce their legacies** during the five years allowed for the settlement. If under this provision the action at law is barred, the remedy in equity and the remedy on the bond still remain. The rights of **creditors** are **not prejudiced** by the stipulation as to time, for they are entitled to be paid independently of the will.
2. A clause, "Should my estate diminish in value, then my legacies shall decrease in proportion," means that, if the estate diminishes in value between the making of the will and the payment of the legacies, the resulting loss shall not fall wholly upon the residuary legatees, but all the legacies shall decrease proportionately.
3. Where the will gives \$1,000 to a legatee if he survives the probate of the will, but the codicil modifies the bequest by declaring that, if he dies before payment, then the sum given shall form a part of the residuary estate, this provision of the codicil makes his right to the legacy contingent upon his surviving until payment. If the legacies are not paid within five years, his right will become absolute, since delay after that time will be the fault of the executors, and they cannot take advantage of it. The legatee will not be entitled to interest so long as his right remains contingent.
4. Where the pecuniary legacies are not contingent, and no time for payment is specified, the legatees are entitled to interest after a year from the death of the testatrix, such being the general rule, which must control in the absence of any clear indication of an intent that it should not be followed; and the allowance of five years within which to settle the estate being permissive, and not mandatory, is not such an indication.

(Providence—Decided November 30, 1887.)

CASE stated for an opinion of the court under Pub. Stat. chap. 192, § 23. *Opinion and decree.*

Petition of Annie C. Spencer and others, executors and legatees under the will of Tabitha G. Spencer, for a construction of the will.

The will, the facts under which the questions arise, and the questions propounded, are as follows:

The will of Tabitha G. Spencer, wife of Thomas J. Spencer, of Warwick, proven May 14, 1884, is as follows:

I, Tabitha G. Spencer, wife of Thomas J. Spencer, of Warwick, in the State of Rhode Island, do hereby revoke all former wills by

me at any time made, and make and declare this only as my last will and testament, as follows; that is to say, I direct that all my debts contracted by me during my life shall be paid by my executors out of my estate. I direct my executors, as soon as reasonably may be done after my death, to put in good order the burying ground upon the farm that was my father's, in said Warwick, repairing and putting strongly together the chain fence around the same, and resetting and cleaning the stones at the expense of my estate.

I bequeath to the Corporation of the Baptist Church, or Society, at Crompton Village the sum of \$350, for the special purpose of building a horse-shed for the use of those who attend worship there, or, if such shed shall have been built during my life, then for the general uses of said society.

I direct my executors, as soon as may be conveniently done after my death, to invest in their names, as executors, in productive stocks or in savings bank, the sum of \$1,000, with power from time to time to change the investment, or any reinvestment thereof, and to accumulate the income so far as not used, and invest the same in augmentation of the principal, during the life of my half-sister Celia Nichols; and, in the event that she lives so long as to exhaust her own property, then from time to time, as needed, to use the income or, if need be, the principal of said fund, for the comfortable support, maintenance, and benefit of my said sister; and, upon the death of my said sister, to divide and pay out whatever may remain of said fund or its income, in equal shares, among my niece Annie C. Spencer, widow of Dr. Henry C. Spencer, and the four children of my brother, Lorenzo D. Budlong, for their own use.

I bequeath to my said husband, if he survives until this, my will, is finally admitted to probate, the sum of \$1,000, and to my half-sister Susan Clafin, and to my nephew Stephen A. Budlong, son of my half-brother, Philip Budlong, each the sum of \$1,000, if they respectively survive until this, my will, is finally admitted to probate.

I bequeath to the three children of my said niece Annie C. Spencer, namely, Dr. Thomas Frank Spencer, Annie L. Spencer, and Henrietta C. Spencer; and to the children of my nephew Lorenzo D. Budlong, Jr., living at my death; and to the children of my niece Mary Isabella Eells, living at my death; and to the children of my niece Tabitha Eliza Bearer, living at my death; and to the children of my nephew Stephen William Budlong, living at my death,—to each of said children and to Nancy C. Budlong, the wife of said Stephen W. Budlong, each the sum of \$100.

I devise and bequeath to my said nephew Stephen W. Budlong, and his heirs forever, all my right, title, and interest in and to any and all lands flowed by the pond or water ways or rights of the Oriental Print Works at or near Appanaug, in said Warwick, and all sums of money that may become payable, after my death, for flowage or damage, or allowances for flowage of the same, for his and their own use.

I bequeath to my said niece Tabitha Eliza Bearer the mortgage and mortgage note and

debt which I now hold upon her farm, and direct my executors to surrender the same to her and to cancel and discharge the same on record.

And, as an equivalent therefor, I bequeath to my said niece Annie C. Spencer, and to my nephew Lorenzo D. Budlong, Jr., and to my niece Mary Isabella Eells, and to my said nephew Stephen W. Budlong, the sum of \$1,000 each.

I bequeath to Lydia L. Palmer, Carrie C. Spencer, Sarah J. Remington, Gideon Spencer, and Abby M. Westcott, children of my said husband, and to my grandniece, Julia L. Ralph, and to my grandnephew, William D. Porter, grandchildren of my brother William D. Budlong, each the sum of \$50.

I bequeath to my said niece Tabitha Eliza Bearer all my wearing apparel, my gold watch and chain and pencil, and all my other jewelry, —also the two pairs of nice blankets last purchased by me, and also the carpet purchased by me in or about February, 1883; and I direct my executors, as soon as may be after the final probate of this my will, to cause the same to be properly packed and forwarded to her at her home in Kinnimundy, in the State of Illinois, by express or otherwise, at the expense of my estate.

I bequeath all my old household furniture and effects and china-ware which formerly belonged to my father and mother, to my said niece Annie C. Spencer and Mary Isabella Eells, and my said nephew Stephen W. Budlong, to be equally divided among them, share and share alike.

*And all the rest and residue of my household furniture and effects of every kind I bequeath to my said husband, and to my said last-named three nieces and nephews, to be equally divided between them, share and share alike.**

And all the rest, residue, and remainder of all my estate, real and personal, including all real estate which I may hereafter acquire, I give, devise, and bequeath to my said nieces and nephew, Annie C. Spencer, Lorenzo D. Budlong, Jr., Mary Isabella Eells, Tabitha Eliza Bearer, and Stephen W. Budlong, in equal shares, their heirs and assigns forever, to their own use, except the 25 lots of land now owned by me upon the plat at Greenwood, so called, in said Warwick, and which lots I devise to my said nephew Stephen W. Budlong, his heirs and assigns forever, to his and their own use.

And I hereby appoint my said husband, Thomas J. Spencer, and my said niece, Annie C. Spencer, and my said nephew Stephen W. Budlong, executors of this my will.

In testimony thereof I hereto set my hand and seal this 18th day of March, 1884.

Tabitha G. Spencer.

Signed, sealed, published, and declared by the said Tabitha G. Spencer, as and for her last will and testament, in the presence of us who, at her request, in her presence, and in the presence of each other, hereto subscribe our names as witnesses to the same.

David Cady,

Mary F. Knowles.

I, Tabitha G. Spencer, wife of Thomas J. Spencer, of Warwick, in the State of Rhode

*This clause and the following italicized words are omitted from the copy of the will given in the case submitted.

Island, having on the 18th day of March, A. D., 1884, made my last will and testament, do now make this, my codicil to said will, in manner following; that is to say, viz.:

I direct my executors named in my said will to pay my husband \$400 of the legacy I have given him in my said will, as soon as may be done after my decease.

And whereas my niece Annie C. Spencer is named in my said will as one of the residuary devisees, now, therefore, it is my will that she shall take my estate at Pawtuxet, in said Warwick (of which she is now the owner of one half), as the first \$1,000 of her portion of such residuary estate, to hold the same to her, her heirs and assigns forever.

And whereas my niece Tabitha Eliza Bearer is named in my said will as one of the residuary legatees, now, therefore, it is my will that she shall take the farm on which she now lives as the first, of \$1,000, of her portion of such residuary estate, to hold the same to her, her heirs and assigns forever.

And whereas my nephews Lorenzo D. Budlong, Jr., and Stephen W. Budlong, and my niece Mary Isabella Eells, are named in my said will as residuary devisees, now, therefore, it is my will that they shall each receive \$1,000 each of their respective shares of said residuary estate, to hold to them, their heirs and assigns forever; the same to take as soon as possible after the probate of my said will and this my codicil.

It is my will that the legacy to the Baptist Church Corporation, or Society, of Crompton, named in my said will, shall be paid within two years after the probate of my will.

It is my will that my executors named in my said will shall be the executors of this my codicil to my said will, and that they shall have five years in which to settle my estate. And whereas, in my last will, I have given a legacy to my half-sister Susan Claffin of \$1,000, and to my nephew Stephen A. Budlong, son of my half-brother Philip Budlong, of \$1,000, now, therefore, should they or either of them die before the payment of such legacy to them, then such sum or sums shall form a part of the residuary estate. Should my estate diminish in value, then my legacies shall decrease in proportion.

In witness thereof I have hereunto set my hand this 20th day of March, 1884.

Tabitha G. Spencer.

Signed, published, and declared by Tabitha G. Spencer as and for her codicil to her last will and testament, in the presence of us, who have, at her request, in her presence, and in the presence of each other, hereto set our names as witnesses—(the words) "either bank stock, money, or real estate, as they may agree upon," were erased before signing.

Mary F. Knowles,
Herbert B. Wood.

The parties in interest under this will state that the executors nominated accepted, and gave notice of their appointment, May 21, 1884; that the personality of the estate is sufficient to pay all debts and legacies; that no inventory or appraisal of the estate had been made other than that made and filed in the probate court immediately after the proof of the will; that

Susan Clafin died June 1, 1885; that the legacies to Stephen A. Budlong, Susan Clafin, Lydia L. Palmer, Carrie E. Spencer, Gideon Spencer, and Abby M. Wescott are wholly unpaid; and that \$600 of the legacy to Thomas J. Spencer is unpaid.

And the parties in interest concur in propounding the following questions:

1. Whether or not the clause in the codicil, in which the executors "shall have five years in which to settle my estate," exempts said executors from suit for legacies during and throughout said period of five years.

2. Whether or not said last-mentioned clause authorizes the executors to postpone the payment of legacies and the settlement of the estate till the end of said five years.

3. Whether or not the clause in the codicil, viz.: "Should my estate diminish in value, then my legacies shall decrease in proportion,"—means that the estate, at the expiration of five years, shall be compared with the inventory filed by the executors at or about the time of the probate of said will.

4. Whether or not the pecuniary legacy of \$1,000 to Stephen A. Budlong was due and payable on the 12th day of May, 1887, on which date said Stephen A. commenced suit for the recovery of the same, and, if yea, whether or not any interest is to be allowed on the same, and, if interest is allowed, then from what time to what time.

5. Whether or not the pecuniary legacy of \$1,000 to Susan Clafin was due and payable on the 14th day of May, 1887, on which date said Willard Clafin, executor of the last will and testament of said Susan Clafin, commenced suit for the recovery of the same, and, if yea, whether or not with interest, and, if interest, from what time to what time.

6. Whether or not the pecuniary legacies to Lydia L. Palmer, Carrie E. Spencer, Gideon Spencer, and Abby M. Wescott were due and payable on the 18th day of May, 1887, on which date they commenced suit for the recovery of the same; and whether or not any interest is due and payable on said legacies at said date, and from what time said interest shall be computed.

7. Whether or not the balance of the \$1,000 legacy to Thomas J. Spencer, amounting to \$600, is now due and payable, and whether or not with interest.

Messrs. Stephen Essex, Oscar Lap-ham, and Albert R. Greene, for petitioners:

At the time of the execution of the will and of the death of the testatrix, the laws of Rhode Island declared that all legacies are due and payable at the expiration of one year from the date of the probate of the will, and bear interest thereafter.

Derby v. Derby, 4 R. I. 414; Pub. Stat. chap. 189, § 23.

A pecuniary legacy, whether charged on land or not, given to a person *in esse* simply,—*i. e.*, without any postponement of payment,—is, of course, vested immediately on the testator's decease.

2 Jarm. Wills, p. 450.

In the vesting of personal legacies the payment of which is postponed to a period subse-

quent to the decease of the testator, a leading distinction is that, if futurity is annexed to the substance of the gift, the vesting is suspended, but if it appears to relate to the time of payment only, the legacy vests *instantly*.

2 Jarm. Wills, p. 453; *Staples v. D'Wolf*, 8 R. I. 74.

In Hawk. Wills, p. 254, it is said: "When a gift of the absolute interest in property to one person, is followed by a gift of it to another in a particular event, the disposition of the courts is to put such a construction on the gift over, as will interfere as little as possible with the prior gift;" hence the rule, "When there is a bequest to one person, and, in case of his death, to another, the gift over is construed to take effect only in the event of the death of the prior legatee before the period of payment or distribution, unless an intention appear to the contrary."

This case is substantially like the cases referred to under the rule laid down in *Hawkins*. The testatrix says, "in case the legatee dies before payment;" but the contingency is really death, and not payment. Payment cannot be a contingency, it is the result. Neither can death be a proper contingency, because, as stated in *Hawkins* on Wills (in *Home v. Pillans*, 2 Mylne & K. 20), 254, "the event here contemplated being so inevitable that it cannot be deemed a contingency, the courts have held that something else must be intended than merely to provide for the case of the legatee dying at some time or other, and so have read these words as if they had been 'in case of his death during the testator's lifetime,'—in which event alone they have allowed the bequest over to take effect."

If there is an immediate gift to A. and a gift over in case of his death, or any similar expression implying the death to be a contingent event, the gift over will take effect only in the event of A's death before the testator.

Theobald, Wills, 836; Jarm. Wills, pp. 605, 606, 678, and cases cited, including *Martin v. Martin*, L. R. 2 Eq. 404, and *Hutchins v. Mannington*, 1 Ves. Jr. 366.

Gifts over on death of prior legatee before receiving, construed receivable when the will points out a time for payment, and, when the will fails to point out a time for payment, it is referred to end of year after the testator's death.

3 Jarm. Wills, p. 672 *et seq.*

Although, by the terms of the codicil of the will, the executors were given five years in which to settle the estate, that provision could in no way affect a vested right to the legacy under the will. Susan Clafin could have compelled payment in a year after probate; and the court will not now allow executors to take advantage of their own misconduct, delay, and negligence, especially as they are the residuary legatees, if it can be shown that the estate was well able to pay the legacy before the death of Susan Clafin.

If the executors were allowed to postpone payment for five years, they would defeat our right of action, which right is limited from one year after to three years after probate of will.

New England Com. Bank v. Newport Steam Factory, 6 R. I. 154.

Durfee, Ch. J., delivered the opinion of the court:

We are of opinion that the executors of the will of the late Tabitha G. Spencer are exempt from suits for legacies for five years after their appointment. The testatrix, by her codicil, confirms their appointment, and declares it to be her will that "they shall have five years in which to settle my estate." The legatees, taking under the will, can only take according to its terms, and are therefore not entitled to enforce their legacies during the five years allowed for the settlement. It is urged that, though the five years are allowed, it was not intended that they should be used without necessity. This may be so; but in our opinion the language in which they are allowed is such that the executors may use the entire period, or not, according to their discretion. It is also urged that, if the executors cannot be sued for five years, they cannot be sued at all at law, since, after the five years, the action at law given by statute will be barred by the three years' limitation in favor of executors and administrators. But, admitting this, the remedy in equity and the remedy on the bond still remain. It follows that the first question, and the second also in so far as it applies to the legacies, must be answered in the affirmative. Of course the clause allowing five years for settlement cannot prejudice the rights of creditors, for they are entitled, not simply under the will, but independently of it.

We are of opinion that the clause in the codicil, viz.: "Should my estate diminish in value, then my legacies shall decrease in proportion," means that, if the estate diminishes in value between the making of the will and the payment of the legacies, the resulting loss shall not fall wholly upon the residuary legatees, but all the legacies shall decrease proportionately; and we answer the third question accordingly.

We are of opinion that the pecuniary legacy to Stephen A. Budlong was not due and payable on May 12, 1887. The will gives him \$1,000 if he survives the probate of it, but the codicil modifies the bequest by declaring that, if he dies before payment, then the sum given shall form a part of the residuary estate. We think this provision of the codicil makes his right to the legacy contingent upon his surviving until payment, if the legacies are paid within five years; though, after the five years, his right will in our opinion become absolute, since any delay of payment after that time will be the fault of the executors, and they cannot take advantage of it. We think he will not be entitled to interest so long as his right remains contingent. This answers the fourth question, and also, virtually, the fifth; for, Susan Claffin having died within the five years and before payment, the amount of her legacy, in accordance with the opinion, falls into the residuum.

We are of opinion that the pecuniary legatees are entitled to interest on their legacies after a year from the death of the testatrix, when they are subject to no contingency and no time for payment is specified.

This is the general rule, and should be followed in the absence of any clear indication of an intent that it should not be followed. We do not think the clause allowing the executors

five years within which to settle the estate is such an indication. It is permissive, not mandatory. It declares that the executors shall have, not that they shall take, five years. It seems to us that the reasonable construction is that it was designed not to benefit the residuary at the expense of the pecuniary legatees, but to enable the executors to take their time, or the period allowed, in case the regular course of settlement would prove disadvantageous. See *Varley v. Winn*, 2 Kay & J. 700; *Wood v. Penoyre*, 18 Ves. Jr. 326. Interest is not allowed after a year because the executor is necessarily obliged to pay at the end of a year, for the will may not have been proved then, or, if proved, it may not be possible to know whether the assets will suffice to pay both debts and legacies. *Pearson v. Pearson*, 1 Sch. & Lef. 10; *Martin v. Martin*, 6 Watts, 67. The ordinary practice is to wait until the claims against the estate have been settled, and a clear fund ascertained, before enforcing the payment of particular legacies. *Thomas v. Montgomery*, 3 Russ. 502. In *Kent v. Dunham*, 106 Mass. 591, the court says that interest is allowed on the principle that it follows as an accretion to the principal legacy, and does not depend on or demand a default. The sixth and seventh questions are, in effect, answered by this opinion taken in connection with the opinion given in answer to the first and second questions.

Decree accordingly.

STATE of Rhode Island

v.

John FLYNN.

1. Pub. Stat. chap. 244, § 24,—declaring **every person convicted** three times within a period of six months, of **intoxication** amounting to a violation of decency, or who shall be proved to have been thus intoxicated **three several times** within a period of six weeks, shall be deemed a **common drunkard**, upon whom a penalty is imposed, by the preceding section, of imprisonment, —does **not make the person** coming within its terms **renewedly liable to conviction** and punishment for **offenses** of which he has been **previously** convicted and **punished**. The Fifth Amendment of the Constitution of the United States, that no person shall be subject, for the same offense, to be twice put in jeopardy of life or limb, imposes a restriction only on the general government, and does not apply to State government; but the statute in question is not within its terms.
2. **One charged under § 6 of the statute is entitled to a trial by jury** on any question of fact arising under the complaint, and **under the former conviction** with which he may be charged, the **right of trial by jury has been secured** to him, and the statute does not therefore violate provisions of the State Constitution which secure the right of trial by jury.

(Providence.—Decided October 22, 1887.)

ON defendant's exceptions to the Court of Common Pleas. *Overruled.*

The defendant had been convicted three several times within the period of six months next preceding the making of the complaint in this case, of being intoxicated under such circumstances as to amount to a violation of decency, and had been punished therefor. Having been so convicted, he was arrested and held to answer the charge of being a common drunkard.

All additional facts are sufficiently stated in the opinion of the court.

Messrs. Charles A. Wilson and Thomas A. Jenckes, for defendant:

If the crime charged under this statute is identical with that for which the accused has already suffered punishment, the statute is unconstitutional, because it conflicts with the United States Constitution, which provides that no person shall "be subject, for the same offense, to be twice put in jeopardy of life or limb" (U. S. Const. art. 5, in amendment thereof); and it matters not that the punishment for the same offense be inflicted in the one case by a municipal court, and in the other by a law of the State.

State v. Thornton, 37 Mo. 360; *State v. Cowen*, 29 Mo. 330; *State v. Welch*, 36 Conn. 216.

Under any possible interpretation, the statute is unconstitutional, because it is repugnant to that United States constitutional provision which provides that no person shall "be deprived of life, liberty, or property without due process of law" (U. S. Const. *supra*), and the Constitution of Rhode Island, which declares the accused shall not "be deprived of life, liberty, or property, unless by the judgment of his peers, or the law of the land."

Const. art. 1, § 10.

The crime, if any, punishable by virtue of this statute, is the crime of being a common drunkard; but the Legislature, by establishing the arbitrary rule of evidence that three convictions, etc., shall be conclusive proof of the guilt of the accused, makes it obligatory upon the court to instruct the jury, upon the production of the record of these convictions, to exclude from their consideration all other evidence, and to find the prisoner guilty.

This renders it impossible to secure to the accused the right of having the question of his guilt passed upon by a judgment of his peers. This the Legislature has no power to do.

State v. Beasick, 13 R. I. 211.

Messrs. N. Van Slyck, City Solicitor, and C. M. Van Slyck, for the State:

The offenses are, by the statutes of the State, made distinct and separate.

Pub. Stat. chap. 244, § 24; House of Correction Act (Nov. 2, 1833), § 13; Pub. Laws, chap. 686 (Apr. 12, 1878), § 1.

The respondent further contends that the statute under which the complaint was made (Pub. Stat. chap. 244, § 24) is unconstitutional and void, as being in conflict with § 10 of art. 1 of the State Constitution, because it establishes a rule of evidence.

To this we reply:

1. It is no objection to a statute that it establishes a rule of evidence, unless that rule makes the evidence *prima facie* or exclusive.

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State v. Higgins, 13 R. I. 330; *State v. Melior*, 13 R. I. 666; *State v. Wilson*, Index X, 21, 1 New Eng. Rep. 888.

2. The statute does not establish a rule of evidence. It only defines and perhaps creates an offense.

The respondent further contends that said § 24 of Pub. Stat. chap. 244, is void because it conflicts with art. 5, in amendment of the Constitution of the United States.

It has been expressly held that this article has no reference to the State government.

State v. Paul, 5 R. I. 185, 196.

"That no person shall be subject, for the same offense, to be twice put in jeopardy of life or limb," is simply a common-law rule.

State v. Lee, 10 R. I. 494.

But the General Assembly has full power to modify or entirely abrogate this rule.

But if it should be held that this article has reference to the State government, the statute is not in conflict therewith. The statute does not provide that a man shall be tried twice for the same offense; it provides that in case he commits an offense of a certain character, and is tried and convicted therefor three times within a certain definite period, he thereby becomes guilty of another and different offense, although perhaps an offense similar in character.

State v. Johnapn, 3 R. I. 94

Durfee, Ch. J., delivered the opinion of the court:

This is a complaint charging that the defendant, at Providence, on the 23d of August, 1887, "is a common drunkard, having been convicted of being intoxicated, in the city of Providence, under such circumstances as to amount to a violation of decency, three several times within six months immediately previous to the date of this complaint, against the statute and the peace and dignity of the State." The complaint was made under Pub. Stat. chap. 244, § 24, which enacts that "every person who shall have been convicted three times within the period of six months, of intoxication, under such circumstances as to amount to a violation of decency, or who shall be proved to have been thus intoxicated three several times within a period of six weeks, shall be deemed a common drunkard." By a preceding section a common drunkard is punishable by imprisonment for not less than six months nor more than three years. The complaint is brought into this court from the court of common pleas, by the defendant, by a bill of exceptions, which raises the question whether the § 24 above quoted is constitutional. The defendant contends that the section is unconstitutional: (1) because it is in conflict with the declaration contained in the Fifth Amendment to the Constitution of the United States, that no person shall "be subject, for the same offense, to be twice put in jeopardy of life or limb," and (2) because it violates provisions of the State Constitution which secure the right of trial by jury.

A sufficient answer to the first objection is that the fifth is one of several amendments to the Federal Constitution which impose restriction only on the general government, and do not apply to State governments. *Barrow v. Baltimore*, 82 U.S. 7 Pet. 243, 247 (8 L. ed. 672);

State v. Paul, 5 R. I. 185; *Commonwealth v. Whitney*, 108 Mass. 5.

We do not think, however, that the section would be in conflict with the declaration if the declaration were in our State Constitution. The defendant's contention is that the section makes him renewedly liable to conviction and punishment for offenses which he has previously been convicted of and punished for. Clearly this is not so. His previous offenses were offenses of being intoxicated, in the city of Providence, under such circumstances as to amount to a violation of decency. The offense of which he is now accused is that of being a common drunkard. The difference is this: His previous offenses were separate acts of intoxication, whereas the offense of which he is now accused consists in his having a character attached to him, by force of the section, in consequence of having been convicted of his previous offenses; namely, the character of a common drunkard for which he is punishable under a preceding section.

The section is similar in effect to a former statute of Massachusetts. The statute provides that where a person had been twice convicted of offenses punishable by confinement to hard labor for any term of years, he should, on his second conviction, be sentenced to solitary confinement, etc., in addition to the punishment prescribed for the offense; and also, if the first conviction was not known in time for this, that the further sentence should be imposed by the supreme court on information setting out the facts. In *Ross's Case*, 2 Pick. 165, the validity of such further sentence imposed on information was affirmed. The policy of such statutes is to prevent the repetition of offenses, by punishing with increased severity the offender who, by repeating his offense, shows that the lighter sentences have been inefficient. *Plumbly v. Commonwealth*, 2 Met. 413; *Commonwealth v. Hughes*, 133 Mass. 496.

We do not see any valid ground for the second objection. There is nothing to prevent any person who is complained of under chap. 244, § 24, from having a trial by jury on any question of fact arising under the complaint if he desires it, and there is, and long has been, provision for jury trial on complaints for indecent intoxication; so that the three convictions cannot have been obtained against him without jury trial, unless he has seen fit to forego it. *Exceptions overruled.*

John SULLIVAN *et ux.*

v.

George E. WEBSTER *et al.*

Where the Act provided that in a certain event, which occurred, a bridge should be built "over the river," on or near the site of the old bridge, "in such place and manner" as the commissioners should determine, and "according to plans and specifications by them approved," the commissioners did not exceed their authority in erecting a bridge high above the river, and extending it beyond the eastern bank to an avenue, there establishing

the eastern abutment, where the Act authorized the commissioners to "take and appropriate, if necessary for the purposes of the bridge, the private property of any person or of any municipal or other corporation," and to "purchase any real estate" required,—it appearing that the bridge was extended at the height at which it is built for the accommodation of a street and of divers railway tracks beneath it.

(Providence—Decided December 9, 1887.)

ON plaintiff's petition for a new trial. *Denied.* This action was trespass on the case. At the trial before a jury, at the April Term, 1887, of this court, it appeared that the defendants were appointed and commissioned under Pub. Laws, chap. 849, of March 28, 1883, known as the "Seekonk Bridge Act." That under said Act they made a plan and built the existing bridge. In doing so they located an abutment across Warren Avenue, which is a public highway in East Providence. The abutment permanently stopped public travel at its location. That the line of the bridge is a continuation of the line of Warren Avenue. That to meet the bridge it became necessary to raise the grade of Warren Avenue. That a bridge might have been built upon the same location on the river as the present bridge, and at the old grade of Warren Avenue, without building a barrier across said Warren Avenue. But the bridge, as built by the commissioners, is at a higher grade than Warren Avenue, and the bridge abutment prevents travel along Warren Avenue between the abutment and the river, to the great injury, as is claimed, of the plaintiffs. That the plaintiffs own an estate on Warren Avenue not far from the bridge abutment and are cut off from traveling on Warren Avenue as formerly. That no part of Warren Avenue has been declared useless as a public highway, and no proceedings have been taken by the town council to abandon it, or by the bridge commissioners, except in locating the bridge and paying all damages to the abutting owners.

Plats and photographs of the premises were produced in illustration.

The presiding justice directed a verdict for the defendants, and the plaintiffs excepted.

Messrs. Amasa M. Eaton, and James M. Ripley, for plaintiffs:

Whenever a special or particular damage is sustained by a private individual for a public nuisance, an action for damages is maintainable.

Ang. & D. Highways, 3d ed. §§ 285-301; Co. Litt. 56, a; *Chichester v. Lethbridge*, Willes, 71; *Iveson v. Moore*, Holt, 10, and see comments thereon by the Vice-Chancellor in *Sollau v. De Held*, 2 Sim. N. S. 133, 145-148; *Iveson v. Moore*, 1 Ld. Raym. 486; *Mills v. Hall*, 9 Wend. 315; *Lyme Regis v. Henley*, 1 Bing. N. C. 222; *Thayer v. Boston*, 19 Pick. 511, 514; *Spooner v. McConnell*, 1 McLean, 387; *Rose v. Groves*, 7 Jur. 951; *Cole v. Sprowl*, 85 Me. 161; *Reynolds v. Clarke*, 1 Pitts (Pa.) 9; *Brown v. Watson*, 47 Me. 161; *Gerrish v. Brown*, 51 Me. 256; *Ottawa Gas Light Co. v. Thompson*, 39 Ill. 598; *Blanc v. Klumpke*, 29 Cal. 156, 159; *Wesson v. Washburn Iron Co.* 13 Allen, 95; *Yolo Co. v. Sacra-*

mento, 36 Cal. 193; *Powers v. Irish*, 23 Mich. 429; *Francis v. Schoellkopf*, 53 N. Y. 152, 153.

See also, to the same effect, the following, in which the obstruction was not in front of the plaintiff's lot:

Wilkes v. Hungerford Market Co. 2 Bing. N. C. 281; *Stetson v. Faxon*, 19 Pick. 147, 180.

This principle has been adopted in this State, in—

Hughes v. Providence & W. R. R. Co. 2 R. I. 498; *Williams v. Tripp*, 11 R. I. 447.

"Not only must the authority to municipal corporations, or other delegated legislative agents, to take private property, be expressly conferred, and the use for which it is taken specified; but the power, with all constitutional and statutory limitations and directions for its exercise, must be strictly pursued."

2 Dill. Mun. Corp. § 469, p. 569; Cooley, Const. Lim. *528, *541; Redf. Corp. § 64; Ang. & D. Highways, 8d ed. § 220; *Vanwickie v. Camden & A. R. R. & Tranap. Co.* 14 N. J. L. 162; *Cincinnati v. Coombs*, 16 Ohio, 181, 188; *Re Exchange Alley*, 4 La. Ann. 4; *Dyckman v. Mayor of N. Y.* 5 N. Y. 434, 439; *Adams v. Saratoga & W. R. R. Co.* 10 N. Y. 328; *Nichols v. Bridgeport*, 23 Conn. 189, 208; *State v. Jersey City*, 25 N. J. L. 309; *Kyle v. Malin*, 8 Ind. 34, 37; *Judson v. Bridgeport*, 25 Conn. 426; *Shaffner v. St. Louis*, 31 Mo. 264, 272; *Harbeck v. Toledo*, 11 Ohio St. 219, 222, and cases cited; *People v. Brighton*, 20 Mich. 57; *Specht v. Detroit*, Id. 168, 172; *Trumpler v. Bemertly*, 39 Cal. 490; *Leslie v. St. Louis*, 47 Mo. 475, 477; *Anderson v. St. Louis*, Id. 479.

Or, in other words, in proceedings of this nature, every requisite must be complied with and must appear upon the face of the record.

"Where public officers overstep the bounds of their authority, and the courts are appealed to as matter of strict right, the actions of these agents are vigilantly watched and their infringement of private rights unhesitatingly repressed."

Sedg. Constr. Stat. Powers, 329.

For an obstruction built under a claim of legal authority, a party injured may have his action for damages, although he is not entitled to compensation as for a taking of his property.

Ang. & D. Highways, 8d ed. § 103, note; *Protzman v. Indianapolis & C. R. R. Co.* 9 Ind. 467; *Evansville & C. R. R. Co. v. Dick*, Id. 438, 435; *Cincinnati & S. G. A. St. R. Co. v. Cummins*, 14 Ohio St. 523, 546; *Lackland v. North Missouri R. R. Co.* 31 Mo. 180.

The abutter may recover for consequential damages, though none of his land is taken.

Tinsman v. Belvidere, D. R. R. Co. 26 N. J. L. 148, 160 *et seq.*

Doubtful grants are to be construed most favorably towards those who seek to defend their property from invasion.

Redf. R. R. p. 251, § 64.

Messrs. Nicholas Van Slyck, Stephen A. Cooke, Jr., and Cyrus M. Van Slyck, for defendants.

Durfee, Ch. J., delivered the opinion of the court:

The question is whether the Seekonk River bridge commissioners, in building the bridge over the river, exceeded their authority by extending it beyond the eastern bank to Warren

Avenue and there establishing the eastern abutment. We think not. The Act (Pub. Laws, chap. 349, §§ 3, 4) of March 28, 1863, provided that, in a certain event, which occurred, the bridge should be built "over the river," or or near the site of the old bridge, "in such place and manner" as the commissioners should determine, and "according to plans and specifications by them approved." The power is very broadly given. The location of the bridge and the manner of constructing it are both left wholly to the commissioners.

The plaintiffs contend that the authority given is to build "over the river," but not beyond it; that the commissioners might have built over without building beyond it, if they had built at grade with the river bank; and that they therefore exceeded their authority when they built beyond it. We think such a construction is too narrow. The bridge was in fact reared high above the river, and we do not see how there can be any question but that the commissioners, under their power to build it in "such manner as they might determine," were authorized to build it in that manner. The bridge, so built, required strong and massive abutments correspondingly high; and such abutments would, as a matter of reasonable, if not absolute, necessity, be erected out of the river on the solid ground. The commissioners were authorized by § 5 of the Act to "take and appropriate, if necessary for the purposes of the bridge, the private property of any person or of any municipal or other corporation," and, by a later Act, to "purchase any real estate" required. It may be said that it does not follow that they were authorized to carry the bridge to Warren Avenue and plant the abutment there, since they might have established it immediately on the river bank.

Doubtless their power should be construed as limited by the purpose for which it was conferred; and an extension of the bridge beyond the river bank without reason, or for reasons having no proper relation to the bridge as such, would be unauthorized; but such does not appear to have been the case here. On the contrary, it appears, from an inspection of the photograph and plat, that the bridge was extended at the height at which it is built for the accommodation of a street and of divers railway tracks beneath it.

If the abutment had been erected directly on the bank, it would have been necessary to connect the bridge with the highway beyond by a long slope or incline, for the safe and easy descent of the public travel. This would have blocked the street below, and would have either displaced the railway tracks or would have left them to be crossed at grade at the foot of the slope, greatly to the peril and inconvenience of travel. Manifestly, therefore, the extension of the bridge was designed and executed in subservience to the purpose for which the bridge was built, namely, to furnish a safe and convenient highway across the river. The bridge accomplished its purpose the better for being thus extended. Our conclusion is that the abutment was lawfully erected in Warren Avenue and consequently was not a public nuisance. This being so, the plaintiff's action cannot be maintained.

New trial denied.

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Patrick C. DENNEY

George E. WEBSTER, Clerk, etc.

1. Public Laws, chap. 596, entitled "An Act for the Suppression of Intemperance," § 32, is amended by § 3 of chap. 634, supersedes the provision (Pub. Stat. chap. 219, § 2) for appeals from sentences for offenses under chapters 596 and 634, and fixes the fifth day before the sitting of the court appealed to as the last day for filing reasons of appeal in such appeals, instead of the second day of the term.
2. An appeal from a sentence of the district court for keeping intoxicating liquors for sale in violation of Pub. Laws, chap. 596, as amended by chap. 634, where the reasons of appeal were brought in on the second day of the term of the court of common pleas, was properly refused on the ground that it should have been filed at least five days before the sitting of the court; and the relator has committed a breach of his recognizance, and is liable to default therefor under Pub. Stat. chap. 248, § 24.

(Providence—Decided October 23, 1887.)

PLAINTIFF'S petition for *mandamus*. Denied and dismissed.

The facts are sufficiently stated in the opinion of the court.

Messrs. H. J. Carroll and Thomas F. McParlin, for relator.

Mr. Ziba O. Slocum, Atty-Gen., for respondent.

Durfee, Ch. J., delivered the opinion of the court:

This is a petition for a writ of *mandamus* to issue to the respondent, as clerk of the court of common pleas, commanding him to receive, file, and docket certain reasons of appeal. The appeal was taken to the court of common pleas at the term now holding, from a sentence of the District Court of the Tenth Judicial District, as complained against the present petitioner, for keeping intoxicating liquors for sale in violation of Pub. Laws of May 27, 1886, chap. 596, as amended by chap. 634 of May 4, 1887. The reasons of appeal were brought in on the second day of the term, and were refused on the ground that they should have been filed at least five days before the sitting of the court. The question is, Were they rightly refused? The answer to the question depends upon the construction to be given to certain provisions of the Public Statutes and the Public Laws.

There is no statute which expressly fixes the last day for filing reasons of appeal in criminal cases. The general provision in regard to criminal appeals is contained in Pub. Stat. chap. 219. The second section of the chapter provides that, when an appeal is taken, the appellant shall be required to give recognizance with condition that he will file his reasons of appeal in the court appealed to on or before the second day of the term. This seems to fix by implication such second day as the last day

for filing the reasons. Since the enactment of the Public Statutes, chapter 596 of the Public Laws, entitled "An Act for the Suppression of Intemperance," and chapter 634 in amendment of and in addition to chapter 596, have been passed. Section 32 of chapter 596 as amended by § 3 of chapter 634 provides that, on appeal from sentence for any offense under said chapters, "the appellant shall be required to give recognizance, * * * with condition that he will file his reasons of appeal in the court appealed to at least five days before the sitting of said court." This provision evidently supersedes the provision of § 2 of chapter 219 for appeals from sentences for offenses under chapters 596 and 634; and it seems to fix the fifth day before the sitting of the court appealed to as the last day for filing reasons of appeal in such appeals, instead of the second day of the term. As we have seen, the appeal taken by the relator was an appeal from sentence under chapters 596 and 634. He has evidently committed a breach of his recognizance by not filing his reasons at least five days before the sitting of the court. How, then, has he the right to have his reasons brought in on the second day of the term, filed and docketed? He claimed the right by § 4 of chapter 219, which has not been superseded by any corresponding provision of chapters 596 and 634. Section 4 provides that if an appellant, having given recognizance, shall neglect to file his reasons in the court appealed to on or before the second day of the term, he shall be defaulted on the recognizance, and the attorney-general shall file the papers in the case and proceed in the same manner as if the reasons had been filed on or before the second day. It is contended that this provision recognizes the right of an appellant to file his reasons on the second day of the term, and that it is therefore the duty of the clerk to receive them. Section 4 was framed with reference to § 2 of the same chapter, and naturally adopts the language prescribed for the recognizance required by § 2; but evidently the purpose of § 4 in the provision referred to is not to give the appellant until the second day of the term to file his reasons, but to prescribe what shall be done in case he neglects to file his reasons on or before the second day, in accordance with his recognizance; and therefore the section, if applied to appeals under chapters 596 and 634, cannot be held to give the appellant until such second day to file his reasons, but must be construed according to its purpose as prescribing that the appellant shall be defaulted if he neglects to file his reasons at least five days before the sitting of the court, in accordance with his recognizance; and that thereupon the attorney-general shall proceed as stated. Is § 4 capable of being so construed and applied? Doubtless the language of the section is not such as would have been chosen if the section has been originally designed to be so applied, but we cannot suppose that the General Assembly intended to relieve defaulting appellants, under chapters 596 and 634, from the consequences attending defaults in the case of other appellants, and therefore the section should, if it can reasonably, be construed as applicable. The language is, "if the appellant neglects to file his reasons on or before the second day." Applying the language to the case of an appellant who is bound by his recogni-

zance to file his reasons at least five days before court, does not such appellant neglect to file his reasons on or before the second day when he neglects to file them at least five days before the court, as his recognizance requires, instead of waiting until the second day of the term, when he has no right to file them? We incline to think so. Indeed, we think such must be the conclusion unless the provision of § 4 in question be rejected as inapplicable, and, if the provision is rejected, then there can be no question but that other reasons were rightly refused, because, in that case, there is plainly nothing but § 82 of chapter 596 as amended by chapter 634 to determine the time for filing, and that section fixes the time as at least five days before court. The relator has clearly committed a breach of his recognizance, and is liable to default, therefore, under Pub. Stat. chap. 248, § 24, whether liable under chap. 219, § 4, or not.

The petition must be denied and dismissed.

John S. LANGLEY, Admr.,

v.

METROPOLITAN LIFE INS. CO.

A general demurrer to the entire declaration is bad, if either count is sufficient.

(Providence—Decided November 5, 1887.)

ASSUMPSIT. On demurrer to the declaration. *Overruled.*

Messrs. Sheffield & Sheffield, Jr., for plaintiff.

Messrs. Miner & Roelker, for defendant.
The facts are sufficiently stated in the opinion.

Per Curiam:

The demurrer to the declaration must be overruled. The declaration contains a special count on a policy of life insurance, also a count on account settled or stated, and the common counts. The demurrer is a general demurrer to the entire declaration. Of course it is bad if either count is sufficient. The defendant does not claim to point out any defect in any but the first count, and we do not discover any defect in the other counts. Gould, Pl. chap. 4, § 6; 1 Chitty, Pl. *696.

Demurrer overruled.

William ARNOLD

v.

Sebastian GARST.

Where the defendant offered to sell the plaintiff a portion of a lot at ten cents less per square foot than he had paid, and the plaintiff accepted the offer,—the contract on both sides being verbal; and the plaintiff accepted a conveyance under the contract, paying forty cents per square foot, on the representation of the defendant that he had paid fifty cents, when in fact he had paid but forty,—an action by the plaintiff in

assumpsit for the excess is not within the Statute of Frauds, but on an implied contract of defendant to refund the money, which, in consequence of his representation, the plaintiff paid to him in excess of the contract price.

(Providence—Decided October 22, 1887.)

ON plaintiff's exceptions. *Sustained.*

This was an action of assumpsit on the common counts for money overpaid on contract.

The facts are fully stated in the opinion of the court.

Messrs. Edward D. Bassett, and Frederick Hayes, for plaintiff.

Mr. Rathbone Gardner, for defendant.

The testimony of the plaintiff as to the verbal contract between himself and defendant for the sale of the land in question was inadmissible, the contract being within the Statute of Frauds.

The action, while not declaring specifically upon the contract, is brought for the purpose of charging the defendant upon the contract, and cannot therefore be maintained except upon evidence of the nature prescribed by the statute.

Pub. Stat. chap. 204, § 7; *Rand v. Walder*, 64 Me. 191; Browne, Stat. Fr. 4th ed. § 134.

The fact that the land had been conveyed by the defendant to the plaintiff is not sufficient to take the contract out of the statute.

Baldwin v. Palmer, 10 N. Y. 232; *Douc v. Way*, 64 Barb. 255.

It was not error to order a nonsuit, and the exceptions should be dismissed.

Durfee, Ch. J., delivered the opinion of the court:

This case comes up from the court of common pleas on exceptions to an order of said court nonsuiting the plaintiff. The action is assumpsit for money had and received. In support of the action in the court below, the plaintiff submitted testimony to show that some time in 1880 the defendant purchased of one McCrillis a lot of land in South Providence, for which he paid a price of forty cents per square foot; that afterwards, representing to the plaintiff that the lot was larger than he needed for himself, and that he wanted to have the plaintiff for a neighbor, he offered to sell the plaintiff a portion of the lot at ten cents less per square foot than he had paid, and the plaintiff accepted the offer, the contract on both sides being oral; that the defendant conveyed to the plaintiff, under the contract, about 6.000 square feet of land, representing to the plaintiff, who did not know what the defendant had paid, that he had paid fifty cents per foot, in consequence of which the plaintiff paid him at the rate of forty cents per square foot, being ten cents per square foot in excess of the price agreed. Subsequently the plaintiff, having learned how he had been deceived, brought this action to recover back such excess. The court below, having at first admitted the plaintiff's testimony *de bene esse*, against the defendant's objection that it was inadmissible under the Statute of Frauds, at the conclusion thereof, ruled it out and nonsuited the plaintiff. The only question made at the bar is whether the testimony is admissible under the Statute of Frauds.

The clause of the Statute of Frauds under which the question is made is this, to wit: "No action shall be brought whereby to charge any person upon any contract for the sale of lands, tenements, or hereditaments, unless the promise or agreement upon such action shall be brought, or some note or memorandum thereof shall be in writing, and signed by the party to be charged," etc. We do not think the action here is within this clause. It was brought, not to charge the defendant on his oral contract to sell a portion of his land for ten cents less per square foot than he paid for it, but to charge him on an implied contract to refund the money which, in consequence of his misrepresentation, the plaintiff paid to him in excess of the contract price. The terms of the contract were offered in proof, not to show a liability under the contract, but merely as evidence to show, in connection with other evidence, a liability outside of it; and, as such, were admissible. *Browne*, Stat. Fr. 4th ed. §§ 124, 125; *Goodspeed v. Fuller*, 46 Me. 141. See also *Chitty*, Cont. 11th Am. ed. 422, note i.

The plaintiff cites *Holtz v. Schmidt*, 59 N. Y. 233, to show that assumpsit for money had and received will lie for the recovery of money paid, in consequence of fraud or mistake, in excess of what was agreed to be paid. We do not understand that any question is made on that point.

Exceptions sustained.

John P. LEWIS *et al.*,

v.

Town of NORTH KINGSTOWN *et al.*

1. Where the bill averred that the defendants were proposing not only to remove the building from a lot belonging to the complainants, thus destroying a portion of their estate, but also to grade the lot, thus obliterating its boundaries and throwing it open to use as a part of the highway; so that, in order to reach a complete remedy, the complainants might not only have to prosecute the defendants for their damages, but also to establish their right as against the public,—a case was stated entitling the complainants to an order restraining the threatened trespass, and, after the bill had been answered, a statement of a supplemental answer that the building had been removed and the grading of the lot completed, which was denied by the replication, did not entitle the defendants to a dismissal of the bill. If the statements of the supplemental answer were admitted, it would not cause such dismissal; for it is not in the power of the defendant, in an injunction bill, to oust the court of its jurisdiction by committing, *pendente lite*, the very acts to prevent which the suit was begun.

2. If the defendant, pending the suit, disables himself to perform the order for which specific relief is claimed in the

bill, the court will proceed to give relief by compelling compensation to be made, and for this purpose will retain the bill and determine the amount of such compensation, although its nature and measure are precisely the same as the party would otherwise recover as damages in an action at law.

(Providence — Decided October 20, 1887.)

MOTION to dismiss bill to restrain threatened trespass. *Overruled.*

The facts are stated in the opinion.

Mr. Samuel W. K. Allen, for complainants.

Mr. William C. Baker, for respondents.

Durfee, Ch. J., delivered the opinion of the court:

This bill sets out that the complainants are owners, in possession of a lot of land situate on Washington Street, in the village of Wickford, in the town of North Kingstown, in Highway District No. 37 of said town, on which lot there is a building belonging to them; that the defendant John H. Weeden, the surveyor of the highways of said district, acting under orders of the town council of said town, the members whereof are likewise made defendants, has entered on said lot and is engaged in raising said building, and taking away the foundations, for the purpose of removing said building and foundations, and grading said lot, thereby throwing the estate open to the public, and obliterating its boundaries to the irreparable injury of the complainants. The bill prays that the defendants may be enjoined from carrying out their purposes, and from further interfering in any way with the estate; and for general relief. The bill was filed February 23, 1885. The defendants, by their answer filed May 27, 1885, admit that they are or were doing as charged, but deny that the lot is part and parcel of the estate of the complainants, and allege that it is, and ever has been from a time whereof the memory of man runneth not to the contrary, part and parcel of a public highway, and that the building had stood thereon by sufferance of the town. The defendants also, by supplemental answer, filed September 23, 1886, allege that their purposes have been fully carried out by removing the building and foundations, and grading the lot, and set up that the complainants ought not to maintain their bill, because their remedy is complete at law. To both answers the complainants have filed general replications. In this state of the pleadings, the defendants move that the bill be dismissed because the complainants have an adequate remedy at law; and, in support of their motion, contend, first, that the bill does not state a case for equitable relief; and, second, if it does, that the case stated has ceased to exist, by reason of the removal of the building and foundations, and the grading of the lot.

It is true that, in case of threatened trespasses, courts of equity generally leave the suffering party to his remedy at law; but when such party is in possession, and the trespass, if permitted, would result in irreparable injury, or tend to the destruction of the estate, the courts

interpose by injunction. In the case at bar the bill averred that the defendants were purposing, when the bill was filed, not only to remove the building from the lot belonging to the complainants, thus destroying a portion of their estate, but also to grade the lot, thus obliterating its boundaries, and throwing it open to use as a part of the highway; so that, in order to reach a complete remedy, the complainants might not only have to prosecute the defendants for their damages, but also to establish their right as against the public. We think the case as stated in the bill falls within the class of cases in which threatened trespasses are enjoined. *Winslow v. Noyson*, 118 Mass. 411, 421; *Fox v. Fitzsimons*, 29 Hun, 574, 579; *McPike v. West*, 71 Mo. 199; *Erwin v. Fulk*, 94 Ind. 285; *Gilbert v. Arnold*, 30 Md. 29; *Kerr*, Inj. 295.

We do not think the motion should be granted because of the statements of the supplemental answer, since those statements are controverted by the replication. Moreover, if they were admitted, we do not think they would make a case for dismissal. It ought not to be in the power of a defendant in an injunction bill to oust the court of its jurisdiction by committing, *pendente lite*, the very acts to prevent which the suit was begun; and such, we think, is the law. "It is well settled," says the Supreme Judicial Court of Massachusetts, "with little or no conflict of authority, that, when a defendant in a bill in equity dis enables himself, pending the suit, to comply with an order for specific relief, the court will proceed to afford relief by way of compelling compensation to be made; and for this purpose will retain the bill and determine the amount of such compensation, although its nature and measure are precisely the same as the party would otherwise recover as damages in an action at law." See *Milkman v. Ordway*, 106 Mass. 232, a case which contains a very full citation and discussion of authorities, and goes even beyond the passage quoted. See also 2 Story, Eq. Jurisp. 12th ed. §§ 794, 799. It may be that an amendment of the bill setting forth the acts committed by the defendants *pendente lite* will be necessary, notwithstanding the supplemental answer, if the complainants desire not only an injunction from further interference, but also an award of damages; but, if so, the complainants should have an opportunity to make it.

Motion dismissed.

David M. COGGESHALL

v.

James GROVES *et al.*

When the cause of action is one that may subsist and be prosecuted independently of the statute, the repeal of the statute neither takes away the right of action nor the right to proceed. The amendment to the Constitution, May 15, 1886, prohibiting the sale of intoxicating liquors to be used as a beverage, did not take away the right of action upon a bond given, pursuant to the provisions of Pub. Stat. chap. 87, upon an application for a

license to sell intoxicating liquor. The cause of action does not depend upon the statute, although it grew out of it. The suit is maintainable as a common law suit. Jurisdiction of the form of cause of action was not given by the statute. It is not a suit for penalty imposed by the statute. The bond was rather a security to the municipal corporation about to grant a license, that the licensee would not be an offender against the law. If the principal violated the law, and thus broke the condition, the bond thereby became due. It was recoverable in an action of debt, which was not taken away by a repeal of the statute, and which can now be prosecuted.

(Newport—Filed November 18, 1887.)

ACTION upon a bond given by a firm to whom had been issued a license to sell liquor, the breach alleged being a sale upon Sunday.

On defendant's motion in arrest of judgment. *Denied.*

Messrs. Charles E. Gorman and Patrick J. Galvin, for defendants.

Mr. Francis B. Peckham, for plaintiff.

Stiness, J., delivered the opinion of the court:

This suit is brought upon a bond which was given pursuant to the provisions of Pub. Stat. chap. 87, upon an application for a license to sell intoxicating liquor. Under the statute the license could not issue until the bond was given with condition not to violate any of the provisions of the law. The license was granted for the year from July, 1882, to July, 1883, and the breach of the condition is alleged, and has been found by the jury, to have been in August, 1882. May 15, 1886, an amendment to the Constitution of the State went into effect, prohibiting the sale of intoxicating liquors to be used as a beverage. On the 1st of July following, this action was commenced, and, after a verdict for the plaintiff, the defendants moved in arrest of judgment, upon the ground that the Amendment to the Constitution repealed, unconditionally, the license law then in force, and such repeal took away the right to recover upon the bond which was given pursuant to its requirements. They claim that the purpose of the bond was to create a penalty for a violation of the Act, additional to other penalties therein prescribed; and the penalties were wiped out together by the amendment to the Constitution.

The amendment undoubtedly repealed any provision of law which was inconsistent with it, for such a law thereupon became unconstitutional. The amendment, however, relates only to the sale of liquor. It does not directly annul any right of action or right to prosecute an action. But the defendants argue that it does this indirectly, because chapter 87 constituted a license system of which the provision relating to bonds was a part, and that the chapter and system, in every part, became unconstitutional, and therefore repealed, upon the adoption of the amendment. We do not need to decide, in this case, whether this is so or not:

for assuming that the chapter was thus repealed, as claimed by the defendants, we still think the present action can be maintained.

It is beyond question that when a statute is repealed, without a saving clause, all authority to proceed solely under that statute is gone, for it is no longer in existence. Hence, if one has been convicted under it, he cannot be sentenced or subjected to a penalty for the violation of the Act; and if an action, dependent upon the Act, has been commenced, it cannot be further prosecuted; for when the statute is taken away all proceedings which depend upon it must fall. So, too, if a right of action is given by statute, it is also taken away with the statute and cannot be carried to judgment. This result necessarily follows from the dependence of the proceedings upon the statute. The case of *Dillon v. Linder*, 36 Wis. 344, is an illustration of this rule. A suit was brought to recover damages under what is known as the civil-damage section of a liquor law. The repeal of the law took away the right of action. As the right to recover no longer existed, there could be no judgment; just as in a criminal case there could have been no sentence.

The case of *Rood v. Chicago, M. & St. P. R. Co.* 43 Wis. 146, is to the same effect. But when the cause of action is one that may subsist and be prosecuted independently of a statute, the repeal neither takes away the right of action nor the right to proceed. The rule, in both cases, is clearly stated in *Graham v. Chicago, M. & St. P. R. Co.* 3 Wis. 473, 484: "Those rights of action which are expressly given by the statute, and do not exist outside of the statute, are necessarily destroyed by its repeal; but rights of property or causes of action which accrue to a party, and which indirectly depend upon the statute, are not necessarily destroyed by its repeal." Accordingly, where a statute made it unlawful to charge a greater sum for transporting freight than that prescribed in the Act, and an action had been brought to recover back an excess that had been paid under protest, it was held that the subsequent repeal of the statute did not take away the plaintiff's right to recover, because he had the right under a common-law action, and the only necessary reference to the statute was to ascertain what was unlawful at the time.

In *Butler v. Palmer*, 1 Hill, 324, a right to redeem under a mortgage, given by statute, was held to fall with the repeal of the statute; but Judge Cowen, in the opinion, recognized a distinction between inchoate rights arising under a statute which is destroyed, and rights which may stand independently of the statute. *Grey v. Mobile Trade Co.* 55 Ala. 387, was an action to recover damages which resulted to the plaintiff from the failure of the defendant to conform to the requirements of an Act of Congress which was subsequently repealed. The court decided that the suit could be maintained, upon the ground that it was not a penal action, or a suit in the nature of a penal action, under the statute, but a suit which stood upon a common-law right of recovery. See also *Conley v. Palmer*, 2 N. Y. 182; *Palmer v. Conly*, 4 Den. 374.

The doctrine of these cases seems to be decisive in this case. This is a suit upon a bond. The cause of action does not depend upon the

statute, although it grew out of it. The suit is maintainable as a common-law suit. Jurisdiction of the form or cause of action was not given by the statute. It is not a suit for a penalty imposed by the statute. The bond was, rather a security to the municipal corporation, about to grant a license, that the licensee would not be an offender against the law. The only necessary reference to the statute is to ascertain whether the obligation still subsists by reason of a breach of its condition, which happens to involve the question whether the statute was violated. If the principal violated the law, and thus broke the condition, the bond thereby became due. It was recoverable in an action of debt, which was not taken away by a repeal of the statute, and which can now be prosecuted. The amendment directed the General Assembly to provide by law for carrying it into effect. At the May Session, 1886, a law was passed repealing chapter 87, but saving all penalties and forfeitures which had accrued under it. Upon the view which we have taken of the case it is not necessary to pass upon this phase of the right to maintain the action.

The motion in arrest of judgment must be denied.

Mary Ann BEATTIE *et al.*, Appts.,

v.

Samuel THOMASON *et al.*

1. On the **contest of a will**, on the ground that the testator, through **mental weakness and disorder**, was incapable of making it, and that it was the offspring of **undue influence**, **testimony is admissible**,—tending to show that the **real estate devised** by the will to the testator's sister was in part **acquired by the earnings** of the testator's wife and her daughters by a former marriage, although it stood in the name of the testator,—introduced in connection with evidence that the testator, years before the death of his wife, when he was confessedly of sound mind, recognized her right to the real estate, and, on request to make it over to her, promised to do so by will.
2. Where the **testimony** in regard to the **mental condition** of the testator was **contradictory**, and such that different minds, in reading it, might fairly come to different conclusions, a **new trial** will **not be granted** on the ground that the verdict was against the evidence or the weight thereof.

(Providence—Decided October 29, 1887.)

A PPEAL from the Municipal Court* of Providence on appellees' petition for a new trial. *Overruled.*

The facts are sufficiently stated in the opinion.

Mr. William H. Sweetland, for appellants.

Messrs. George J. West and Daniel L. D. Granger, for appellees.

*This court has probate jurisdiction in Providence.

Durfee, Ch. J., delivered the opinion of the court:

This is an appeal from a decree of the Municipal Court of the City of Providence, admitting to probate the will of Joseph Knight, who died August 30, 1886. The will, dated July 9, 1886, gives to his sister, with whom until shortly before his death he had been on bad terms for years, his real estate and two thirds of the personal, the remainder being given to his brother. He made a will July 24, 1884, by which he gave his entire property to his wife, who died June 28, 1886, leaving two daughters by a former husband, who are the appellants. At the last term of this court the case was tried to a jury, who returned a verdict against the will. It is before us now on petition for new trial for alleged erroneous rulings, and on the ground that the verdict was against the evidence and the weight thereof.

The only ruling now complained of is a ruling by which the appellants were allowed to introduce certain testimony going to show that the real estate devised by the will in contest to the testator's sister was in part acquired by the earnings of Mary Knight and her daughters, although it stood in the name of the testator. The contention is that the testimony was irrelevant, but at the same time prejudicial, since it was likely to appeal to the sympathies of the jury and lead them to suppose that this was a proper proceeding to establish the equitable claim of the stepdaughters.

We think the testimony was properly admitted. The will was contested on the grounds, (1) that the testator, through mental weakness

and disorder, was incapable of making it; and (2) that it was the offspring of undue influence. And any evidence tending to show that it is unreasonable or unjust, as compared with the prior will, under which the contestants claim was relevant to the issues. "Where a will is impeached for imbecility of mind in the testator, together with fraudulent practices by the devisees," says Gibson, *Ch. J.*, in *Patterson v. Patterson*, 6 Serg. & R. 55, "the intrinsic evidence of the will itself, arising from the unreasonableness or injustice of its provisions, taking into view the state of the testator's property, family, and the claims of particular individuals, is competent and proper for the consideration of the jury." See also, to the same effect, *Fountain v. Brown*, 38 Ala. 72; *Kevil v. Kevil*, 2 Bush, 614; 1 Redf. Wills, 521.

Moreover, the testimony objected to was connected with the testimony going to show that the testator had, years before the death of Mary Knight, when he was confessedly of sound mind, recognized her right to the real estate, and, on being asked to make it over to her, had promised to do so by will,—the claim of the appellants being that the will of 1884 was made to carry out this promise.

We do not think that a new trial should be granted on the ground that the verdict was against the evidence or the weight thereof. The testimony in regard to the mental condition of the testator was very contradictory, and was, in our opinion, such that different minds, in reading it, might fairly come to different conclusions.

Petition dismissed.

CONNECTICUT.

SUPREME COURT OF ERRORS.

Robert C. DUNHAM,

v.

City of NEW BRITAIN.

1. Where an Act of the Legislature, which authorized the establishment of a reservoir and the taking of land and water rights for that purpose, directed the borough to elect three persons as water commissioners, and authorized them to purchase and take conveyances, for and in the name of the borough, of all property necessary for the purposes of the Act, it was sufficiently broad to include, as an incident, the right to fix the terms and conditions of the purchase; and where such commissioners, as part of the consideration for land purchased, gave, in a contract independent of the deeds, a license to the grantors to boat and fish, the borough, having accepted the land, cannot be heard in repudiation of the agreement, although there was no vote or act of the board of water commissioners, acting as a board, authorizing its execution or delivery, but it was signed "The Warden, Burgesses, and Freemen of the Borough of New Britain. F. T. Stanley, G. M. Landers, Water-Commissioners."
2. Where the grantors of the land upon which the reservoir was located established a pleasure resort contiguous thereto, and the frequenters of the place have used the lake for boating, sailing, and fishing in boats hired of the grantors, and in this way a profitable business has been established, and a large number of other persons have also been in the habit of using the lake for boating, sailing, and fishing, and though such use is not in itself injurious or a nuisance, yet the consequences of such use may result in the propagation of disease, and does discourage the use of the water for domestic purposes; and where the common council of the city which succeeded to the rights of the borough, acting pursuant to powers given it by the Legislature to "make such orders and ordinances as it should see fit for the better protection and preservation of the waters of said lake," passed an ordinance prohibiting under a penalty, among other things, "boating, sailing, and fishing on said lake,"—the enforcement of which ordinance has had the effect to keep away the public from the lake, so that the grantors lost the profits of such pleasure resort,—in a suit to enjoin the city from enforcing the ordinance, where damages are claimed for its enforcement, and it is claimed that the deeds of conveyance to the borough should be reformed so as to reserve to the commissioners the privilege of boating, sailing, and fishing on the lake, or

that the deeds should be set aside and declared void; and the decision of the court was adverse to the plaintiff,—it was held, on appeal, that, as the ordinance had for its object the preservation of the public health, and was adapted to that object, and had been authorized by the Legislature, it was a proper and valid exercise of the police power of the State; and, even if the ordinance was invalid, there would have been an adequate remedy at law, so that no error could have been predicated upon a denial of the injunction; and, whatever the record may suggest as to the possible claim for damages, the facts as found do not lay an adequate foundation for such a judgment.

3. As there was neither a mutual mistake, nor even a mistake on the part of the plaintiff, concerning the deeds; but they were knowingly made and executed precisely as the water commissioners insisted they should be, without any reservation or provision therein concerning the plaintiff's right to use the lake for boating and fishing; and any parol agreement was merged in the written agreement signed by the water commissioners, which was accepted without claim that it did not embody the agreement of the parties; and the agreement in part induced the grantors to deliver the deeds,—there can be no ground for questioning the deeds as they exist, the rights of the plaintiff being embodied in the written agreement.
4. Whether the plaintiff acquired his right under the written agreement or under a prescriptive right, either title would be insufficient to lay the foundation for an injunction against the enforcement of an ordinance which is a valid exercise of the police power of the State.
5. The plaintiff cannot claim a prescriptive right, because its exercise was not adverse. He relied upon the written agreement, which was an express license to do the acts relied upon, and cannot, by such use, convert the license of a personal privilege, limited to the life of the plaintiff, into an absolute title; to last forever.

(Hartford — Filed November 19, 1887.)

ON plaintiff's appeal from a decision of the Superior Court refusing an injunction restraining the enforcement of an ordinance forbidding fishing and boating upon a lake supplying a city with water, and refusing the reformation of deeds or to declare them void.

Dismissed.

The finding of facts and judgment are as follows:

1. In May, 1857, the Legislature of this State authorized and empowered the borough of New Britain to take water from the stream known as Shuttle Meadow Brook, either within or without the limits of the town of New Britain, for the use of said borough, and in such quan-

ties as the necessities and convenience of the borough might require, and authorized and empowered the borough to purchase and take conveyances of all lands necessary for the accomplishment of that purpose, as fully appears by an Act entitled "An Act to Supply the Borough of New Britain with Water for Public and Private Purposes," approved May 26, 1857. Said Act is made part of this finding.

2. Harvey Dunham, now dead, and Robert C. Dunham, his son, the plaintiff, owned all the land (except a few acres) upon that stream which the borough needed for the construction of their dam and the maintenance of their reservoir, which land, about 150 acres in all, was part of a larger tract owned by said Dunham, and was situated in the town of Southington.

Acting under the authority conferred by said Act, the borough of New Britain, for the purpose of obtaining a water supply for public and private purposes, through its board of water commissioners, consisting of three members appointed pursuant to said Act of May, 1857, applied to said Dunhams to buy enough of their land for the building and maintaining of a reservoir, and all the purposes of said Act.

Negotiations followed said application, and resulted in the execution and delivery, by said Dunhams, to said borough, of the deeds marked Exhibits A, B, C, D, and E, respectively, and the execution of Exhibit I by two of said water commissioners to said Dunhams. It was agreed that the borough paid for said land a money consideration, but there was no evidence, except as contained in the deeds themselves, as to the amount thereof.

Upon the trial of this case, the Dunhams claimed that said land was much more valuable than the amount stated as the consideration in said deeds.

And I find that, prior to the said application of said commissioners to said Dunhams, they had made, and were making, efforts to ditch, drain, and reclaim the same, and to that end had expended \$200 or \$300. And I find that the said Dunhams, when they executed said deeds and received Exhibit I, regarded said lands of greater value than the consideration stated in said deeds, and were induced to part with the title to said land in part because Exhibit I was signed and delivered to them by two of said water commissioners, and in part because they thought that the establishment of said reservoir and the use of its waters for fishing and pleasure, by themselves and others, would render their adjacent land more valuable.

The plaintiff claimed that a part of the real consideration of these conveyances was the agreement of Stanley and Landers that they, the Dunhams, should have the right of boating and fishing upon the lake forever. The plaintiff claimed that Stanley and Landers made such an agreement, and induced the plaintiff to believe that they had full power to make such an agreement. The plaintiff claimed that his father and himself insisted on reserving said right of fishing and boating in said deeds, but were finally prevailed upon by said Stanley and Landers to forego this reservation, they promising to give their subsequent and separate agreement, and stipulating that such an agreement would be sufficient to secure to them said right of fishing and boating: and, to

prove this claim, offered four witnesses, among them said Robert C. Dunham, to whom the following questions were put and rulings made:

Q. Now, Mr. Dunham, I want to have you relate and give the history of the negotiations between you and the parties acting, as you supposed, for the borough of New Britain, which ended in your passing the title to that land there to the borough of New Britain. Relate the whole matter.

Objected to; and the court excluded the question, because it was too broad. The court stated that it was understood that when a question was put, and it was objected to, and a ruling made, one way or the other, that it was excepted to.

Q. I call the witness's attention to Exhibit C (which was read); I call the witness's attention further to Exhibit D (which was read); and I call the witness's attention to Exhibit E (which was read). Now, having read those deeds to you, Mr. Dunham, I ask you first if you are the Robert C. Dunham mentioned in those deeds as grantor?

A. Yes, sir.

Q. Will you state, beginning at the beginning, what the bargain was in pursuance of which you executed these deeds to the warden, burgesses, and freemen of New Britain?

Objected to.

The Court. I will exclude that, because it does not call for the conversation; it calls for a conclusion instead of the facts themselves.

Q. I will ask you this, Mr. Dunham,—What were the negotiations, the talk, and the conversation that preceded the giving of these deeds to the borough?

Objected to, and objection sustained.

Q. I ask you this question, Mr. Dunham: State whether or not you had, in the year 1857, prior to the giving of these deeds, any conversation with F. T. Stanley, G. M. Landers, of New Britain with regard to the conveyance of this land, and if so, what it was?

Objected to, and objection sustained.

Q. I ask you whether F. T. Stanley or G. M. Landers—either or both of them—came to you during the year 1857 and had a conversation with you relative to the purchase of this land, before the giving of these deeds?

Objected to, and the court ruled that the question, as it is, was admissible.

Q. State whether or not they came to you and had a conversation with you in regard to the purchase of land.

A. They came to me about the spring of 1857.

Q. Did they have a conversation with you relative to the purchase of these lands?

A. They did.

Q. Now, I ask you what that conversation was?

Objected to, and the court excluded the question.

Q. What was the real consideration of these deeds, which you executed to the warden, burgesses, and freemen of New Britain, of this land? What was the real consideration?

Objected to.

The Court. If that calls for the conversation between either Stanley or Landers, or both of them, and this witness, it is already excluded. If it calls for Exhibit I, I should want to hear

from the other side as to whether that is admissible or not.

Mr. Case. I don't put any limit to the question.

The Court. I will exclude the question because it is too broad; it may include something that is not admissible.

By Mr. Case. Q. For the purpose of showing what the real contract was in pursuance of which these deeds, marked Exhibits A, B, C, D, and E, were given, the plaintiff offers to prove, by the testimony of Robert C. Dunham, that some time prior to the 22d day of June, 1857, F. T. Stanley and G. M. Landers, who represented themselves at that time to be water commissioners of the borough of New Britain, and who were in fact two of the water commissioners, commenced negotiations with Harvey and Robert C. Dunham for the purchase of the lands mentioned in said deeds, and held and had various conversations with them, both Harvey and Robert C. Dunham, for the purpose of arriving at an agreement with them, and in the course of this conversation they offered, not only to pay a certain stipulated sum of money for the land, but they further offered that, in consideration of the conveyance of this land to the borough for the purpose of a reservoir, the Dunhams should have reserved to them forever the right to fish and boat upon the waters of the lake to be created by this reservoir, and further represented to them, as an inducement for them to part with the title to their property, that the creation of this lake would greatly enhance the value of their other property there; that, in putting up buildings and laying the grounds for a pleasure resort there, it would be a source of very great profit, and would greatly enhance the value of the other land; that they represented to the Dunhams that they had full power in the premises of reserving to them, the Dunhams, all those privileges and rights, and would do so provided that in consideration of them they would convey the land to the borough; and that it was finally, by reason of these representations, and because they were induced to believe that the water commissioners had the power which they represented they had, and because they believed that the rights and privileges which they had represented would accrue to them from the giving of these deeds and the building of this reservoir, and because they believed these rights would be a compensation for parting with the title to the lands,—for that reason, they finally consented to execute the deeds, and did execute the deeds of this land; that the real consideration of these deeds by which they parted with the title to these lands was not the money which they received, but the prospective advantages which they expected to reap from the creation of the reservoir under those promises of these two gentlemen, Stanley and Landers. Now, for the purpose of proving that this was the state of facts, and that it was upon these representations and promises that the Dunhams parted with their title to their lands to the borough of New Britain, I offer to prove this conversation, or conversations, in which these promises, inducements, and representations were made.

The court excluded the question.

The borough, by virtue of the deeds referred to, took possession of the land described therein and built a dam there and made a reservoir,

which constituted the body of water ever since known as the "Shuttle Meadow Lake," a body of water flooding all the land acquired of the Dunhams, besides a number of acres acquired from other parties. As soon as the borough built the dam, the Dunhams, who owned all the land contiguous to the lake on the east side, commenced the establishment of a pleasure resort there, and since known as "Shuttle Meadow Lake House." They built a house of entertainment, with lodging and dining rooms, bar-room, and all the other rooms and appurtenances of a hotel; they graded and cleared up the grounds, and built a pavilion for skating, dancing, etc.; built barns and outhouses and a boathouse, and placed upon the lake a dozen rowboats, a sailboat, and a steamboat. They laid out some \$20,000, more or less, in the establishment of this pleasure resort upon their own land on the bank of the lake, which constituted substantially the main attraction of the place. They believed that visitors would come in large numbers, attracted by the facilities for fishing and boating, and the result justified their expectations. The yearly gross income, sometimes, of the place, has been from \$5,000 to \$7,000. They exercised the right of using and letting for use the boats referred to for the purpose of fishing and boating upon the lake uninterruptedly for more than twenty-five years, claiming the right so to do. Such use of the waters of the lake was not exclusive.

In 1885 the borough of New Britain had become the city of New Britain, and the Legislature of that year passed an Act amending the charter of the city of New Britain, in and by which they authorized the common council of said city to make such orders or ordinances as they might see fit for the better protection and preservation of the waters of Shuttle Meadow Lake (Priv. Acts 1885, § 24, pp. 126, 127). Under the authority of this Act the common council passed, on or about the 6th of July, 1885, an ordinance, which was caused to be printed and publicly posted (particularly in the neighborhood of the Shuttle Meadow Lake House) in the manner following:

NOTICE.

To Whom it May Concern :

The attention of all parties is hereby called to the following ordinance of the city of New Britain, and extract from the statutes of the State of Connecticut, which will be rigidly enforced.

Per order Water Commissioners,
Arthur W. Rice, Chairman.
New Britain, Conn., July 6, 1885.

Be it ordained by the Common Council of the City of New Britain:

§ 1. That for the preservation of the purity of the water of Shuttle Meadow Lake, so called, in the town of Southington, all boating and sailing and keeping of boats upon said lake, and fishing therein from boats or through the ice, skating, and driving or riding upon the ice of said lake with horses or animals, is hereby prohibited.

§ 2. No person shall throw into the water of said lake any dead fish.

§ 3. Every person who shall offend against the provisions of § 1 of this ordinance by going sail-

ing or being upon the water of said lake on any raft or in any boat of any description, or by fishing from any such boat or raft, or keeping or maintaining upon said lake any such boat or raft, or by fishing on or through the ice, or by skating, or driving or riding upon the ice of said lake with horses or animals, shall forfeit and pay a penalty of \$25 for each offense.

§ 4. Any person who shall offend against the provisions of § 2 of this ordinance shall forfeit and pay a penalty of \$10 for each offense.

§ 5. The provisions of §§ 1 and 2 of this ordinance—except as to fishing from boats or rafts on said lake, or in or through the ice, and skating,—shall not apply to persons in the employ of said city of New Britain or the water commissioners thereof, while engaged upon said lake in maintaining, repairing, or improving the waterworks of said city, or to the keeping or maintaining upon said lake, by said water commissioners, of boats or rafts to be used for said purposes of maintaining, repairing, or improving said waterworks.

§ 6. It shall be the duty of the water commissioners of said city to see that the provisions of this ordinance are enforced.

The posting of this notice was immediately followed by the arrest, trial, and conviction of parties for the alleged violation of said ordinance, by boating upon the lake, whereupon, in obedience to the ordinance, boating and fishing upon the lake was stopped by the Dunhams, and the present action brought for relief.

The enforcement of this ordinance operates to keep the public away from the said lake, and thus the plaintiff loses the profit of said pleasure resort; and in this manner only the acts of the defendants substantially impair the said business and substantially depreciate the value of the plaintiff's said property.

The borough of New Britain, in 1857, and for some years thereafter, had a population of not more than 4,000 or 5,000, but it has gradually increased in size and population until in 1871 it became an incorporated city, and has at the present time a population of between 18,000 and 20,000.

From time to time from 1858 to 1885 the attractions at said Shuttle Meadow Lake, so called, have been increased by improvements to the grounds, in the way of bowling-alleys, swings, pavilions, and other conveniences for pleasure parties, and the number of boats on said lake, owned, used, and let for hire by said Dunhams, has been increased until the carrying capacity of the same is now about 200 persons. The chief attraction of said pleasure resort is the boating, sailing, and fishing, and it has come to pass that the lake, from about April 1 to November 1 in each year, is largely and almost continuously used for such purposes. Other persons, also, beside the Dunhams and those hiring boats of them, have been in the habit of keeping pleasure boats to some extent upon said lake.

In 1857 the borough of New Britain elected three water commissioners under the Act of 1857 hereinbefore referred to, and in December of that year two of said commissioners, to wit, F. T. Stanley and Geo. M. Landers, executed Exhibit I, referred to in the complaint, and delivered the same to the plaintiff.

There was no vote of said borough authorizing the execution or delivery of Exhibit I and no vote or act of said board of water commissioners acting as a board was offered to authorize the execution or delivery of Exhibit I.

Owing to the acts of the plaintiff and those claiming to act under his authority and permission in using said lake as a place of pleasure resort in boating, sailing, and fishing thereon; and owing also to the acts and conduct of such persons and a large number of others who have used said lake for purposes of recreation and pleasure,—the General Assembly of this State, at the January Session thereof, 1885, gave to the common council of said city power to make such orders and ordinances as it should see fit for the better protection and preservation of the waters of said lake, and to enforce the same, as by an Act relating to the city of New Britain, approved April 14, 1885, fully appears.

The city of New Britain succeeded to all the rights, privileges, and property rights of the borough of New Britain, of which it is the legal successor.

Shuttle Meadow Lake constitutes the sole water supply of said city, and the waters thereof are used very largely by the inhabitants thereof for drinking and domestic purposes; and a large number of families in said city have no wells, and depend upon said lake for supplying water for the above purposes; and the city and its predecessor, said borough, have expended a large amount of money in maintaining and improving said water supply. Said lake depends for its water supply upon the natural watershed of the lands that are about it, and upon springs. No stream of water flows through it, and the water of said lake is conducted in pipes to said city, and is distributed directly from said lake to the consumers.

The use of the waters of said lake for the purpose of fishing in or sailing thereon, in itself, is not injurious or a nuisance, and agitation of the surface of the water is beneficial; but, as a necessary incident to, or concomitant of, such use, a considerable quantity of impure and objectionable and decayed and decaying matter and filth, and various excreta of the human body, is from day to day deposited in the water of said lake. But such deposit has not been and is not at present in sufficient quantities to be appreciable in its effect upon said waters; but the knowledge on the part of the public of such deposit produces disgust, and tends to prevent the use, by the public, of said waters for domestic purposes. If the germs of contagious or infectious diseases should be deposited at or near the entrance of the supply pipes, such diseases might be communicated to the people of said city using said water for domestic purposes.

All the acts of which the plaintiff complains were done under and by virtue of said ordinance and the statutes of this State; and, in passing the ordinance and in endeavoring to enforce the same, the defendants have acted in good faith and for the purpose of better protecting and preserving the waters of said lake. In so far as the reasonableness of said ordinance is a question of fact, I find that said ordinance is reasonable.

It is ruled and decided: (1) that no injunction will issue to prevent prosecutions of a

criminal nature under the by-laws or ordinances in question; that any person criminally prosecuted has adequate remedy in the proceedings upon said ordinance; (2) that no action for damages can be sustained against the city of New Britain for any act of any of said officials acting pursuant to the direction of said ordinance to enforce the same; (3) that no action for damages can be maintained against said officials for the acts done by them in enforcing said ordinance, said ordinance not having been declared void; (4) that said ordinance is reasonable and valid, and does not interfere with any right of the plaintiff so as to entitle him to collect damages.

Judgment is rendered for the defendants.

Stoddard,

Judge.

February 23, 1887.

**Messrs. M. H. Holcomb and Case, Mal-
bie, & Ely**, for plaintiff, appellant:

When the decision on a demurrer is not appealed from and is not assigned as an error, and the defendant does not claim that the court erred in that decision, the question is not an open one in this court.

Stat. Acts 1882, p. 146, §§ 8; Practice Act, p. 358, chap. 14, § 1.

The plaintiff claimed that he had certain vested rights secured to him by contract with the borough of New Britain, and attempted to show what the contract was. The fact that the whole contract did not appear in the deeds does not estop him from introducing the testimony; for the agreement made by the borough of New Britain was a part of the entire contract, which was that, in consideration of the land, the borough would secure to the Dunhams certain rights and privileges; and the entire contract was what plaintiff was to prove, and he had a right to do so.

Collins v. Tillou, 26 Conn. 368; *Clarke v. Tappin*, 32 Conn. 56; *Post v. Gilbert*, 44 Conn. 9; *Schindler v. Muhleisen*, 45 Conn. 153; *Hubbard v. Ensign*, 46 Conn. 585; *McFarland v. Sikes*, 1 Conn. (L. ed.) 256, 3 New Eng. Rep. 252, 54 Conn. 250; *Walker v. City Council of Charleston*, 1 Bailey (S. C.) Eq. 443.

The fact that one party is a municipal corporation and the other a private individual does not change the result, for title can be gained by prescription against a municipal corporation as well as an individual.

Cincinnati v. First Presbyterian Church, 8 Ohio, 298; *Lane v. Kennedy*, 13 Ohio St. 42; *Cincinnati v. Evans*, 5 Ohio St. 594; *St. Charles County v. Powell*, 22 Mo. 525; *Pratt County v. Goodell*, 97 Ill. 84; *Foreyth v. Wheeling*, 19 W. Va. 318; *Oxford Twp. v. Columbia*, 38 Ohio St. 87; *Brown v. Painter*, 44 Iowa, 368; *Wheeling v. Campbell*, 12 W. Va. 36.

The rule requiring that possession shall be exclusive does not mean that the possession must have been of such a nature that no other person besides the one claiming by prescription has done or could have done what the owner of the dominant estate claims the right to do by prescription.

Burrows v. Gallup, 32 Conn. 499.

"It is not necessary that the one who claims the easement should be the only one who can or may enjoy that or a similar right in another's property," but that his right should not

depend for its enjoyment upon a similar right in others, and that he may exercise it under some claim existing in his favor independent of all others.

Washb. Easem. p. 144, and cases cited; *Curtis v. Angier*, 4 Gray, 547.

Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the Legislature is not final or conclusive. If it passes an Act ostensibly for the public health, and thereby destroys or takes away the property of a citizen or interferes with his personal liberty, then it is for the courts to scrutinize the Act and see whether it really relates to and is convenient and appropriate to promote the public health. It matters not that the Legislature may, in the title to the Act or in its body, declare that it is intended for the improvement of the public health.

Re Jacobs, 98 N. Y. 110.

Messrs. P. J. Markley and F. L. Hungerford, for defendant, appellee:

The ordinance being a valid exercise of the police power, and being manifestly reasonable and proper, the plaintiff must yield his obedience to it the same as any other person. It was also wholly immaterial whether the plaintiff, by user, had acquired a prescriptive right to do the acts prohibited by the ordinance. By whatever manner they might have been acquired,—by reservation, grant, or prescription,—when ever their exercise conflicted with the ordinance, those rights must yield and the ordinance prevail.

4 Bl. Com. Sharswood's ed. 161; 1 Dill. Mun. Corp. § 141, and cases cited; *Cooley, Const. Lim.* 572, 574, 594, and cases cited; *Commonwealth v. Teaksbury*, 11 Met. 55; *Commonwealth v. Alger*, 7 Cush. 84; *Commonwealth v. Goodrich*, 13 Allen, 546; *Pedrick v. Bailey*, 12 Gray, 161; *Barbier v. Connolly*, 113 U. S. 27 (28 L. ed. 982); *Soon Hing v. Crowley*, 113 U. S. 703 (28 L. ed. 1145); *State v. Tryon*, 39 Conn. 188.

The pretended declarations of Messrs. Stanley and Landers were unauthorized either by the Act of the Legislature [1857] or of the borough. They were agents of the law and not of the borough.

Jones v. New Haven, 34 Conn. 1, 17; *Hewison v. New Haven*, Id. 186; *McCune v. Norwich City Gas Co.* 30 Conn. 522; *Judge v. Meriden*, 38 Conn. 95; *Burritt v. New Haven*, 42 Conn. 174, 197; *Healey v. New Haven*, 47 Conn. 305; *Perkins v. New Haven*, 1 Conn. (L. ed.) 315, 3 New Eng. Rep. 579, 53 Conn. 214; *State v. Fyler*, 48 Conn. 145; *Child v. Boston*, 4 Allen, 41, 51.

The pretended declarations were inconsistent with the uses and purposes for which the lands of the plaintiff and his grantors were to be taken.

Individuals must take notice of the extent of the authority of a person acting in an official capacity; and, if they fail to do so, their ignorance of the law will furnish no excuse for any mistake or wrongful act.

State v. Hays, 52 Mo. 578; *People v. Phania Bank*, 24 Wend. 431.

The pretended declarations were not the acts of the board, but of the members thereof not acting in their official capacity.

Members of a municipal board cannot bind

the corporation by their individual acts, even though a majority join in or ratify the acts.

Strong v. Dist. of Columbia, 9 Am. & Eng. Corp. Cas. pt. 3, pp. 568, 577, and note.

As to the right by prescription. The finding expressly states that the use of the lake by the plaintiff for fishing and boating was not exclusive. On the contrary, not only a large number of other persons did the same thing, but there was never any ouster of the borough or city. This, of itself, prevented the plaintiff from acquiring a prescriptive right.

Sedg. & W. Trial of Title, §§ 752, 729.

But such a right to boat and fish as the plaintiff claims cannot be acquired by prescription.

2 Washb. Real Prop. 25; Washb. Easem. 120; *Merwin v. Wheeler*, 41 Conn. 14; *Pearsall v. Post*, 20 Wend. 111.

But whether or not, as between the city and the plaintiff, the latter may have acquired some sort of title by prescription, of which he could avail himself in a civil action against him (as, for example, trespass) by the city, he cannot have acquired any prescriptive right as against the State to do an act which is punishable as a crime upon a proceeding in the name and on behalf of the State.

Commonwealth v. Upton, 6 Gray, 478.

Loomis, J., delivered the opinion of the court:

The material facts found by the trial court in this case are in substance as follows: In 1857 the water commissioners of the then borough of New Britain, acting under an Act of the Legislature passed that year, purchased of the plaintiff, and of his father, Harvey Dunham, now deceased, and of some other parties, certain lands for the construction of a reservoir for supplying the borough with water for public and private purposes; and sundry absolute warranty deeds were executed and delivered to said borough, of said lands, and possession was taken by the latter, and a reservoir upon the lands purchased was constructed and filled with water and used by the borough until the present city of New Britain was chartered, which succeeded to all the rights, privileges, and property rights of the borough; and, ever since, the reservoir has constituted the sole water supply of the city, and is largely used for domestic purposes.

It was agreed that the borough paid a money consideration for the lands bought of the plaintiff and his father; but there was no evidence of the amount paid, except the statement of the consideration in the several deeds. It is not found that the money consideration was in fact inadequate, but it is found that the Dunhams so regarded it; and that they were induced to part with the title to the land referred to, in part because of an agreement in writing signed and delivered to them by two of the water commissioners, and in part because they thought that the establishment of the reservoir and the use of its waters for fishing and pleasure would render their adjacent lands more valuable.

The agreement referred to was as follows:

"Whereas the warden, burgesses, and freemen of the borough of New Britain are about to pond a 'shuttle meadow' on the mountains in

the east of Southington, for the purpose of supplying water to the inhabitants of New Britain under the charter granted to them by the last Legislature; and a large portion of the land to be covered by the water of said pond has been sold and conveyed to said warden, burgesses, and freemen of the borough of New Britain, by Harvey Dunham and Robert C. Dunham, of Southington,—

"Now, therefore, the said warden, burgesses, and freemen of the borough of New Britain, in consideration of the sale and conveyance aforesaid, do hereby give and grant unto the said Harvey Dunham and R. C. Dunham the right to sail on said pond and take fish therefrom at all times; said privilege not to be enjoyed by them exclusively, but to enure to them in common with the grantors and such other persons as said grantors shall license during their natural lives.

"In witness whereof the grantors, by the hands of their water commissioners, duly appointed according to the provisions of said charter, have hereunto affixed their names and seal this 1st day of December, 1857.

[L. s.] The Warden, Burgesses, and Freemen of the Borough of New Britain.

F. T. Stanley, } Water
G. M. Landers, } Commissioners."

Soon after this, the Dunhams established upon the shore of said reservoir, better known as Shuttle Meadow Lake, upon land owned by them, or one of them, contiguous to the land conveyed to the borough, a pleasure resort; and the frequenters of the place have used the lake for boating, sailing, and fishing in boats hired of the plaintiff or his father; and in this way a profitable business was established, which at the commencement of this suit belonged wholly to the plaintiff. A large number of other persons have also been in the habit of using said lake for boating, sailing, and fishing. The use of the waters of the lake for boating, sailing, and fishing is not in itself injurious or a nuisance, and the agitation of the surface of the water is beneficial. But, as a necessary incident to, or concomitant of, such use, a considerable quantity of impure and objectionable and decayed and decomposing matter, filth, and various *excreta* of the human body, is from day to day deposited in the water of said lake. But such deposit has not been and is not at present in sufficient quantities to be appreciable in its effect upon said waters; but the knowledge, on the part of the public, of such deposit, produces disgust, and tends to prevent the use of said waters by the public for domestic purposes. If the germs of infectious or contagious diseases should be deposited at or near the entrance of the supply pipes, such diseases might be communicated to the people of said city using said waters for domestic purposes. Under these circumstances the common council of the city of New Britain, acting pursuant to power given it by the Legislature in 1885 to "make such orders and ordinances as it should see fit for the better protection and preservation of the waters of said lake," passed the ordinance set forth in the finding, prohibiting under a penalty, among other things, "boating, sailing, and fishing on said lake." The passage and enforcement of this ordinance is what has given rise to this suit. It has had the effect to keep

away the public from the lake, and thus the plaintiff loses the profit of such pleasure resort; and in this manner only the acts of the defendant substantially impair the plaintiff's business and depreciate the value of his property. That said ordinance is reasonable is found by the court below as a matter of fact, and so held by it as a matter of law. The plaintiff seeks in this suit to enjoin the city from enforcing said ordinance; he also claims damages for its enforcement; and, further, claims that the deeds of conveyance from him and his father, through whom he claims his present title, should be reformed so as to reserve to him the privilege of boating, sailing, and fishing on said lake, or that said deeds should be set aside and declared void. The decision of the court below was adverse to the plaintiff on all his claims, and the only grounds of this appeal are: (1) the exclusion of certain testimony by which the plaintiff claimed to be able to prove that, in the negotiations for the sale of his and his father's land to the borough for the purpose of a reservoir, it was agreed by certain members of the board of water commissioners that the Dunhams should have the privilege of boating and fishing on said lake forever; and that this privilege, instead of being reserved in said deeds, as the Dunhams wished, should be secured to them by a separate agreement; (2) the refusal of the court to hold, as a matter of law, upon the evidence, that the plaintiff had acquired by prescription the right to fish and boat upon said lake.

The assignments of error restrict the questions for review to a very narrow compass. No complaint is made that the court, upon the facts as found, denied the injunction, the reformation of the deeds, or refused to set them aside, or to award damages; nor is there any complaint because the court held the ordinance a valid one. To prevent the possible implication that it might have been better for the plaintiff had these matters been assigned for error, we will say, in passing, that in our opinion the decision of the court upon these points, upon the facts as found, was correct.

The ordinance—having for its object the preservation of the public health, and being adapted to that object, and having been authorized by the Legislature—was a proper and valid exercise of the police power of the State; and, even if the ordinance was invalid, it is obvious there would have been an adequate remedy at law; so that, in either event, no error could have been predicated upon a denial of the injunction. *Burnett v. Craig*, 30 Ala. 135; *Garrison v. Atlanta*, 68 Ga. 64. And whatever the record may suggest as to a possible claim for damages on the part of the plaintiff, the facts as found do not lay an adequate foundation for such a judgment. We proceed, then, to the consideration of the only errors assigned, and as to these we think it is clear that the plaintiff's position is untenable.

The parol evidence of the conversation and negotiations between the Dunhams and the water commissioners, which was excluded by the court, was undoubtedly relevant to that part of the complaint which prayed for a reformation of the deeds, and was admissible upon that issue; but it is manifest that, if the evidence had been received, the result would

have been the same. For, upon the facts which the plaintiff offered to prove, taken in connection with the other conceded facts, the deeds could not properly have been corrected.

No foundation for such relief was laid or even claimed. There was neither a mutual mistake, nor even a mistake on the part of the plaintiff, concerning the deeds. The deeds were knowingly made and executed on the part of the Dunhams precisely as the water commissioners insisted they should be, without any reservation or provision concerning the plaintiff's right to use the lake for boating and fishing. And, besides, the parol agreement was all merged in the written agreement signed by the water commissioners, which was accepted by the Dunhams without any objection or claim, then or since, that it did not truly embody the agreement of the parties on that subject; and it was the agreement which the court finds in part induced the plaintiff and his father to execute and deliver the deeds; and it is very significant that the complaint does not even ask for any correction of this instrument. It is manifest, therefore, that whatever express rights relative to this reservoir the plaintiff has must now be found in the terms of this written agreement.

And this brings us to the only remaining question, whether the court ought to have found upon the facts that the plaintiff had acquired by prescription the right to fish and boat upon the lake.

Several independent answers might be made to the plaintiff's claim under this head. It surely can make no difference with the result whether the plaintiff's sole right is under the agreement or under a prescriptive right. Either title would be insufficient to lay the foundation for an injunction against the enforcement of an ordinance which is a valid exercise of the police power of the State. But there is a direct answer to the plaintiff's claim, which we prefer to rest the case upon. Upon the facts found, the plaintiff's use of the reservoir lacks one indispensable element of a prescriptive title,—it was not adverse. The court has found that the plaintiff relied upon this agreement which was an express license to do the acts relied upon. Under this license the plaintiff acted, and he has never repudiated it in any way; and he cannot now, by such use, convert the license of a personal privilege limited to his life into an absolute title to last forever.

But in this connection the question will naturally be suggested, whether the agreement was valid. The court finds there was no vote of the borough authorizing its execution or delivery, and there was no vote or act of the board of water commissioners acting as a board; but it was signed "The Warden, Burgesses, and Freemen of the Borough of New Britain, F. T. Stanley, G. M. Landers, Water Commissioners." And the Act of 1857, which authorized the establishment of the reservoir and the taking of land and water rights for the purpose, directed the borough to elect three persons as water commissioners, and authorized such water commissioners to purchase and take conveyances, for and in the name of the borough, of all property necessary for the purposes of the Act. This is sufficiently broad to include as a necessary incident the right to fix

the terms and conditions of the purchase. If, then, as claimed by the plaintiff, this license to boat and fish was to take the place, in part, of money compensation for the land conveyed, the borough, having accepted the land, ought not now, it would seem, to be heard in repudiation of the agreement.

In confirming the judgment of the court, that upon the record the plaintiff is not entitled to the redress sought, we do not intend to decide, or even to express any opinion upon, the claim made by the plaintiff, that the rights and privileges of which he has been deprived constituted a part of the payment agreed to be made for the price of his land, and that for the loss of these he is entitled to compensation.

There was no error in the judgment complained of.

In this opinion the other Judges concurred.

FARMERS' LOAN & TRUST CO.

POSTAL TELEGRAPH CO. *et al.*

Where a New York corporation mortgaged all its property, including real estate in Connecticut and New York, to secure the payment of its bonds; and, upon a foreclosure in New York, a referee was appointed, who sold all the property, including that in Connecticut, and executed a conveyance,—the proceedings were nugatory as to the estate in Connecticut. The courts of this State will not recognize the right of courts in other States to affect directly the title to real estate in the former. The most that can be done is to allow foreign courts having jurisdiction of the parties to compel conveyances, by the owner, and recognize, as valid, titles so acquired. The proceedings in New York have left the rights of the parties as to real property in this State unaffected, and a suit may be maintained to foreclose the mortgage upon the property here situate.

(New Haven—Filed November 10, 1887.)

APPEAL by Benedict & Burnham Manufacturing Company from a decision sustaining a demurrer to its answer to a suit to foreclose a mortgage upon real estate upon which defendants had levied an attachment. *Affirmed.*

The facts are fully stated in the opinion.

Mr. George E. Terry, for defendant Benedict & Burnham Mfg. Co.:

It appears from the pleadings in the record, that the defendant Postal Telegraph Company executed a trust mortgage to the plaintiff, to secure an issue of bonds, upon all its property situated in several States, including real estate located in Derby in this State. It was provided in said mortgage that the plaintiff, upon default of payment of interest on said bonds, might apply to any court having jurisdiction for a foreclosure and sale of all said mortgaged property.

On the 2d of November, 1885, the plaintiff

applied to the supreme court of New York in the city of New York for such foreclosure of all the property covered by said mortgage, including that located in this State; the defendants appeared (excepting the Benedict & Burnham Manufacturing Company, whose interest, if any they have, accrued subsequently) and submitted to the jurisdiction of the court; decree of foreclosure was passed and the property ordered sold; it was sold and the plaintiff received the avails thereof. They now seek to foreclose again, obviously for the purpose of strangling any claim which the Benedict & Burnham Manufacturing Company may have acquired by their attachment.

Did the supreme court in the city of New York have jurisdiction of the foreclosure suit brought there?

1. There can be no question but that it had jurisdiction of the parties. They were all served, appeared, and submitted to the jurisdiction.

2. It had also jurisdiction of the subject-matter of the suit.

It was a suit in equity, and courts of equity always have jurisdiction of the subject-matter when they have all the parties before them.

Mead v. New York H. & N. R. R. Co. 45 Conn. 199, 228.

3. The court once having had jurisdiction of all the parties and the subject-matter of the action, its judgment or decree is binding upon all the parties (even though irregular) until reversed and set aside.

4. The court might have passed a decree in strict foreclosure which, under the ruling in *Mead v. New York H. & N. R. R. Co. supra*, would have apparently given the plaintiff a good title. That the court passed a decree for the sale of the property (which may be improper) is of no consequence to us, so long as the plaintiff consented to it and has never asked to have it modified or set aside.

5. We do not claim that, if the plaintiff had brought a petition to foreclose only the property covered by the mortgage situated in New York, in the courts of that State, such action would prevent a like action in this State to foreclose the property situated in this State at this or any other time. What we do claim is that the plaintiff has no right to have two actions against the same parties and the same property in two different jurisdictions, either of which has full jurisdiction to dispose of the whole matter, and especially when one of them has already done so.

Bank of N. A. v. Wheeler, 28 Conn. 433; *Schuler v. Israel*, 120 U. S. 506 (8 L. ed. 707).

It is not at all certain that the purchaser, if his title is bad, can have any remedy against the plaintiff. The property was sold by order of court, and the money paid into court, and distributed by order of the court. If the referee gave no title, or a defective one, he is the one to whom the purchaser must look for a good one.

Messrs. Hyde, Gross, & Hyde, for appellee:

The decree of the supreme court in the city of New York set up in said defense was entirely nugatory and void and of no effect, and the deed of the referee appointed by said court was absolutely void, so far as the same related to the said real estate and other property located

in the State of Connecticut. A leading case on this subject is—

Watkins v. Holman, 41 U. S. 16 Pet. 26, 57 (10 L. ed. 874).

In this case, the facts were that Holman had executed in his lifetime, in Massachusetts, a title bond to one Brown, for land situated in Alabama, and had died without making a conveyance thereof. Administration on Holman's estate was granted in Massachusetts. On petition of Brown the probate court in Massachusetts, by a decree, licensed or empowered the administratrix to make a conveyance of the property to Brown, and who executed a deed to Brown in accordance with the decree. This deed, coming in question, was held to be void for want of jurisdiction of the court authorizing it to be made. This same doctrine is held in the case of *Boyce v. Grundy*, 34 U. S. 9 Pet. 276 (9 L. ed. 127).

The jurisdiction of courts over land is local. Neither State nor Federal courts can reach or confer titles, nor sell under a decree those, which are situated in a different State from that in which the court sits.

See *Rorer*, Interstate L. p. 207; *Booth v. Clark*, 58 U. S. 17 How. 322 (15 L. ed. 164); 33 Alb. L. J. p. 152, 1886; *Olney v. Tanner*, 10 Fed. Rep. 101; *Holmes v. Sherwood*, 16 Fed. Rep. 725; *Hazard v. Durant*, 19 Fed. Rep. 471.

It has never been claimed that a receiver or other officer appointed by the court of one State had any authority to convey or transfer the title to real property situated in another State.

Rorer, Interstate L. 211, 212.

It is therefore clear that neither the interest of the Postal Telegraph & Cable Company, nor the plaintiffs as mortgagees, has been conveyed or affected by the deed of the referee.

The reception of the purchase money from Platt, the purchaser, does not change or affect the title of the plaintiff as mortgagee, as against this defendant, an attaching creditor of the mortgagor; and it does not appear, nor is it claimed, that the plaintiff has ever released by deed its title, under said mortgage, to said real estate and other property located in the State of Connecticut.

The money was not paid by Platt as a volunteer to redeem the mortgage on this property for the use and benefit of the Postal Telegraph & Cable Company, but as a consideration for the sale and conveyance to him of the property free from incumbrance.

Carpenter, J., delivered the opinion of the court:

The Postal Telegraph Company, a New York corporation, mortgaged all its property, which was situated in several States, including Connecticut and New York, to the plaintiffs, in trust to secure the payment of its bonds. Upon a failure to pay the interest, the plaintiffs brought a suit for a foreclosure, in the supreme court in the city of New York. Judgment was rendered for the plaintiffs, pursuant to which a referee was appointed, who sold all the property, including the real estate in this State, and executed a conveyance of the same to the purchaser. The present suit is brought to foreclose the mortgage on the property in this jurisdiction, according to the law and prac-

ICE.

tice of this State. The defendant, the Benedict & Burnham Manufacturing Company, an attaching creditor, appeared, and set up a special defense alleging the foreclosure and proceedings in the State of New York. That defense was demurred to and the demurrer sustained. The defendant appealed.

The question is not one of jurisdiction, as the defendant assumes; for the jurisdiction of the court in New York over the parties and the subject-matter of the suit, so far as the property in that State is concerned, cannot be questioned. But the question is, What effect had that judgment on the real estate in Connecticut? Or, if it is preferred to state it as a jurisdictional question, have the courts of that State jurisdiction over lands and land titles in this State? The validity of the defense depends upon the answer to this question. If the result was to convey to, and vest in, the purchaser, the title to that real estate, then the mortgage had performed its office before this suit was brought, and the plaintiffs have no title, equitable or otherwise. But if those proceedings were nugatory as to that estate, then the mortgage is in force, and the plaintiffs are entitled to a foreclosure. We think the latter is the better view. The courts of our State will not recognize the right of courts in other States to affect directly the title to real estate in the former. The most that can be done is to allow foreign courts having jurisdiction of the parties to compel conveyances by the owner, and recognize, as valid, titles so acquired. We are aware of no case that has gone so far as to recognize the validity of a deed given by a referee or other officer of court by authority of law in another jurisdiction. The rule seems to be that the courts of each State have exclusive jurisdiction to settle the title to lands within its own limits.

In *Watkins v. Holman*, 41 U. S. 16 Pet. 25 (10 L. ed. 874), *McLean, J.*, in speaking for the Supreme Court of the United States, says: "A court of chancery, acting *in personam*, may well decree the conveyance of land in any other State, and may enforce their decree by process against the defendant. But neither the decree itself, nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court." In *Booth v. Clark*, 58 U. S. 17 How. 322 (15 L. ed. 164), the same court says, speaking of a receiver appointed under a creditors' bill: "He has no extraterritorial power of official action,—none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property."

It follows that, as to real property in this State, the rights of the parties remain as they were, unaffected by legal proceedings in the State of New York.

There is no error in the judgment complained of.

The other Judges concurred.

Henry BELL, Trustee,

Theron TOWNER *et al.*

Where a testator devised the residue of his estate to his executors in trust to

hold **one-third part**, together with the rents, income, and profits thereof, for the use of his wife, **one-third part** for the use of his son, and **one-third part** for the use of his daughter, each during the term of their natural lives; and, upon the decease of his wife, the property given for her use to be held for the proper use and benefit of his son and daughter in equal shares, for their lives; and, upon the death of each, for the use of the children of each *per stirpes*, and not *per capita*,—the **trust estate** should be held in one entire fund for the purposes of the will. A holding of all the property for the equal benefit of all the beneficiaries would be a holding of the equal parts of the property for the benefit of each beneficiary. The consideration that governs the construction of the will is that the testator intended that the income of the widow, son, and daughter derived from the residue of his estate should be equal, which would result—and could result only—from an equal distribution of the income of the entire residue among the beneficiaries.

(New Haven—Filed November 10, 1887.)

CASE reserved by the Superior Court for consideration by the Supreme Court on the construction of a will, portions of which, considered by the court for interpretation, are fully recited in the opinion. *Cause remanded, with instructions to hold the estate as one entire fund for the purposes of the will.*

Mr. John W. Alling, for Alfred A. Holly, Mary C. Holly, and Theron T. Holly:

Our construction of this will does not require or justify an extensive examination or citation of authorities.

It is well understood that each will, as a rule, furnishes, either by itself or as applied to the subject-matter, the key of its own construction. Some assistance may be derived from the following cases:

Giles v. Little, 104 U. S. 291 (26 L. ed. 745); *White v. White*, 52 Conn. 518; *Lyon v. Acker*, 38 Conn. 225; *Bond's App.* 31 Conn. 190; 1 Redf. Wills, p. 663, and note.

Where the language of a will may be equally susceptible of two constructions, that should be adopted which would carry out the main purpose of the testator.

Dexter v. Episcopal City Mission, 184 Mass. 397; *Grimes v. Harmon*, 35 Ind. 198; *Taggart v. Murray*, 53 N. Y. 236.

The practical interpretation which has been put upon this will for twenty-five years, holding it to create but one trust estate, is very significant as to its true construction.

That the estate may now probably be in a better condition to divide than it was at the testator's death does not tend to indicate his intent.

Gerard v. Buckley, 137 Mass. 478.

Mr. John W. Bristol, for trustee:

Park, Ch. J., delivered the opinion of the court:

Theron Towner, of the town of New Haven, in this State, after making certain dispositions

of his property by will, devised and bequeathed all the residue of his estate to his executors in trust for certain purposes, and among them the following:

"And upon the further trust to hold one-third part of all the rest and residue of my estate, both real and personal, together with the rents, income, and profits thereof, for the proper use and benefit of my wife, Clarissa, during the term of her natural life, the same to be in lieu of dower; one-third part thereof for the use of my son, Theron W. Towner, during the term of his natural life; and one-third part thereof for the use of my daughter, Mary C. Holly, during the term of her natural life.

"Upon the decease of my wife, if either of my children shall survive her, then the property so given for her use for life shall be held by my executors in trust for the proper use and benefit of my said son and daughter, in equal shares, for their lives respectively; but if they or either of them shall have deceased leaving children or other descendants, then equally for the use of the children or other descendants of such deceased son or daughter; such children or other descendants of my children to take *per stirpes* and not *per capita*."

The question at issue between the parties in this case is, whether this provision of the will requires, before the death of the widow, that the residue of the estate shall be divided into three separate trust estates,—one for the benefit of the widow and one each for the benefit of the son and daughter respectively; and, after the death of the widow, into two separate trust estates,—one each for the benefit of the son and daughter; thus causing the needless expense of maintaining more than one trust estate.

We think it is clear that the testator never contemplated the division of his estate into two or more separate trust estates, although the language used by him is susceptible of such a construction.

Manifestly the great object the testator had in view in this part of his will was to bequeath all the income from all the residue of his estate to his widow, son, and daughter, in equal proportions, during the life of the widow, and after her death to divide the same equally among the beneficiaries named, in the manner described. This was his purpose; but the mode of accomplishing the object, he did not consider sufficiently to discover that there might be a difference between the income from one-third part of the residue of his estate, and one-third part of the income from all the residue; and this may account for the ambiguity of his language.

The difference is not manifest between a holding of all the property for the equal benefit of the widow, son, and daughter, and a holding of the separate thirds of the same property for the benefit of each respectively. A holding of all the property would be a holding of all its parts, on the principle that the greater contains the less; hence it could be said that a holding of all the property for the equal benefit of all the beneficiaries would be a holding of the equal parts of the property for the benefit of each beneficiary. But the consideration that should govern the construction of this will is that the testator intended that the income of the widow, son, and daughter, derived from the residue of his estate, should be equal; which would re-

sult—and could result only—from an equal distribution of the income of the entire residue among the beneficiaries. In this way only can the purposes of the will be fully accomplished.

We advise the Superior Court that the trust estate should be held in one entire fund for the purposes of this will.

In this opinion the other Judges concurred.

Andrew SCHWAB

v.

THE CHARLES PARKER CO.

1. Where the plaintiff charged that the defendant owed him a duty to maintain a dike at a particular place, and neglected to perform it, to his consequent injury, and the finding has been in his favor; and that the extreme northern point to which it is the duty of the defendant to maintain the embankment cannot now be fixed with exactness, but is somewhere between the letters P and Q upon the map accompanying the report; that in 1884 water broke through the embankment "at the place indicated by the letters P and Q on the map, and washed and gullied the plaintiff's land,"—the finding will be interpreted as saying that there is certainty as to the defendant's duty to maintain the embankment over a portion of the line next beyond P and Q, but uncertainty as to the exact length of the line to be maintained; and that the judgment is based upon its failure to maintain the portion as to which there is certainty of duty.

2. It would be improper to recommit the finding, with directions to locate at some point the northerly end of the dike, which the defendant is bound to maintain. If it is within the spirit of the Practice Act that, at any stage, the defendant might graft such an inquiry in the original action, and make future possibilities part of the present judgment, the motion comes too late after a finding that the defendant has neglected to maintain the dike at a particular place where this duty is ascertained to exist.

(New Haven—Filed November 10, 1887.)

A PPEAL by defendant from a decree of the Superior Court for New Haven County accepting the committee's report and rendition of judgment thereon in a suit for flowing plaintiff's land. *Affirmed.*

The main facts are stated in the opinion.

Mr. C. R. Ingersoll, for defendant, appellant:

1. The court erred in holding the answer to the defendant's remonstrance against the committee's report to be sufficient, and overruling the demurrer thereto.

2. The facts reported by the committee do not justify the judgment of the superior court, 1 Conn.

and for this reason the court erred in rendering such judgment.

3. At the least, the report should be recommended, with directions to locate at some point the northerly end of the dyke, which the defendant is bound to maintain.

As to the first point: The effect of the judgment upon this ruling is to impose upon defendant the duty of maintaining the entire bank of the pond owned by plaintiff, whether natural or artificial. No such duty is found by the committee to rest upon defendant as a mill-owner; and the error is injurious to defendant. "As a matter of law, the artificial becomes the natural condition of the stream."

Adams v. Manning, 48 Conn. 488.

As to the second point: The hinge of the controversy between these parties, it is apparent, is just in this fact: Their respective rights and duties depend upon the location of the dyke "between the points P and Q." If that cannot be determined, the plaintiff's case is not proved.

Johnson v. Sanford, 18 Conn. 467.

As to the third point: If this dyke extends to the point Q, the parties should be advised of it clearly and unmistakably, for the guidance of their future relations. But, if it falls short of that point, that spot should be determined as somewhere, and not left, as it is by the present finding, doubtful and indeterminate.

Messrs. W. C. Case and R. S. Pickett, for plaintiff, appellee:

The defendant's demurrer to the plaintiff's answer to the remonstrance, was properly overruled by the superior court, because the allegation of said answer, that "it was at all times the duty of the defendant company to keep the waters of said pond in, at all points, including so much of the bank of said pond, and the arm thereof, as was occupied by said deposit of stones, between the points marked P and Q, in red ink on said map," was consistent with the finding of the committee; and the further allegation of said answer that "it was also the duty of the defendant company to so strengthen, secure, and maintain the natural bank of said pond, and the arms and branches thereof, so that the plaintiff's land should not be damaged by the waters escaping therefrom," was not inconsistent with the report of said committee, although said committee had no occasion to make a special finding as to the breaking down and washing away of the natural bank of said river and pond; and the same was and is in conformity with well-settled law.

Gould, Waters, §§ 209-211, 298, 416; Ang. Watercourses, 7th ed. § 330; *Bryant v. Bigelow Carpet Co.*, 131 Mass. 491-499; *Gray v. Harris*, 107 Mass. 492; *Amoskeag Mfg. Co. v. Goodale*, 46 N. H. 53, 54; *Pixley v. Clark*, 35 N. Y. 581, 582; *Casebeer v. Mowry*, 55 Pa. 419, 423; *Wilson v. New Bedford*, 108 Mass. 261, 266.

Upon these grounds the superior court was warranted in finding the answer to said remonstrance sufficient, in finding said remonstrance untrue and overruling the same, in accepting the report of the committee, and finding the issue for the plaintiff.

Pardee, J., delivered the opinion of the court:

This is a complaint for flowing the plaintiff's

land. The issue was closed to the court, judgment was rendered for the plaintiff, and an appeal taken by the defendant.

The finding is that the plaintiff is riparian owner on Quinnipiac River; that the defendant is the owner of a mill privilege thereon, and ponds the water to a higher level than that of the plaintiff's land, and restrains it therefrom by an embankment; that it has neglected to maintain this properly, and that, as a consequence of such neglect, water flowed upon and injured the plaintiff's land; also, that the extreme northern point to which it is the duty of the defendant to maintain the embankment cannot now be fixed with exactness, but is somewhere between the letters P and Q, upon a map accompanying the record; and that in 1884 water broke through the embankment "at the place indicated by the letters P and Q on the map, and washed and gullied the plaintiff's land." Upon this, for reason of appeal, the defendant says as follows: That the finding of the report that "just where," between the points P and Q the northerly end of said dike or embankment originally terminated, cannot now be determined, renders the further finding that the breaking of the waters through and over the locality between said points was due to the negligence of the defendant in not keeping said dike or embankment in repair,—inconclusive, inconsistent, and erroneous.

We think the objection is not well taken. We must interpret the finding as saying that there is certainty as to the defendant's duty to maintain the embankment over a portion of the line next beyond P towards Q, but uncertainty as to the exact length of the line to be maintained; and that the judgment is based upon its failure to maintain the portion as to which there is certainty of duty. Otherwise we must

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impute this to the court, namely: A finding that the plaintiff's charge is not supported by any proof, and yet a judgment for him. This we cannot do. The finding is fairly susceptible of an interpretation in accord with the judgment.

Again, the defendant insists that it is our duty to recommit the finding, with directions to locate at some point the northerly end of the dike, which the defendant is bound to maintain. We think we ought not now to impose this burden upon the plaintiff. He charged that the defendant owed him a duty at a particular place, and neglected to perform it to his consequent injury. He proved the duty, the neglect, and the amount of the damage. His right to judgment and execution for this is absolute and perfect; it neither depends upon, nor can be affected by, the answer to the question whether the defendant owes him a duty at a point further north. Indeed, upon a proper interpretation of the finding and judgment, the reason of appeal does not question this right; and in effect, the defendant's motion is that we shall make it a condition precedent to the enforcement of a judgment against it for neglect of duty at one place, that the plaintiff shall be burdened by the expense attending the inquiry whether, if water shall hereafter escape from the pond at another place, with consequent injury, the defendant will be liable in damages.

If it is within the spirit of the Practice Act that, at any stage, the defendant might graft such an inquiry into the original action, and make future possibilities part of a present judgment, we yet think the motion too long delayed.

There is no error in the judgment complained of.

All concur.

1 CONX

MAINE.

SUPREME JUDICIAL COURT

STATE of Maine

v.

Levi LASHUS.

1. A complaint charging, in the language of the statute, the defendant with transporting intoxicating liquors from "place to place" within the State, is not sufficient.
2. The complaint should designate the places in the State from and to which the liquor was transported.

(Kennebec—Decided December 10, 1887.)

ON exceptions by the defendant to a *pro forma* ruling of the court in overruling a demurrer to the complaint. *Sustained.*

Mr. F. A. Waldron, for defendant:

All the circumstances and facts which constitute a crime must be stated with such certainty and precision that the defendant may be enabled to judge whether they constitute an indictable offense or not, in order that he may demur and plead to the indictment accordingly; that he may be able to plead a conviction or acquittal upon the indictment, in view of another prosecution for the same offense; and that there may be no doubt as to the judgment to be given if the defendant is convicted.

11 Pick. 432; 16 Pick. 213; 18 Met. 1368; 4 Gray, 32; 2 Pick. 143; 13 Pick. 863; 17 Pick. 399; 19 Pick. 307.

The criminal nature of an offense is a conclusion of law from the facts and circumstances of the case. Therefore the indictment should set out precisely all the facts and circumstances which render the defendant guilty of the offense charged. And this principle is too well supported by authorities, ancient and modern, to require citations.

1 Stark. Cr. Pl. 89; 2 Hale, 169; 19 Pick. 304.

The offense must not only be proved as charged, but it must be charged as proved.

Archb. Cr. Pl. 5th Am. ed. 86; 1 Chitty, Cr. L. 213; 2 East, P. C. 651, 781; *Re v. Walker*, 3 Campb. 264; *Re v. Robinson*, Holt, N. P. 595. *Commonwealth v. Blood*, 4 Gray, 31.

Every man accused of a crime should have a reasonable opportunity to know what the charge is, that he may not be called to meet evidence at the trial that he could not have anticipated from the charge in the indictment; that the court may know what judgment to render; and that the party tried, and either acquitted or convicted, may be enabled, by reference to the record, to shield himself from any future prosecution for the same offense.

Commonwealth v. Phillips, 16 Pick. 211.

The reason for the strictness in setting out all the facts and circumstances connected with the crime may be reduced to three: (1) to apprise the defendant of the precise nature of the charge made against him; (2) to enable the court to determine whether the facts constitute an offense, and to render a proper judgment thereon; and (3) that the judgment may be a bar to any future prosecution for the same offense.

1 Mr.

3 Stark. Ev. 1527; 13 Pick. 359.

In *Commonwealth v. Webster*, 5 Cush. 295, 886; *S. C.* cited in 11 Cush. 143, which was an indictment for murder, it was held that an allegation that the defendant committed the crime at a time and place specified in some way and manner, and by some means, instruments, and weapons, to the jurors unknown, was sufficient when the circumstances of the case will not admit of greater certainty. But here it will be seen that there is the averment that the means, etc., were to the jurors unknown, which is entirely wanting in this complaint.

In *Commonwealth v. Boston & W. R. R. Corp.* 11 Cush. 512, which was an indictment for causing the death of a person, it was held that it need not set out the names of the heirs at law of the deceased, if it avers that their names were to the jurors unknown.

In *Commonwealth v. Moore*, 11 Cush. 600, which was an indictment for letting a house for the purpose of prostitution, it was held that the indictment must state the name of the lessee, or state his name to be unknown.

In short, if any fact or circumstance which is a necessary ingredient of an offense is omitted in an indictment, it vitiates the indictment unless it contains the allegation that such fact is to the jurors unknown; and the respondent may take advantage of it by demurrer, or arrest of judgment, or by writ of error.

6 Met. 243; 11 Cush. 422, 600.

In *Commonwealth v. Pray*, 13 Pick. 859, which was an indictment following the language of the statute, Morton, J., in delivering the opinion of the court, says: "The indictment describes the offense in the very words of the statute. This usually is not sufficient. The established rules of pleading require the essential facts and circumstances to be particularly, unambiguously, and certainly stated."

In *Commonwealth v. Reily*, 9 Gray, 1, this precise question arose, and it was decided on motion in arrest of judgment, after conviction, that the complaint was fatally defective.

Mr. L. T. Carlton, County Atty. for the State:

The allegation could not be made more precise without tedious and useless prolixity.

61 Me. 181; 78 Me. 546, and authorities there cited; 77 Me. 380; Rev. Stat. chap. 27, § 81.

Again, it is not necessary that a complaint should be so formal and precise as is required in an indictment, as the court says in *State v. Corson*, 10 Me. 473, "The same technical precision and accuracy is not required as in an indictment."

Virgin, J., delivered the opinion of the court:

The complaint follows the language of the statutory provision (Rev. Stat. chap. 27, § 81) which creates the offense intended to be charged; but such a mode of setting out a violation of a penal or criminal statute is not necessarily sufficient. *State v. Androscooggin R. R. Co.* 76 Me. 411; *Commonwealth v. Pray*, 13 Pick. 859. The law affords to the respondent in a criminal prosecution such a reasonably particular statement of all the essential elements which constitute the intended offense as shall apprise him of the criminal act charged; and to the end, also, that, if he again be prosecuted for the

same offense, he may plead the former conviction or acquittal in bar.

Recurring to the complaint, we find no allegation designating from what place or to what place, "in the State of Maine" the liquors were transported. The complaint is too indefinite to afford to the defendant the requisite information to which the law entitles him, or to identify it in case another and subsequent prosecution for the same offense should be instituted. The case of *Commonwealth v. Reily*, 9 Gray, 1, based on a similar statute, is in point, and holds, on a motion in arrest of judgment, that a complaint like the one at bar is insufficient.

Had the allegations limited the places to and from which the liquors were transported to a particular town or city, the complaint would have been sufficient. *Commonwealth v. Hutchinson*, 6 Allen, 595.

Exceptions sustained; complaint adjudged bad.

Peters, Ch. J., Danforth, Walton, Emery, and Foster, JJ., concurred.

Lovisa H. WILLIAMS

v.

CAMDEN & ROCKLAND WATER CO.

1. **Damages sustained prior to the date of the writ only can be recovered in an action on the case for diverting water from its natural watercourse.**
2. **If a dam is maintained by the authority of a statute which provides a method for the assessment and recovery of the damages occasioned by the dam, an action on the case can not be maintained to recover such damages.**

(Knox—Decided December 17, 1887.)

ON exceptions by the plaintiff. *Overruled.*

The case is stated in the opinion.

Mr. J. H. Montgomery, for plaintiff:

The rule for prospective damages is laid down clearly in the case of *Cumberland & O. Canal Corp. v. Hutchings*, 65 Me. 142. In this case defendant cannot be made to remove the dam at the mouth of the pond, which stops the flow of water by the brook through the plaintiff's land, and causes the injury of which she complains. The right to build the dam and divert the water of the pond is granted defendant by legislative authority; and, if that authority is not exceeded, injunction will not lie.

Washburn & M. Mfg. Co. v. Worcester, 116 Mass. 458.

In the case of *Lee v. Pembroke Iron Co.* 57 Me. 481, where, by authority of the Legislature, defendant corporation erected a dam across the Pennemaquan River, which caused the water to flow back, and injured plaintiff's mill and privilege, the court says: "It cannot be necessary to waste time or word, to establish the proposition that he who assumes, under color of legislative authority, to overflow an ancient mill, 'takes' that mill and privilege from the owner as directly and effectually as though he entered upon the premises and demolished the buildings."

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If the damages were to be assessed under the statute, immediate and prospective would be the rule.

Bailey v. Woburn, 126 Mass. 421.

Cognell v. Essex Mill Corp. 6 Pick. 94, a case where, by legislative authority, a corporation was empowered to erect a milldam across a river, and no remedy was provided to compensate persons injured thereby, the court says: "What, then, is the remedy if anyone is injured by the execution of the Act of the Legislature? An action at common law. * * * They will have an action for the consequential injury."

In *Newhall v. Ireson*, 8 Cush. 599, a case similar to this, in which plaintiff only asked for nominal damages, the court says: "And, although the plaintiff has sustained no present damages, because she has had no mill upon it, or otherwise used it for any agricultural or manufacturing purposes, yet such diversion would prevent such beneficial use of it hereafter, and thus impair the value of the estate."

And therefore, although a cranberry meadow, was never used for that purpose, yet the possible use of it for such purpose is a proper claim, when water is diverted from it under legislative authority.

Warren v. Spencer Water Co. 1 Mass. (L. ed.) 775, 3 New Eng. Rep. 111, 143 Mass. 155.

So with a water power.

Plumleigh v. Dawson, 6 Ill 544.

So with a prospective ferry-landing.

Little Rock & F. S. R. Co. v. McGehee, 41 Ark. 202.

And the general rule is, the market value of the land appropriated, in view of all the purposes to which it is naturally adapted, is the measure of damages.

Moulton v. Newburyport Water Co. 187 Mass. 167; *Cobb v. Boston*, 112 Mass. 181; *Laurence v. Boston*, 119 Mass. 126; *Drury v. Midland R. R. Co.* 127 Mass. 571.

Mr. C. E. Littlefield, for defendant:

The case of *Cumberland & O. Canal Corp. v. Hutchings*, 65 Me. 140, seems in point. It was a case of the construction of a permanent street, and the filling of a canal in the course of its construction; and the court there held that the injury was in the nature of a nuisance, and that damages could only be recovered to the date of the writ.

"In all cases," our court says in *Rockland Water Co. v. Tillson*, 69 Me. 268, "the plaintiff recovers for such damages as legally follow the wrongful acts set out in the writ. It is the damage only which continues, and is recoverable because it is traced back to the act; while in the case of a nuisance it is the act which continues, or rather is renewed day by day."

An illustration of what has been held to be continuing acts renewed day by day is found in the case of *Cole v. Sprovel*, 35 Me. 161.

The case of *Dority v. Dunning*, 1 Me. (L. ed.) 215, 3 New Eng. Rep. 41, 78 Me. 390, sustains our contention.

In *Staple v. Spring*, 10 Mass. 75, the Massachusetts court distinctly states the proposition for which we contend.

The case of *Lund v. New Bedford*, 121 Mass. 286, is parallel, in its general facts, with the case at bar.

The best elementary writers sustain our contention.

See 1 Sedg. Dam. 195, 279, 280; 1 Suth. Dam. 187, 202.

Libbey, J., delivered the opinion of the court:

This is an action of case against the defendant for diverting the water from a natural watercourse over the plaintiff's land, from April 1, 1886, to the date of writ,—July 26, 1886.

The watercourse flowed from Oyster River Pond, and in 1885 the defendant erected a dam at the outlet of the pond, which, when the water was low, diverted the water from the brook—which the plaintiff claims damaged her pasture and a natural mill privilege on her land.

The contention between the parties is whether the plaintiff can recover in this action prospective damages, or must be limited to damages sustained prior to the commencement of the action. The court below ruled that she could recover only what she had sustained at the date of the writ.

We think this ruling correct. The case as reported does not show the destruction of the watercourse. The flow of the water in it was diminished only. In time of drought it is prevented by the dam from flowing at all. If the dam was unlawfully erected, it is the duty of the defendant to remove it, or open a gate in it, to give the water its natural flow over the plaintiff's land; and every day it continues the dam, it is guilty of a wrong. If it removes the dam, which it may at any time do, or permits the water to have its natural flow in its course, it is no longer guilty. While the dam is maintained it is a nuisance, and its continuance may be enjoined. In such case it is the settled law of this State that damages are limited to the date of the writ. *Cumberland & O. Canal Corp. v. Hutchings*, 65 Me. 140; *Dority v. Dunning*, 1 Me. (L. ed.) 215, 3 New Eng. Rep. 41, 78 Me. 381.

But the plaintiff claims that the diversion of the water by the defendant is by virtue of an Act of the Legislature of 1885, chap. 522, which gives authority to take it for the purposes specified; and therefore the injury is permanent.

The case does not show that the erection of the dam by the defendant was under the authority of that Act. If the water was taken by it in conformity with the requirements of the Act, it was not unlawful,—not a tort,—and this action cannot be maintained. The plaintiff must pursue her remedy for damages under § 4 of the Act, which provides that they shall be “ascertained in the same manner and under the same conditions, restrictions, and limitations as are by law prescribed in the case of damages by the laying out of highways.” But the case as reported does not show that the defendant had taken the water in accordance with the provisions of the Act.

By the report, if the exceptions are overruled, the court is to assess the damages upon the evidence reported. We think the evidence does not show that the plaintiff sustained more than \$10 damage prior to the date of the writ.

Exceptions overruled; damages assessed at \$10.
Walton, Danforth, Emery, Foster,
and **Haskell, J.J.**, concurred.
Peters, Ch. J., did not sit.

William B. SNOW

Henry M. FOSTER.

1. When a note is given to take up an old note which is delivered to the maker, the presumption is that the old note was paid by the new.
2. This presumption is made conclusive by indorsing the new note to a third person in whose name an action is brought on it.
3. Such an action is barred by a discharge in insolvency under an insolvent law enacted prior to the date of the new note though subsequent to the date of the old note.

(Somerset—Decided December 22, 1887.)

ON report. *Judgment for defendant.*

The opinion states the case.

Messrs. Danforth & Gould, for plaintiff:

The substitution of one simple contract for another is not payment; the same debt continues in a different form.

Frink v. Branch, 16 Conn. 275.

“Payment is the transfer of money from one person to another.”

2 Rapalje & L. L. Dict. *Payment*.

The taking of this note acted to carry forward the day of payment, and ought not to deprive the holder of the note of his remedy; for, if the holder's right to maintain this action was taken away by the debtor's obtaining a discharge in insolvency under an insolvent law passed after the debt was contracted, it would be contrary to the Federal Constitution,—it would impair the obligation of the contract.

U. S. Const. art. 1, § 10.

The courts of this State have already held that “the general doctrine is that the taking of a note is to be regarded as payment only when the security of the creditor is not thereby impaired.”

Paine v. Dwinel, 53 Me. 54.

In *Ross v. Tozier*, 1 Me. (L. ed.) 195, 2 New Eng. Rep. 708, 78 Me. 312, it is decided that a judgment founded upon a contract existing at the time of the passage of the insolvent law is not barred by a discharge under said law.

This case seems to us to be similar, and that the law in this case should be the same, for here we have a note existing in August, 1876,—prior to the passage of the insolvent law. Instead of its passing into a judgment, and putting the defendant to needless costs and vexation, a new note is given, January 18, 1880, to carry forward the time of payment of said debt. The amount for which the new note is given is arrived at by the same process as though we were ascertaining the amount for which judgment should be rendered; the one act or the other prolongs the life of the debt.

Messrs. Walton & Walton, for defendant:

The only question is: “Have the parties left the original contract of indebtedness in such a condition that an action can still be maintained upon it?” If not, then the new note—the later contract—has been received in payment of the former indebtedness.

Strang v. Hirst, 61 Me. 14; *Paine v. Dwinel*, 53 Me. 52, cited by plaintiff's counsel.

In the absence of any evidence, the presumption (in this State and Massachusetts) is that it was so received.

Thacher v. Dinsmore, 5 Mass. 299; *Melledge v. Boston Iron Co.* 5 Cush. 169.

Parsons, in his work on Notes and Bills, admits that the doctrine of Maine and Massachusetts, though not the prevailing one, is the most logical, and best accords with the nature and purposes of negotiable paper, which, treated as a substitute for money, should be presumed to pay prior indebtedness in the same manner as money would.

Pars. N. & B. 2d ed. 161, 162.

Though the general doctrine may be "that the taking of a note is to be regarded as payment only when the security of the creditor is not thereby impaired," as stated by *Chief Justice* Appleton in *Paine v. Dwinel*, and referred to by plaintiff's counsel, yet this is only one consideration in determining the fact whether or not the original claim and contract was really and actually extinguished and paid.

If it was, then, no matter how great the hardship to the creditor, the fact that he lost valuable security—such, for instance, as a personal lien upon attachable property—could not change the rule of law.

Coburn v. Kerwell, 35 Me. 126.

We have, in the case as here presented, only to look at plaintiff's action, as he presents it. It is on a promissory note dated since the passage of the insolvent law, and barred by a discharge obtained by a compliance with its provisions.

Rindge v. Breck, 10 Cush. 48.

Plaintiff has not even the excuse of having brought his action upon the original contract existing prior to the passage of the Insolvent Act, and, if he had, it would not have availed him.

Wyman v. Fabens, 111 Mass. 77.

This is a very different question from that decided in *Ross v. Tozier*, 1 Me. (L. ed.) 195, 2 New Eng. Rep. 703, 78 Me. 312.

Danforth, J., delivered the opinion of the court:

This is an action upon a negotiable promissory note payable to Wm. B. Snow, administrator, and by him, as the case shows, indorsed and delivered to the plaintiff.

The defense is a discharge in insolvency, which is admitted to have been duly obtained. To this it is replied that the note in suit was given in renewal of a prior note bearing date before the passage of the insolvent law, and is not therefore affected by the discharge. The note in suit comes within the provisions of the law; the prior one does not. Which is to prevail? It is evident that, if the prior note was discharged by the later, the defense is made out.

It is now too well settled in this State, that taking a negotiable note in consideration of an existing debt is a presumptive payment of that debt, to require the citation of authorities. This presumption may be rebutted, for the parties may make such a contract in regard to it as they see fit. In this case the facts agreed upon show nothing tending to rebut that presumption. There was no collateral security for the first note. That had only the personal liability

of the defendant; the last note had the same. The existence of the insolvent law would not affect any security, whatever influence it might have upon the note. On the other hand, the facts tend strongly to confirm the presumption. When the new note was given the old one was delivered to the maker, which, unexplained, must be considered a cancellation of it. But farther, and, if possible, more conclusive, than this, the payee has indorsed and delivered the last note to the plaintiff, thus treating it as a distinct and subsisting contract. The two cannot stand together as separate contracts. The parties have treated the first as discharged and the last as the only one in force. The plaintiff certainly can have no claim for exemption from the insolvent law. He shows no connection with the prior debt. His rights began with the purchase of the note in suit, and he can only claim such rights as that gives him. His contract was made under the insolvent law and must be subject to its provisions.

Judgment for defendant.

Peters, Ch. J., **Walton, Virgin, Emery,** and **Foster, JJ.**, concurred.

STATE of Maine

v.

James CARVILLE.

An indictment for incest is not bad because the word "incestuous" is spelled "incestous."

(Kennebec—Decided December 7, 1887.)

ON exceptions by defendant. *Overruled.*

The point is stated in the opinion.

Mr. L. T. Carlton, County Attorney, for the State.

Mr. J. H. Potter, for the defendant.

Per Curiam:

In this indictment for incest between father and daughter, the word "incestuous" is spelled "incestous," a letter "u" being omitted by chance. It is, however, not a fatal omission. It is not only nearly enough *idem sonans*, but the spelling is not grammatically incorrect. The essential part of the meaning of the term is in the noun "incest," a word borrowed from the Latin language, into which it was imported from the Greek. The adjective may not incorrectly be incestous, although it is, for merely the sake of euphony, spelt incestuous. No one could mistake its meaning in its connection in this indictment.

The other points taken do not require particular discussion. The more important ones have been clearly settled in this State in previous decisions.

Exceptions overruled; judgment for the State.

STATE of Maine

v.

Michael MALIA.

In the absence of any defect to a plea of misnomer, the prosecution can raise

1 Mr.

either of two questions by replication. (1) that the defendant was as well known by the name in the complaint as by that in the plea; (2) that the two names were pronounced alike. Neither of these questions is presented by a demurrer to the plea.

(Sagadahoc—Decided December 10, 1887.)

ON exceptions by the defendant. *Sustained.* The exceptions were to the ruling of the court sustaining a demurrer to a plea of misnomer, where there was no defect in the form of the plea.

Mr. George E. Hughes, for defendant:

The respondent should have been discharged because there was a fatal error in pleading, when the State demurred to the plea of misnomer in abatement. The State should have filed a replication, and then an issue of fact should have been framed for the jury.

5 East, 2d Am. ed. p. 295; *Rez v. Shakespeare*, 10 East, 1st ed. 87, note a; *Rez v. Sherman*, Cas. t. Hardw. 308.

The State, by its demurrer, admits the fact that the respondent was misnamed, and proceeds to try him by a name different from what he is known by. It is a well-established and familiar rule of law that a demurrer admits the facts well pleaded.

Heard, Cr. L. 169.

When the State demurred, the respondent was obliged to join the demurrer, and he was therefore unable to have an issue framed for the jury to decide whether there was a misnomer or not. Suppose that, in the first case, the State had filed its replication, in reply to the misnomer of the respondent, that he is as well known by one name as another; this is a question of reputation, of custom, and usage,—a question of fact for the jury, and not of law for the court.

11 Gray, 330.

Again, suppose the State had filed its replication, in reply to the misnomer of the respondent, that the names are "*idem sonans*,"—that the name "*Malia*" and "*Mallia*" differ only in spelling, but have the same sound; whether they are thus sounded alike is a question of fact for the jury, and not of law for the court.

11 Gray, 322.

Mr. Frank J. Baker, County Attorney, for the State.

Virgin, J., delivered the opinion of the court:

The county attorney filed a demurrer to the defendant's plea of misnomer. No question is raised as to the form of the plea, and we perceive no defect therein. *State v. Flemming*, 66 Me. 142.

The demurrer having been sustained by the judge, the defendant was found guilty on his plea of not guilty. By going to trial, he waived no right to his exceptions on the pleading. *State v. Pike*, 65 Me. 111.

In the absence of any defect in the plea of misnomer, the State could have raised either of two questions by replication: (1) that the defendant was known as well by the name in the complaint as by that in the plea (*State v. Corkey*, 64 Me. 521); or (2) that the two names were pronounced alike. The county attorney

filed no replication, but demurred, and now contends in substance that the two names are *idem sonans*, which is not a question of law, but of fact, which the defendant has the right to submit to a jury. *Rez v. Shakespeare*, 10 East, 87, and cases in note a; *Commonwealth v. Mehan*, 11 Gray, 323, and cases there cited.

The result is: *Exceptions sustained; verdict set aside; judgment for the defendant.*

Peters, Ch. J., Danforth, Walton, Foster, and Haskell, JJ., concurred.

Hymen BLUMENTHAL

v.

MAINE CENTRAL R. R. CO.

A railroad company is not liable, as a common carrier, for its failure to transport merchandise which has been checked by the owner as his personal baggage.

(Kennebec—Decided December 17, 1887.)

ON report. *Judgment for defendant.*

An action to recover the value of a valise, and merchandise contained in it, which was checked as baggage by the defendant's agent at Bangor, for Augusta, at the request of the owner, who did not inform the agent of the contents of the valise.

Mr. F. E. Southard, for plaintiff:

While there is a case which apparently holds that pack-peddlers have no rights which railroads are bound to respect (see *Blumantle v. Fitchburg R. R.* 127 Mass. 322); and while it is conceded that the checking of merchandise by a party intending thereby to defraud the carrier of the freight money creates no liability as a common carrier for its loss,—it is believed that the circumstances of this case create some liability for which the defendant is answerable, and bring it within another and quite different principle from that governing cases of actual or legal fraud, such as is spoken of in *Michigan Cent. R. R. Co. v. Carrow*, 73 Ill. 348; *S. C.* 24 Am. Rep. 248.

The learned editor of the American Decisions, in a note to *Hutchings v. Western & A. R. R.* 71 Am. Dec. 161, says: "The true doctrine seems to us to be that, where there is no concealment on the passenger's part, and a carrier receives and treats as baggage a package which he knows to be merchandise, he should be liable in case of loss, although no extra compensation was charged for its transportation; and certainly he should be liable if he knowingly receives merchandise and charges for and carries it as extra baggage."

See *Great Northern R. Co. v. Shepherd*, 8 Exch. 80; *Sloman v. Great Western R. Co.* 6 Hun, 546.

The baggage-master who checked the package, so far as the plaintiff was concerned, had authority to do so.

Perley v. N. Y. Cent. & H. R. R. Co. 65 N. Y. 374. See also *Sloman v. Great Western R. Co. supra*; Field, Corp. § 198.

The action of the baggage-master has been ratified by the defendant. Upon the authority of the agent the defendant has raised no question, either by the pleadings or at the time of

taking evidence. If it had intended to repudiate the agent's authority, it should have done so long ago, and cannot be heard to deny such authority now. The defendant's silence has ratified the agent's act.

2 Kent, Com. 616; *Kelsey v. Crawford County Nat. Bank*, 69 Pa. 429; *Bank of Pa. v. Reed*, 1 Watts & Serg. 101; *Ward v. Williams*, 26 Ill. 447; *S. C.* 79 Am. Dec. 345, and note.

The liability of this defendant is settled by the case of *Michigan Cent. R. R. Co. v. Carrow*, 73 Ill. 348; *S. C.* 24 Am. Rep. 248, in which it is held that, although the fraudulent checking of merchandise as baggage, and its loss by the carrier, does not make the latter liable as a common carrier, yet that he is liable as a bailee without reward, or as a mandatory. That the defendant owes to the plaintiff the duty of ordinary care and is responsible to him for gross negligence, is, I think, hardly to be controverted. *Story*, Bailm. §§ 182, 182 a; *Coggs v. Bernard*, 2 Ld. Raym. 909.

Judge Story, in his work on Bailments, § 278, lays down the rule in these words: "Where a demand of the thing loaned is made, the party must return it or give some account how it is lost. If he shows a loss, the circumstances of which do not lead to any presumption of negligence on his part, there the burden of proof might, perhaps, belong to the plaintiff to establish it."

See also *Logan v. Mathews*, 6 Pa. 417; *Bush v. Miller*, 18 Barb. 482.

The case of *Beardslee v. Richardson*, 11 Wend. 31; *S. C.* 25 Am. Dec. 596, would seem to be a leading authority upon this proposition.

"All persons who stand in a fiduciary relation to others are bound to the observance of good faith and candor. * * * The property is in the possession and under the oversight of the bailee whilst the bailor is at a distance. Under these circumstances good faith requires that, if the property is returned in a damaged condition, some account should be given of the time, place, and manner of the injury."

Collins v. Bennett, 46 N. Y. 490.

And the rule is the same where the property is not returned at all.

Boies v. Hartford & N. H. R. R. Co. 37 Conn. 272. See *Camden & A. R. R. Co. v. Baldauf*, 16 Pa. 67; *S. C.* 55 Am. Dec. 481; *Clark v. Spence*, 10 Watts, 385; 2 Kent, Com. 587; *Mills v. Gilbreth*, 47 Me. 320; *S. C.* 74 Am. Dec. 487; *Schoul. Bailm.* 25, note; *Schmidt v. Blood*, 9 Wend. 268; *S. C.* 24 Am. Dec. 143. And see a very elaborate note on p. 153; *Funkhouser v. Wagner*, 62 Ill. 59.

Messrs. Baker, Baker, & Cornish, for defendant:

"The ordinary contract," says *Mr. Chief Justice Gray*, "made by a railroad corporation with a passenger, by the sale and purchase of a passenger ticket, is for the transportation of the passenger and of his reasonable personal baggage; and the corporation is liable as a common carrier for such personal baggage only, and not for merchandise delivered by the passenger as baggage, without clear proof of an agreement to that effect."

Blumantle v. Fitchburg R. R. Co. 127 Mass. 322. To the same effect are *Collins v. Boston & M. R. R.* 10 Cush. 506; *Stimson v. Connecticut R. R. R. Co.* 98 Mass. 88; *Connolly v.*

Warren, 106 Mass. 146; *Wilson v. Grand Trunk R. Co.* 56 Me. 60; *Smith v. Boston & M. R. R.* 44 N. H. 380; *Macrow v. Great Western R. Co.* L. R. 6 Q. B. 612; *Cahill v. London & N. W. R. Co.* 10 C. B. N. S. 154; *Hutchings v. Western & A. R. R.* 25 Ga. 61; *S. C.* 71 Am. Dec. 158, and note, 158, where a long list of citations sustaining this principle may be found.

As a matter of law it is well settled that neither a special agreement can be proved, nor a responsibility created, by evidence that the package delivered by the passengers as baggage is of such form and appearance as to raise a doubt, suspicion, or inference that it contains merchandise.

Stimson v. Connecticut R. R. R. Co. 98 Mass. 88; *Ailing v. Boston & A. R. R. Co.* 126 Mass. 121; *Mich. Cent. R. R. Co. v. Carrow*, 73 Ill. 348; *S. C.* 24 Am. Rep. 248; *Cahill v. London & N. W. R. Co.* 10 C. B. N. S. 154; *Belfast & B. etc. R. Cos. v. Keys*, 9 H. L. Cas. 556.

No obligation rests upon the carrier of passengers to inquire as to the contents of a trunk or valise delivered as baggage by a passenger. He has a right to assume that it contains nothing but personal baggage. The traveler represents by implication that it contains no property not included within that class or description.

Dunkap v. International S. B. Co. 98 Mass. 371; *Haines v. Chicago, St. P. M. & O. R. R.* 29 Minn. 160; *S. C.* 43 Am. Rep. 199; *Michigan Cent. R. R. Co. v. Carrow*, 73 Ill. 348; *S. C.* 24 Am. Rep. 248; *Collins v. Boston & M. R. R.* 10 Cush. 506; *Ailing v. Boston & A. R. R. Co.* 126 Mass. 121.

Nor can such responsibility be created by mere evidence of a custom of passengers to take with them, and of railroad companies to carry, similar packages as personal baggage.

Stimson v. Connecticut River R. R. 98 Mass. 88; *Smith v. Boston & M. R. R.* 44 N. H. 335; *Michigan Cent. R. R. v. Carrow*, *supra*; *Ailing v. Boston & A. R. R. Co.* 126 Mass. 121; *Blumantle v. Fitchburg R. R. Co.* 127 Mass. 322.

Emery, J., delivered the opinion of the court:

The plaintiff's story is substantially as follows:

Just before the morning train was leaving for Augusta, he was at the Bangor station of the Maine Central Railroad Company (the defendant), with a large valise, around which an oilcloth cover was strapped with a common shawl-strap. This valise contained no personal baggage for use upon a journey, but only merchandise for sale. He purchased of the company's ticket agent a passenger ticket for Augusta; and then, having his ticket in his hand, took the valise to the baggage-master, and asked him to check it for Waterville, and received from him a check therefor. He did not inform the baggage-master of the contents of the valise, but held the passage ticket so it could be seen. The baggage-master made no inquiries.

The plaintiff went to Augusta on the same morning train, giving up his passage ticket to the conductor. A few days later he presented his baggage check to the baggage-master of the railroad company at Waterville, but his valise

could not be found there. He has made no inquiries at Bangor, and has made no other effort to find his valise. He has now brought this action against the railroad company to recover the value of the merchandise, alleging, as a cause of action, its obligation to transport the merchandise safely, and its failure to do so.

The plaintiff's purchase of a passage ticket entitled him to safe transportation of himself and his personal baggage on the same train. It entitled him to nothing else. The company was thus under that obligation, but under no other obligation to him. There was created no obligation to transport the plaintiff's merchandise. *Wilson v. Grand Trunk R. Co.* 56 Me. 60.

By going as he did with his valise to the baggage-master, and asking for a baggage check for Waterville, without stating the contents of the valise, he evidently meant the baggage-master to believe that he was intending to take passage on the train then about to leave, and that the valise contained only personal baggage, such as he was entitled to take with him as a passenger. The check was given him in that belief. He thus committed a fraud upon the company to obtain free transportation of his merchandise. His fraud, however, did not impose upon the company such an obligation. The baggage-master received the valise upon the implied assurance of the plaintiff that it contained personal baggage only. If that assurance was false, and the valise contained no personal baggage, neither the baggage-master nor the company were bound to forward it, though they had received it.

The plaintiff further testified, however, that other baggage-masters of the same company at other stations knew the usual contents of the valise, and he now urges that the company thus had notice of the contents at the time it was received by the Bangor baggage-master. Notice to other baggage-masters, at other times and other places, of matters existing only at those times and places, cannot affect the company at this time and place, where its only eyes and ears in this matter were those of its Bangor baggage-master. The other baggage-masters had nothing to do with the Bangor station, and were not servants of the company there.

Of course the baggage-master, having received the valise, could not lawfully throw it away, destroy it, or convert it; and if he or any of the company's servants has done so, the company may be liable therefor. There is no such evidence in this case, however. The valise may still be at Bangor waiting for the plaintiff to remove it, or, if lost, may have been lost without fault of the company. This action is for failure to transport safely, and the evidence does not show any such obligation on the company.

Judgment for defendant.

Peters, Ch. J., Walton, Danforth, Virginia, and Foster, JJ., concurred.

Silas A. SKILLIN

v.

Colby MOORE and Dwelling House.

1. When a building is erected by a person in possession of the land under a

1 Mr.

bond for a deed, the building becomes a part of the realty.

2. Such building and lot should be attached as real estate, to enforce a lien claim thereon for labor in its erection.

(Placataquis—Decided December 20, 1887.)

ON report. *Judgment for claimant.*

Assumpsit for labor in erecting a building, against the contractor, and to enforce a lien upon the building. William Paine, the alleged owner of the building, appeared upon a summons from the court, claimed the building and lot, and was made a party to the suit. The facts are stated in the opinion.

Mr. J. F. Sprague, for plaintiff:

The proper certificate of the amount due the plaintiff was filed in the clerk's office of the town of Monson. This was a sound foundation for the action.

Ricker v. Joy, 72 Me. 107.

If the town clerk did not perfect his record in accordance with the facts, he had the authority to amend it at a subsequent time.

Welles v. Battelle, 11 Mass. 477; *Chamberlain v. Dover*, 18 Me. 466; *Prince v. Skillin*, 71 Me. 361; *Spauld. Pr.* 325, and cases there cited.

The officer's return is conclusive in all actions except those in which the officer is a party.

Wetherell v. Hughes, 45 Me. 62; *Darling v. Dodge*, 36 Me. 370; *Dutton v. Simmons*, 65 Me. 586; *Bott v. Burnell*, 11 Mass. 165; *Campbell v. Webster*, 15 Gray, 28.

In various ways Paine consented to this work. This makes the lien good against him, although the contract was made with Colby Moore.

Morse v. Dole, 73 Me. 358.

This case is within the rule laid down in *Rines v. Bachelder*, 62 Me. 95. The court here decided that where one who has bargained for a parcel of real estate, and failed to pay for it, has erected buildings thereon by the consent of the owners of the realty, such buildings are his personal property.

An agreement giving a right to remove a dwelling-house which is put upon the land of others may be implied from circumstances.

14 Allen, 124.

When the owner of land has given permission to another person to erect a building upon his land, to be held and enjoyed as personal property, if such permission is given before the building is erected, the building is not a part of the realty.

Gibbs v. Estley, 15 Gray, 587, and cases there cited; 4 Mass. 514; 5 Pick. 487; 8 Pick. 402; 8 Cush. 190; 1 Gray, 578; 7 Allen, 187.

Mr. Henry Hudson, also for plaintiff:

No lien was given—only when the building became a part of the realty. This Act was amended by Rev. Stat. 1841, chap. 125, §§ 87, 88.

By Rev. Stat. 1871, chap. 91, § 28, all persons who performed by consent of the owner have a lien; and such lien attaches to said building and land, if real estate; and to such building only, if personal property.

Dustin v. Crosby, 75 Me. 76.

Section 28 of 1871 was amended by Pub. Acts 1876, chap. 140, so that the laborer has a lien

unless the owner gives written notice that he will not be responsible.

The law of 1883 (Rev. Stat. chap. 91, §§ 80-84) is essentially word for word with that of 1871, with the exception of the amendment of 1876.

Bouvier says that "consent is either express or implied; express when it is given *in voce* or in writing; implied when it is manifested by signs, actions, or facts, or by inaction or silence, which raise a presumption that the consent has been given."

Consent may be implied from such knowledge and acts as appear in this case.

Morse v. Dole, 78 Me. 353; *Weeks v. Walcott*, 15 Gray, 54; *Hilton v. Merrill*, 106 Mass. 530; *Davis v. Humphrey*, 112 Mass. 313; *Worthen v. Cleveland*, 129 Mass. 573.

The case also shows that Paine made a written contract with Moore to build this house. When he did that he thereby empowered Moore to employ the necessary workmen to execute said contract; and the labor of such workmen was performed by the consent of Paine, necessarily implied from the contract under which said house was built.

Parker v. Bell, 7 Gray, 429; *Hilton v. Merrill*, 106 Mass. 530; *Worthen v. Cleveland*, 129 Mass. 573; *Davis v. Humphrey*, 112 Mass. 314.

It seems that the land was sold by each and all the parties with a superadded agreement that buildings were to be erected. If such was the case, it is clear that the plaintiff has a lien on said house.

Hilton v. Merrill, 106 Mass. 530; *Worthen v. Cleveland*, 129 Mass. 573; *Davis v. Humphrey*, 112 Mass. 314; *Dustin v. Crosby*, 75 Me. 75; *Dame v. Dame*, 38 N. H. 429.

To sustain the position that such dwelling-house is personal property, I cite the following cases:

First Parish of Sudbury v. Jones, 8 Cush. 190; *Wells v. Banister*, 4 Mass. 514; *Howard v. Fessenden*, 14 Allen, 128; *Russell v. Richards*, 10 Me. 431; *S. C. 11 Me. 374*; *Jewett v. Patridge*, 12 Me. 250; *Osgood v. Howard*, 6 Me. 452; *Rines v. Bachelder*, 62 Me. 99; *Dustin v. Crosby*, 75 Me. 75; *Davis v. Humphrey*, 112 Mass. 313; *Dame v. Dame*, 38 N. H. 429.

The certificate made and filed in the town clerk's office at Monson was sufficient, and conformed to the law.

Ricker v. Joy, 72 Me. 106.

The description of the premises, a dwelling-house, in said certificate was sufficient.

Ricker v. Joy, *supra*; *Parker v. Bell*, 7 Gray, 429.

The original certificate shows that it was duly filed in the town clerk's office and recorded. This is sufficient.

Ames v. Phelps, 18 Pick. 814; *Phill. Mech. Liens*, § 368; *Tracy v. Jenks*, 15 Pick. 465; *Fuller v. Cunningham*, 105 Mass. 442; *Wood v. Simons*, 110 Mass. 116.

The recording of the certificate was sufficient recording, and if the clerk omitted to affix his name to the record he had a right so to do afterwards.

Wood v. Simons, *supra*.

The officer's return upon the writ is the only evidence of a valid attachment of the property. *Drake*, *Attach.* 6th ed. § 236 a; *Carleton v. Ryerson*, 59 Me. 488; *Beasey v. Vose*, 73 Me. 218.

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In *Darling v. Dodge*, 36 Me. 372, the court says that "the return of the officer is the evidence that property referred to therein has been attached."

The return of the officer on the writ is conclusive, and the owner, William Paine, is estopped to deny it, and cannot contradict said return in this action. If said return is false, his remedy is against the officer.

Bott v. Burnell, 11 Mass. 165; *Bean v. Parker*, 17 Mass. 600; *Whitaker v. Sumner*, 7 Pick. 555; *Pullen v. Haynes*, 11 Gray, 379; *Campbell v. Webster*, 15 Gray, 29; *State v. Leach*, 60 Me. 74; *Sawyer v. Harmon*, 136 Mass. 416; *Baker v. Baker*, 125 Mass. 7; *Bamford v. Melvin*, 7 Me. 19; *Huntress v. Tiney*, 39 Me. 241; *True v. Emery*, 67 Me. 33; *Stinson v. Snow*, 10 Me. 265; *Sykes v. Keating*, 118 Mass. 519; *Ames v. Phelps*, 18 Pick. 814.

The case of *Dutton v. Simmons*, 65 Me. 586, does not controvert any of the positions here taken and sustained by the various opinions of the court,—only so far that the certificate of the officer filed in the registry of deeds may be admitted to contradict the return on the writ. But it would seem from the opinion in *Ames v. Phelps*, 18 Pick. 814, that the Massachusetts court does not hold even that.

In *Reed v. Acton*, 120 Mass. 131, the court says: "The clerk's office may be his dwelling-house."

The failure of the clerk to make the proper entries will not defeat the attachment.

Sykes v. Keating, 118 Mass. 519.

Messrs. Ephraim Flint, A. G. Lebrooke, and W. E. Parsons, for Wm. Paine:

It is true that Rev. Stat. chap. 91, § 31, provides that, "if the labor or materials were not furnished by a contract with the owner of the property affected, the owner may prevent such lien for labor or materials not then performed or furnished, by giving written notice to the person performing or furnishing the same that he will not be responsible therefor." This section is applicable to an owner for whom or by whose procurement a building is erected upon land in which he has an attachable interest, and to a mortgagee who takes his mortgage after, and not before, the execution of the contract under which the lien is claimed.

See *Morse v. Dole*, 78 Me. 351.

As held in *Westgate v. Wison*, 128 Mass. 306, and *Lapham v. Norton*, 71 Me. 88, the relations between the owner of land and the person erecting a building thereon "more nearly resemble those existing between mortgagor and mortgagee, in which case any additions made or fixtures annexed to the realty enure to the benefit of the mortgagee."

But even if the plaintiff at any time had a lien, it could have been enforced only by an attachment of the property as real estate, as authoritatively settled in—

Hemenway v. Cutler, 51 Me. 407; *Poor v. Oakman*, 104 Mass. 309; *Westgate v. Wison*, 128 Mass. 304; *Hinkley & E. I. Co. v. Black*, 70 Me. 473; *Lapham v. Norton*, 71 Me. 88; *Dustin v. Crosby*, 75 Me. 75; 1 Washb. Real Prop. chap. 1.

As stated by Parker, *Ch. J.*, in *Williams v. Amory*, 14 Mass. 30: "A statute title must always be perfect; that is, every thing which the law deems essential to the transfer of the prop-

1 ME.

erty of one to another must appear of record to have been done."

Wilson v. Bucknam, 71 Me. 547.

The failure of the town clerk to note on a certificate of attachment the time of receiving it, to enter it in a suitable book, and to keep it on file, would be fatal to the validity of an attachment; and the record is the only legal evidence that the clerk has performed his duty in relation to such certificate. The officer's return is *prima facie* evidence of what he has stated to have been done, as held in *Dutton v. Simmons*, 65 Me. 588, and *Bessey v. Vose*, 73 Me. 217.

Evidence of an inferior nature, which supposes evidence of a higher, in existence, and which may be had, shall not be admitted.

Commonwealth v. Kinison, 4 Mass. 646; *Watterman v. Robinson*, 5 Mass. 308; *Taunton & S. B. Turnp. Corp. v. Whiting*, 10 Mass. 827.

The old and familiar rule of law is "that positive proof is always required when from the nature of the case it can be had."

1 Stark. Ev. p. 500; 1 Greenl. Ev. chap. 4, § 82.

The following cases cited, relating to certificates of attachments of real estate and the filing of the same in the office of registry of deeds, are claimed to be applicable to certificates of the attachment of personal property required to be filed in the office of town clerk:

Kendall v. Irving, 42 Me. 841; *Dutton v. Simmons*, 65 Me. 588; *Bessey v. Vose*, 73 Me. 217.

It is true that Rev. Stat. chap. 91, § 80, provides that, "if the debtor has no legal interest in the land on which the building is erected, the lien attaches to the building and may be enforced as before provided." But this statute can apply only where the debtor is owner of the building as personal property by virtue of a contract with the owner of the land; and if not owned under such contract the building must belong to the owner of the land, and can be attached only as real estate.

Dustin v. Crosby, 75 Me. 75, and cases above cited in this connection.

In *Orocker v. Pierce*, 81 Me. 188, the court says: "An attachment can operate only upon the rights of the debtor existing at the time it was made. No interest subsequently acquired by the debtor can in any manner be affected by the return thereof, when none was in him at the time. If the levy of an execution would not be effectual to pass any title to the creditor at the time of the return of the attachment upon the original writ, the latter could have no effect."

Also see *Brett v. Thompson*, 46 Me. 480.

Libbey, J., delivered the opinion of the court:

The contention between the plaintiff and Wm. Paine, claimant of the property, is whether the plaintiff is entitled to a judgment against the house described in his writ, for the lien claimed by him.

The evidence reported fully establishes the following facts: In March, 1884, one Chapin purchased the land known as the Cushman farm, in Monson, of Lucinda Cushman, paying her a part of the price agreed upon, and taking a bond for a deed on the payment of the balance at times stipulated. It was understood between the parties that Chapin might take pos-

session of the land, and sell it in lots for the erection of dwelling-houses. Afterwards, in the spring of the same year, Chapin contracted with one Penny to sell him a part of the land, and give him a deed when he made payment of the price as agreed. In the same season Penny, by parol agreement, sold a part of the land which he bought of Chapin to Paine, the claimant. It was understood between all the parties that the purchaser might build on the land as if it was his own; but there was no agreement or understanding between them that the buildings should be the personal property of the builder and might be moved off by him. It was the ordinary case of contract for the purchase of land with a bond for a deed, the purchaser to have the right to enter into possession at once and erect buildings.

In such case the buildings, when erected and attached to the land, become a part of the realty, and the legal title to them is in the owner of the land. *Hemenway v. Cutler*, 51 Me. 407; *Lapham v. Norton*, 71 Me. 88.

The plaintiff worked on the house for the defendant, Moore, who built it by contract for Paine, in the fall of 1884.

December 12, 1884, Chapin paid the balance of the purchase money and took a deed from Mrs. Cushman; and December 18, 1884, Chapin conveyed to Penny, who conveyed to Paine June 17, 1885.

The house was real estate, and the plaintiff so claimed it when he filed his lien-claim, January 1, 1885, in the office of the town clerk. After describing the buildings in language sufficient, if in a deed, to convey the house and land on which it stood, he says: "For which I claim a lien on said buildings and the land on which the same are situated."

If the plaintiff had a lien for his work, as he claims, as against Paine, it was on the house and lot, and, to preserve and enforce it, the house and lot should have been attached as real estate; but the officer did not return his attachment to the registry of deeds in the county, but returned it to the town clerk of Monson, as an attachment of personal property. For this reason the plaintiff cannot have judgment for his lien; and, as this is fatal, it is unnecessary to consider the other grounds of defense.

Judgment against Moore for the sum claimed. Judgment for lien on the house denied.

Peters, Ch. J., Walton, Danforth, Emery, Foster, and Haskell, JJ., concurred.

Benjamin THATCHER

v.

George E. WEEKS *et al.*

1. An officer arrested a person for violating a city ordinance by beating a drum. He took and detained the drum. He believed, and had reason to believe, that if he restored the drum to the offender the ordinance would be again violated. Held, that the officer was not justified in detaining the drum after the trial.

2. In such a case, after demand, trover may be maintained against the officer for the value of the drum.

(Hennebec—Decided December 17, 1887.)

ON exceptions by plaintiff. *Sustained.*

Trover against the mayor and city marshal of Augusta.

The opinion states the facts.

Mr. Melvin S. Holway, for plaintiff:

If an officer who makes an arrest takes money or goods because he believes them to be connected with the supposed crime, he holds such property subject to the order of the court by which the alleged offense is to be investigated.

Bish. Cr. Proc. § 212.

If such an officer retains such property after a time sufficient for submitting it to the jurisdiction of the proper court, his only defense to an action of trover brought by the rightful owner is by producing an order from such court.

Bullock v. Dunlap, L. R. 2 Exch. D. 43, 19 Eng. Rep. 363; *Ex parte Craig*, 4 Wash. C. C. 710.

An officer who seizes burglar's tools does not retain them for the reason that he has a right to hold them so long as attending existing circumstances continue to afford reasonable ground that he would use them for the purpose of committing that crime immediately if they were restored to him.

Common drums do not have that special adaptability to criminal acts that kits of burglar's tools possess, and comparisons of them are odious and unjust.

Mr. A. M. Goddard, for defendants:

In order to support this action the plaintiff must, at the time of the conversion, have had a complete property, either general or special, in the chattel; and also the actual possession, or the right to the immediate possession, of it. 1 Chitty, Pl. p. 148, and cases there cited.

Plaintiff must have right of present possession as well as right of property.

22 Pick. 535; 8 Pick. 258; 9 Pick. 156; *Ames v. Palmer*, 42 Me. 197; 7 T. R. 9.

At the trial, the plaintiff hinted that he deemed this ordinance unconstitutional, as being in conflict with art. 1, § 3, of the Constitution of Maine. *Donahoe v. Richards*, 38 Me. 379, fully covers this point.

Spalding v. Preston, 21 Vt. 9, is a parallel case to this, and there the judges express surprise that the plaintiff had presumed to bring such an action.

Emery, J., delivered the opinion of the court:

One of the defendants was the city marshal of Augusta, and had arrested the plaintiff for violation of a city ordinance in beating drums. The case does not show what the officer did with his prisoner, but we may assume that he did his duty and took him, within a reasonable time, before the proper court for trial. We may also assume that the court duly disposed of the charge. At the time of the arrest the officer also took from the plaintiff the drums, and had kept them for some time over three months when the plaintiff, after demand, brought this action of trover for their value. The officer did not bring the drums before any court or magistrate, nor did he obtain any order or decree from any magistrate as to their disposition.

The officer (the defendant) claims it was no part of his duty so to do. He claims that, for the purpose of preventing any further violation of the city ordinance, he could lawfully

take the drums thus being unlawfully used, and could lawfully detain them in his own possession, so long as he had reason to believe, and did believe, that the plaintiff would immediately again use the drums in the same unlawful manner, if restored to him. The principle thus contended for by the officer would enable him to detain the team of a person arrested for too fast driving, so long as he, the officer, believed with reason the owner would immediately repeat his offense of too fast driving if the team were restored to him.

Does the power of executive officers extend so far?

It is common learning that an officer may, without a precept, arrest any person he finds committing an offense. It is also well known that he must within a reasonable time bring his prisoner before the proper court, or obtain a legal precept for detaining him. A failure to do so may make the officer a trespasser. Rev. Stat. chap. 183, § 4. An officer making an arrest upon a criminal charge may also take from the prisoner the instruments of the crime, and such other articles as may be of use as evidence upon the trial. These may not be confiscated or destroyed by the officer, however, without some order or judgment of a court. We do not find any authority or reason for the officer's rendering any judgment in the matter. He holds the property, as he does the prisoner, to await, and subject to, the order of the court. The officer, having taken into his possession such articles as will supply evidence, "holds them to be disposed of as the court shall direct." Bish. Cr. Pr. 211. "The taking of things from the arrested person does not change the property in them. The officer holds all such property subject to the order of court." *Id.* 212.

Wharton, in his *Criminal Pleading and Practice*, 8th ed. § 61, says: "They (the articles taken from the prisoner) should be carefully preserved for the purposes of the trial, and after its close returned to the person whose property they lawfully are."

In *Spalding v. Preston*, 21 Vt. 9, relied upon by the defendant, the prisoner was committed for trial, and the officer was preserving the property (counterfeit coin) to be used as evidence at the trial. The court held that the officer could lawfully retain them for that purpose. In the case before us it is not claimed that the drums were detained for evidence. The trial was presumably long over.

There is an evident difference, also, between articles which can only have an unlawful use, like counterfeit coin, and articles in themselves innocent, like drums. If an officer may indefinitely hold the former, it does not follow that he can so hold the latter. Yet in the former case it is provided by our statute (Rev. Stat. chap. 125, § 12) that all such contraband articles are to be kept "by the direction of the court or magistrate having cognizance of the case."

We think it clear that, after the trial is over, the officer has no right to retain the property without some order of the court.

The court below sustained the defendants' contention above stated. We think this was error.

Exceptions sustained.

Peters, Ch. J., Walton, Danforth, Virgin, and Foster, JJ. concurred.

VERMONT.
SUPREME COURT.

Ezekiel TUCKER
v.

Susannah PRESTON.

1. Assumpsit on a *quantum meruit* will lie to recover what one's services are reasonably worth, where the parties supposed that they had entered into a contract in regard to compensation, but, through a failure to understand each other, their minds never met.
2. In an action to recover for labor extending through several years, where there is no express contract as to compensation, there is no error in allowing interest on the balance due at the end of each year, if this was the method of ascertaining the sum due; and in such case the question of demand does not arise.

(Orange—Filed December 20, 1887.)

ASSUMPSIT in general counts. Heard on a referee's report, December Term, 1886, Orange County, Walker, J., presiding. Judgment for the plaintiff. *Affirmed.*

The referee found that the action was assumpsit, and that the plaintiff filed a specification, to which the defendant pleaded the general issue and offset with specification, but defendant also claimed that plaintiff had no cause of action; that plaintiff in 1878 was sixty-two or sixty-three years old, and defendant an aged widow lady; that plaintiff worked as a laborer for the defendant on her farm at her request from March, 1878, to July, 1885; that the plaintiff claimed there was no special agreement as to what he should receive for his services, but that, in the January following the commencement of his work, they had some talk about that matter, and that defendant then said to him she wanted him to stay with her as long as she lived,—that she would give him a home as long as she lived, and if he outlived her he was to have her property.

The defendant claimed that plaintiff's residence with and services for defendant were by virtue of a verbal contract by which both parties understood and agreed that the plaintiff was to have a home with her during his lifetime, rendering such service as he was capable of, and receiving from her such care, attention, nursing, food, and clothing as he required; that the plaintiff had no reason to be dissatisfied with her performance of her part of the contract; that, for all the services rendered during the entire period of the plaintiff's residence with the defendant, his board, clothing, care, etc., with payment of his taxes, and the privilege he exercised of working elsewhere and retaining the pay he might receive, were a fair compensation.

Both parties substantially agreed as to what the talk was in the January after the plaintiff went to the defendant's, except that the defendant denies that anything was said about her property if he outlived her.

The referee's finding continued:

"I find that the plaintiff worked for defend-

ant from March 1, 1878, to the following January, with no understanding or agreement as to what he was to receive for his services; that thereafter he supposed and believed he was working and making his home with the defendant under the agreement which was then made, as he understands it, and now claims it to be; and I find that the defendant supposed and believed that he was thereafter working for her and making his home with her under the agreement as she then understood it and now claims it to have been. I therefore find that in fact there was really no mutual contract or understanding between them. I further find that the plaintiff left the defendant because he supposed and believed from reports, and her acts and hints to him, that she wanted to get rid of him, and that if he did not leave she would throw him on the town; and, from the evidence and the circumstances in the case, I find the fact that he had good reason to believe that the defendant wanted to get rid of him, and he had good reason to believe that, unless he went away from the defendant, she would throw him on the town for his future support."

"It further appeared that the defendant's grandson, who had lived with his grandmother all the while the plaintiff was there, having arrived at the age of twenty-two or twenty-three years, went to Mr. Haywood, one of the selectmen of Tunbridge and acting as one of the overseers of the poor for said town, a short time before the plaintiff left defendant, and said that something had got to be done; they had kept him (the plaintiff) about as long as they could, for the reason that he was blind, and that his grandmother was going away soon; and in consequence of this application, Mr. Haywood, acting in the capacity of overseer of the poor for the town of Tunbridge, made some effort to inquire into the affairs of the plaintiff."

"The defendant claims that this application to the overseer of the poor by her grandson was not authorized by her, and that her grandson never knew, until after this application was made, by what understanding the plaintiff was staying with the defendant,—and it did not appear that he did know. It did appear that the defendant made no effort to quiet the mind of the plaintiff or allay his suspicions in the matter, and that the plaintiff never said anything to the defendant about it.

"If from the foregoing facts the plaintiff can recover, then I find that his services for the defendant for the first three years, or from March 1, 1878, to March 1, 1881, were reasonably worth \$50 per year,—\$150, * * * to which should be added the balance of interest reckoned to December 21, 1886, of (if the plaintiff is entitled to interest) \$71.16."

Mr. W. B. C. Stickney, for defendant:

If the contract had been as the plaintiff claimed,—that he was to have her property if he survived defendant,—the case seems analogous to that of service rendered in expectation of a legacy, and there could be no recovery.

Martin v. Wright, 13 Wend. 460; *Raynor v. Robinson*, 36 Barb. 180.

It does not appear that the defendant understood that plaintiff was mistaken as to the contract, or that she would have been unwilling to carry it out. She should have had an opportunity to exercise her option.

Scott v. Littledale, 27 L. J. Q. B. 201.

It does not appear that she has violated any part of what the plaintiff understood was agreed; or that his mistake would work any injury. If it would, the remedy would be in equity.

1 Story, Eq. Jurisp. § 140.

The ground of abandonment was the alleged refusal to fulfill; and the plaintiff should show that the refusal was absolute and unqualified.

Outter v. Powell, 2 Smith, Lead. Cas. 80, note.

The services were given under mutual mistake, and defendant is not liable to pay money.

Add. Cont. § 31; *Lunay v. Vantyne*, 40 Vt. 501.

In an implied contract, the law supplies that which is presumed to have been intended by the parties.

1 Wait, Act. & Def. p. 73, § 4; *Watson v. Sterer*, 25 Mich. 386.

The defendant has fulfilled the supposed agreement, except the conditional part, and the condition has not arisen.

Munro v. Butt, 8 El. & Bl. 738.

The plaintiff is not entitled to interest.

Brainerd v. Champlain Transp. Co. 29 Vt. 154; 1 Am. Lead. Cas. 623, note.

A demand was necessary.

Case v. Osborn, 60 How. Pr. 187; *Newell v. Keith*, 11 Vt. 214.

McCaes. D. C. Denison & Son, for plaintiff:

There was no express contract between the parties; therefore the whole case rests on the implied contract for work and labor.

Paddock v. Kittredge, 31 Vt. 378.

Ross, J., delivered the opinion of the court:

The result of the facts found by the referee is that the plaintiff went to work for the defendant at her request, worked nearly a year without any special agreement in regard to the compensation which he was to receive or when it was to be paid; then the parties supposed they had entered into a permanent contract in regard to his services, past and future, but, by failure to understand each other, their minds never met, and the plaintiff continued to work several years for the defendant. This leaves the plaintiff's entire work performed at the defendant's request, without any agreement in regard to compensation or payment. He can therefore recover for it in assumpsit on *quantum meruit*. The referee has found how much the plaintiff's services thus performed were reasonably worth, and how much he had received in payment. The defendant contends that the referee has allowed too much interest, if the plaintiff is allowed to recover. We do not think this contention can be maintained. The referee, in determining what would be a reasonable compensation for the plaintiff's services, found a certain sum due the plaintiff yearly, and diminished this sum by whatever he had received in payment, and allowed interest on the balance from the end of the year. This was his method of ascertaining the sum which the plaintiff reasonably deserved to receive as compensation for his services for the defendant. No question of a demand, or the necessity of a demand, before the allowance of interest, arises upon the facts reported by the referee. His method of ascer-

taining the sum which the plaintiff reasonably deserves to receive as compensation for his services makes the interest on the balance due yearly a part of the sum total as much as the yearly balances.

The judgment of the County Court is affirmed.

Jane FARRANT

v.

F. C. BATES.

An exception to the rendition of a judgment upon a special verdict does not reach back to a question, whether raised or not on trial, to which no exception was reserved, and which it is not necessary to determine in order to render a valid judgment. Thus in such case it was held that whether the court erred in omitting to submit to the jury questions and instructions which ought to have been submitted was not open to review. *Goodenough v. Huff*, 53 Vt. 482, distinguished.

(Orleans—Filed December 20, 1887.)

TRESPASS *quare clausum fregit*. Trial by jury, February Term, 1886, Orleans County, Ross, J., presiding. Judgment on a special verdict for the plaintiff. *Affirmed.*

The Newport & Richford Railroad runs across the premises in question, and along and near Lake Memphremagog. The defendant, at the time of the alleged trespasses, was the owner of a veneer mill situated near said lake; and it was in bringing the logs intended for use in the mill over the railroad, and rolling them from the cars on to the dump, and thence into the lake, that said trespasses were committed. It was conceded that the plaintiff owned the premises described in the declaration, of which she claimed that the strip in controversy formed a part. The plaintiff's evidence tended to show that said railroad was built in 1872; that the next year the husband of the plaintiff built a fence, both sides of the railroad, along the foot of the dump, from 2 to 6 feet from the dump and between it and the lake; that the fence was maintained till 1880, but finally disappeared, or the most part, except posts in the ground; that plaintiff afterwards caused the fence to be rebuilt, and claimed, among other things, to recover for its destruction; that, previous to and at the time of building the railroad, there was a strip of land between the line where the fence stood and low-water mark; that this strip varied in width from 1 to 4 rods, and was of considerable value for the purposes of cranberry culture and a mill site, and was covered with bushes from 6 to 10 feet high; that the defendant rolled some of the logs across said strip of land when not covered with water, broke down the fence and bushes, and that he boomed his logs against and upon said strip, attaching the end of his boom to the railroad dump. The defendant's evidence tended to show that when the railroad was constructed (41½ feet from the central line of survey) there was no land between the line where the fence stood and low-water mark; that after the building of the railroad there was only a

narrow strip (in some seasons none at all) exposed for a few days between the foot of the dump and low-water mark, and that this had been entirely formed by the spreading out of the dump in the soft bottom, and the action of the waves in washing down the sand from the dump; that this strip could be of no use for an agricultural purpose, or any purpose, except to pass over in going from the railroad dump to the lake; that said lake was navigable; that its waters varied in height from 4 to 6 feet between high and low water mark, and during the greater part of the year the waters of the lake washed the foot of the dump; and that said trespasses were committed by rolling logs from the cars on to the dump, and from the dump on to the ice or into the water, which came nearer the dump than the fence, and so floating them out into the water without actually touching the land claimed by the plaintiff; that he committed said supposed trespasses by the consent and direction of the managers of said railroad.

On October 28, 1884, the plaintiff executed to the railroad a deed of right of way, which was to be "the same width as it is now fenced." The railroad had paid no land damages till this deed was given. The plaintiff's evidence tended to show that she rebuilt the fence soon after this deed was given, and that the trespasses were committed at various times between July 1, 1883, and December 27, 1884. The main contention was whether there was a strip of land where said logs were rolled off, between the original fence, or its remains, and low-water mark of the lake, at the time the railroad was built and subsequently. The question whether the lot extended into the lake was not presented to the jury. The court submitted the questions in the special verdict to the counsel of both parties, and they made no objections thereto, and did not suggest any other subject of inquiry to be submitted. The following is a copy of the verdict:

Q. Where was the low-water mark of the lake, between the point to which the defendant's boom is attached and where the line of the plaintiff crosses the knoll, when the railroad dump along there was constructed? Nearer, at, or farther from the lake than where the plaintiff's fence, or remains of such fence, were October 28, 1884, when the plaintiff and others deeded to the railroad company?

A. Nearer the lake.

Q. Where was the low-water mark of the lake, at the same place as stated in question one, from July 1, 1883, to December 27, 1884? Nearer, at, or farther from the lake than the fence, or remains of fence, were October 28, 1884?

A. Nearer the lake.

Q. If Question 2 is answered "nearer the lake," was the low-water mark of the lake at that place made by building the dump of the railroad along there?

A. In part.

Q. Where was the low-water mark of the lake at the place stated in Question 1, when the railroad company entered upon the land now owned by the plaintiff to construct its road? Nearer or farther than 4½ feet from the centre line of the railroad as constructed?

A. Nearer.

Q. When the railroad dump was constructed, did the high-water mark of the lake come to the fence located as claimed by the plaintiff on the lake side? And, if so, how much of the time each year did it reach the line of said fence?

A. It did for nine months in the year.

Q. Has the defendant committed any trespasses upon the plaintiff's premises, other than on the strip of land in controversy, between July 1, 1883, and December 27, 1884?

A. No.

Q. What damages, if any, has the plaintiff sustained by the trespasses of the defendant on the strip of land in controversy, between July 1, 1883, and December 27, 1884?

A. Five dollars.

Q. What damages, if any, has the plaintiff sustained by the trespasses of the defendant on her premises, at places other than on the strip in controversy, between July 1, 1883, and December 27, 1884?

A. Not any.

Messrs. T. Grant, J. C. Burke, and C. A. Prouty, for defendant:

The first question is whether the owner of land bordering on a navigable lake has the same title to the strip between high and low water mark that he has to the land above high-water mark, or whether his title is of a qualified character. There is no evidence that the plaintiff's lot extended into the lake, or, at least, that question was not submitted to the jury. In navigable waters the State holds title to land between high and low water mark.

Gould v. Hudson R. R. Co. 6 N. Y. 552; *State v. Jersey City*, 25 N. J. L. 525.

In England only those waters were termed navigable in which the tide ebbd and flowed; but in the United States all those waters are called navigable which are navigable in fact.

Genesee Chief v. Fitzhugh, 53 U. S. 12 How. 448 (13 L. ed. 1058); *Barney v. Keokuk*, 94 U. S. 324 (24 L. ed. 224); *Martin v. Waddell*, 39 U. S. 16 Pet. 867 (10 L. ed. 996); *Pollard v. Hagan*, 44 U. S. 3 How. 213 (11 L. ed. 565); *Goodtitle v. Kibble*, 50 U. S. 9 How. 471 (13 L. ed. 220).

These cases related to tidewater, but the principles enunciated in them apply to all navigable waters. The tendency of recent decisions seems to be that a riparian owner of land bordering on a navigable lake holds to the ordinary waterline.

Seaman v. Smith, 24 Ill. 521; *Delaplaine v. Chicago & N. W. R. Co.* 42 Wis. 214; *Diedrich v. Northwestern R. R. Co.* Id. 248.

The defendant had a right to occupy this shore as he did, it being a part of the lake itself for nine months in the year.

Harvard College v. Stearns, 15 Gray, 1.

The owner of soil which, in its natural state, is covered with navigable water during the greater part of the time, holds his title subject to the public right of navigation.

Martin v. Waddell, *supra*; *Blundell v. Catterall*, 5 Barn. & Ald. 268; *Olsen v. Merrill*, 42 Wis. 208.

One is not liable in trespass who enters upon a strip like this when it is not covered by water, and digs up the soil for the purpose of taking shell fish.

Peck v. Lockwood, 5 Day, 22.

One who leases the right to anchor a raft op-

posite his land on a navigable stream cannot recover the contract price, because he had no right to lease.

Moore v. Jackson, 2 Abb. N. C. 211.

The court in this State has apparently denied the right to wharf out into deep water (*Austin v. Rutland R. R. Co.* 45 Vt. 215); but, if the rule should be held otherwise, then the defendant is entitled to a new trial; because, if the court omitted to submit any question, or give any instructions, which ought to have been submitted or given, it is cause for a new trial (*Goodenough v. Huff*, 58 Vt. 482).

The defendant's evidence tended to show that he rolled his logs directly from the dump into the water, and this question ought to have been submitted to the jury.

Messrs. Edwards, Dickerman, & Young, for plaintiff:

The plaintiff had such an interest in the land between high and low water mark that she could maintain trespass for an injury upon it. *Clement v. Burns*, 48 N. H. 609.

She could have erected a wharf on this strip of land.

Rez v. Russell, 13 E. C. L. 271.

"The public have no common-law right of bathing in the sea," and cannot cross the sea-shore on foot for that purpose.

Holroyd, J., in *Blundell v. Catterall*, 7 E. C. L. 91; *S. C.* 5 Barn. & Ald. 268.

In the same case *Bailey, J.*, said: "But, if A hath the *ripa* or bank of the port, the king may not grant a liberty to unlade upon that bank or *ripa*, without his consent, unless custom had made the liberty free to all, as in many places it is; for that would be a prejudice to the private interest of A." *Lord Hale* was quoted as saying the same; and *Abbott, Ch. J.*, said: "Now such consent as applied to the natural state of the *ripa* or bank would be wholly unnecessary, if every man had a right to land his goods on every part of the shore at his pleasure."

"The owner of the soil of the shore may also erect such buildings or other things as are necessary for carrying on of commerce."

Blundell v. Catterall, *supra*; *Ang. Tidew.*

Green, J., says, in *Gough v. Bell*, 22 N. J. L. 441, "that most of the Atlantic States had adopted the principle that extends the riparian owner to low-water mark;" and this was affirmed by the court of appeals.

28 N. J. L. 624.

The riparian owner has the sole right of quarrying stone between high and low water mark (*Hart v. Hill*, 1 Whart. (Pa.) 187); to use a spring (*Lehigh Valley R. R. Co. v. Prone*, 28 Pa. 206); to seaweed cast upon the shore (*Emans v. Trumbull*, 2 Johns. 322); and he may maintain trespass for an entry upon the shore to carry off a wreck (*Barker v. Bates*, 13 Pick. 255).

Such owner's rights extend so far as they do not interfere with the public interest in navigation.

Frink v. Lawrence, 20 Conn. 117.

It is a settled rule, "assumed and acted on," says *Shaw, Ch. J.*, in *Barker v. Bates*, *supra*, that the soil in the seashores and flats of our maritime frontier is the property of the riparian owner, subject to certain modifications.

Storer v. Freeman, 6 Mass. 435; *Parker v. Smith*, 17 Mass. 418; *Lapish v. Bangor Bank*, 8 Greenl. 85

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If any land was made outside the fence by the railroad, by placing the dump there, it belonged to the plaintiff.

Nichols v. Lewis, 15 Conn. 143.

The owner of land bounded on Lake Champlain has a right to low-water mark.

Austin v. Rutland R. R. Co. 45 Vt. 244; *Jakeway v. Barrett*, 38 Vt. 316.

"A grant bounded by a great pond or lake, which is public property, extends to low-water mark."

Gray, Ch. J., *Paine v. Woods*, 108 Mass. 160. See *East Haven v. Hemingway*, 7 Conn. 203; *Gould, Waters*, 156; *Champlain & St. L. R. R. Co. v. Valentine*, 19 Barb. 491; *Waterman v. Johnson*, 18 Pick. 265; *Wood v. Kelley*, 80 Me. 55; 5 Wend. 428; 7 Allen, 158; *Fletcher v. Phelps*, 28 Vt. 257; *Fay v. Salem & D. A. Co.* 111 Mass. 27; *State v. Gilmanton*, 9 N. H. 461; 77 U. S. 10 Wall. 497 (19 L. ed. 984); 66 U. S. 1 Black, 23 (17 L. ed. 29); 4 Wis. 486.

Taft, J., delivered the opinion of the court: The only exception taken upon the trial below was to the rendition of judgment upon the special verdict. There was no general verdict. No exception having been taken to the action of the court in ruling upon any question which arose prior to or at the time the special verdict was returned, there is no question in this court for revision, save the one taken to the rendition of the judgment; and there was no error therein, if the facts established by the special findings are sufficient to support the judgment rendered. The special verdict, as we construe the answers, established the facts that the plaintiff owned and was in possession of a strip of land uncovered by water between the old fence and low-water mark, over which the defendant rolled his logs, and in so doing became a trespasser. Such facts were sufficient to support the judgment. The many questions discussed by counsel at the hearing are not properly before us, no exception having been taken to the action of the court in passing upon them. It is claimed by counsel that, if the court below "omitted to submit any question which ought to have been submitted, or to give any instructions which ought to have been given," a new trial should be granted; and they cite the case of *Goodenough v. Huff*, 58 Vt. 482. To entitle the party to the benefit of such questions they should have been reserved in the court below; and an exception to the rendition of the judgment upon the verdict does not reach back to questions arising during the trial. The judgment should stand, if facts sufficient to base a judgment upon were established by the answers to the questions which were submitted; and *Goodenough v. Huff*, *supra*, is not in conflict with this view of the question. In that case the plaintiff sought to recover the amount of a promissory note; one question was whether there was a consideration for the giving of it; the issue was made by the pleadings and the evidence. The court did not submit that question to the jury; only submitting the ones when the note was signed, as that became material under the plea of the Statute of Limitations, and the amount due upon it. The special verdict established the facts that the defendant signed the note within six years prior to the bringing of the action, and the amount due upon it.

It was incumbent upon the plaintiff, under his claim as to when the defendant signed the note, to show a consideration for the signing. The judgment was rendered, not on the special finding alone, but also on the undisputed facts as to the circumstances under which the defendant signed the note, as shown by the plaintiff's testimony. The exception of the plaintiff reached every ground of the judgment, one of which was that there was no testimony tending to show a consideration; and, as the supreme court held there was such testimony, the rendition of the judgment was error. The case therefore only amounts to this, that every question involved in the rendition of a judgment is reached by an exception to its rendition; and we think the converse of the proposition is true, that the exception does not reach a question, although raised upon trial, that it was not necessary to determine in order to render a valid judgment.

The counsel have thoroughly argued a question involving the rights of riparian owners, but, as a majority of the court think the question is not presented by the record, we refrain from any discussion of it. The duty of the court is to pass only upon questions presented by the record.

Judgment affirmed.

John A. WARTHEN *et al.*,

v.

John G. PRESCOTT.

1. In assumpsit, where the writ issued under the statute (Rev. Laws, § 1478) as a *capias* against an absconding debtor, the defendant was bail for the debtor, and, on the return day, surrendered him into court, and was discharged. The justice of the peace before whom the case was pending, after a rendition of judgment and a partial hearing as to the debtor's situation and property, continued the case at the debtor's request for a further hearing in this respect, and, at the same time, took the defendant's recognizance for his appearance. *Held:*

(a) That the recognizance was valid.

(b) That it was valid although larger than the judgment.

(c) That the defendant could surrender the debtor in discharge of himself.

2. The defendant was the same as special bail, or bail above, at common law; and he could at any time or place, without a bail-piece, have apprehended the debtor, even on Sunday, or in his dwelling, or in another jurisdiction. In law he was the debtor's jailer.

(Orange—Filed December 19, 1887.)

SCIRE FACIAS on a recognizance. Heard on demurrer to the declaration, December Term, 1886, Orange County, Walker, J., presiding. Demurrer overruled and declaration held sufficient. *Affirmed.*

It was alleged that the plaintiffs on the 29th day of December, 1886, commenced an action

1 Vr.

of assumpsit against one Morey; that the writ was made returnable before E. R. Aldrich, a justice of the peace, on the 27th day of February, 1886; that the agent and attorney of the plaintiffs filed with the justice, before the issuing of the writ, an affidavit, in due form of law, stating that he had good reason to believe, and did believe, that said Morey was about to remove or abscond from the State, and that he had money or other property secreted about his person or elsewhere to an amount exceeding \$20; that judgment was rendered by the justice in favor of the plaintiffs on said 27th day for the sum of \$134.83 damages, and \$4.72 costs; that the original writ was issued against the defendant's goods, chattels, etc., and, for want thereof, against his body, and was served by a constable who arrested the body of said Morey, and that said defendant, Prescott, became bail and surety for his appearance, etc.; that said Prescott delivered his principal, said Morey, at the time of the trial, into court in discharge of himself, and that he was discharged by the court; that on said 27th day, after judgment had been rendered, said Morey submitted himself to be examined on oath as to his situation, circumstances, and property, in accordance with the statute; that, after said Morey had been partially examined before said justice, on application of said Morey, the case was continued to the 8th day of March, 1886, for a further hearing and examination; that said Prescott became surety before said justice, in the sum of \$200, for the personal appearance of said Morey on the continuance day, and in default thereof that he should satisfy said judgment; that said Morey did not appear; that the justice adjudged that he was not entitled to the poor debtor's oath, and that said bail and recognizance of said Prescott be forfeited in due form of law; that execution was legally issued and returned by the officer; that he found neither the body nor estate of said Morey.

Mr. A. M. Dickey, for defendant:

The justice had no common-law right to take such recognizance; all his powers in this respect are statutory; and the statute confers no such authority.

If § 1469 applies, then the surety must be upon the original writ. Rev. Laws, § 1407, provides that a justice may take a recognizance in case of judgment against an absent defendant.

Abells v. Chipman, 1 Tyler, 377.

The statute provides that the officer shall give the bail a bail-piece, and with that the bail may take his principal anywhere and bring him into court; but in this case there is no provision for a bail-piece. This is sufficient to show that the recognizance is not valid. In all other cases the statute makes provision for bail, but none here.

State v. Lamoiné, 53 Vt. 568; *Strong v. Edgerton*, 22 Vt. 249; 2 U. S. Dig. 220; 35 Vt. 565; 11 Vt. 349.

The justice had no authority to declare the recognizance forfeited. The case had been adjourned before the recognizance was entered into.

Converse v. Washburn, 43 Vt. 129.

The recognizance was void because taken larger than the judgment.

8 Ga. 128; 2 U. S. Dig. 423; *Washburn v. Phelps*, 24 Vt. 506.

Mr. John H. Watson, for plaintiffs:

The defendant first became bail by indorsing his name on the back of the writ as provided by Rev. Laws, § 1461. He then delivered his principal into court in discharge of himself (Rev. Laws, § 1468). Final judgment was rendered against Morey, and thereupon he submitted himself to be examined on oath "as to his situation" (Rev. Laws, § 1488).

The hearing was properly continued. § 1489.

The defendant became bail according to the provisions of § 1489 of the statute. The case was still pending (*Chase v. Holton*, 11 Vt. 347), and the bail was properly taken.

Rowell, J., delivered the opinion of the court:

This is *scire facias* on a recognizance entered into by the defendant for one Morey before a justice. The declaration is demurred to, which brings in question the validity of the recognizance.

The defendant was bail for Morey on a writ issued as a *capias* against him in an action of *assumpsit* in favor of the plaintiffs; and on the return day he surrendered his principal into court in discharge of himself, and was discharged. Such proceedings were thereupon had in the case that judgment was rendered against Morey for \$189.55, damages and costs; whereupon, and within two hours from the rendition of judgment, Morey submitted himself to be examined as to his situation, circumstances, and property, according to the statute in that behalf; and, after a partial hearing on that question, the justice, at Morey's request, continued the case nine days for further hearing, and at the same time took the recognizance in question for \$200 conditioned for Morey's personal appearance on the continuance day, and, in default thereof, for the payment of the judgment.

The defendant had the right to surrender his principal into court in discharge of himself, as he did. Rev. Laws, § 1468; *Abells v. Chipman*, 1 Tyler, 377; *Chase v. Holton*, 11 Vt. 347. The continuance of the case for further hearing, on Morey's application to take the poor debtor's oath, suspended the judgment, and kept the case open and in hand until that question was disposed of; and execution could not issue till then. *Chase v. Holton*, *supra*. Hence it was the duty of the court, under § 1469 of the statute, which is unquestionably applicable to justice's courts, unless Morey procured bail for his appearance on the continuance day, to order him committed to jail, that he might be held if needed to be taken on execution. And, although the statute says that such commitment shall be deemed to be a commitment on the original writ, yet it is not so in fact, but only in legal effect; for the original writ is returned into court, and cannot be taken out for the purpose of commitment; but the court, if the commitment is to be beyond its then present-session certainty, must issue a *mittimus*, upon which the commitment must be made. This is the course pointed out in 1 Tyler, 377, for a justice to pursue. From all which it follows that bail like this is not literally taken on the origi-

nal writ, as the defendant claims it must be; but, as the commitment is deemed to be on the writ, the obligation of the bail should be, and in this case by the condition of the recognizance is made to be, coextensive with that of bail on the writ.

It is strongly urged, as a reason why the justice had no power under the statute to take this recognizance, that there are no provisions for issuing a bail-piece in such a case, so that the bail is powerless to bring in the principal. But the bail here is the same as special bail, or bail above, or to the action, at common law, and the right of such bail to apprehend their principal is not at all dependent upon their having a bail-piece; which is not process, or in the nature of process, but is only evidence that the surety has become bail. At the common law the bail-piece seems not to have been delivered to the person becoming bail, but it was signed by a judge and filed in the court in which the case was pending.

Lord Coke says that, "in truth 'bailly' is an old Saxon word, and signifieth a safe keeper or protector, and 'baile' or 'ballium' is safe keeping or protection; and thereupon we say, when a man upon surety is delivered out of prison, *traditur in ballium*, he is delivered into bayle: that is, into their safe keeping or protection from prison." Co. Litt. 61 b. Blackstone derives the word "bail" from the French, *bailler*—to deliver. Some derive it from the Greek, *ballein*—to deliver into hands.

Hence a defendant who is delivered to special bail is looked upon, in the eye of the law, as being constantly in their custody. They are regarded as his jailers, and have him always, as it were, upon a string that they may pull at pleasure, and surrender him in their own discharge. They may take him on Sunday, which shows that it is not an original taking, but that he is still in custody. Bac. Abr. *Pail in Civil Cases*; *Pyecell v. Stow*, 3 Taunt. 425; *Payne v. Spencer*, 6 M. & S. 231.

They have a right to be constantly with the principal, and to enter his dwelling when they please, to take him. *Sheers v. Brooks*, 2 H. Bl. 120.

Their authority arises more from contract than from the law, and, as between the parties, neither the jurisdiction of the court nor of the State controls it; and so the bail may take the principal in another jurisdiction or another State, on the ground that a valid contract made in one State is enforceable in another according to the law there. *Nicoll v. Ingersoll*, 7 Johns. 145; *Commonwealth v. Brackett*, 8 Pick. 138. This shows that the authority need not be exercised by process, but that it inheres in the bail themselves; and they may exercise it personally or depute another to exercise it for them. See the cases last cited, and *Pyecell v. Stow*, 2 Taunt. 425; 1 Tidd, Pr. 218.

But it is said that the recognizance, being larger than the judgment, is larger than the law requires, and therefore irregular; and that the bail should be discharged on motion. But the statute does not fix the amount of the recognizance in such cases. The recognizance is conditioned for the payment of the judgment in default of the principal's appearance, and so the liability upon it is limited to the amount of the judgment, though the recognizance be for more. Rev. Laws, § 942.

The judgment of the County Court overruling the demurrer and adjudging the declaration sufficient is affirmed; but, as no final judgment was rendered below, the cause is remanded.

GREEN *et al.*
v.
H. P. SEYMOUR.

1. The question of duplicity in a replication cannot be raised by general demurrer.
2. To an action of assumpsit brought by the plaintiffs, the defendant pleaded the Statute of Limitations, and the plaintiffs in their replication alleged that the defendant promised to waive said statute as to their causes of action against him, in consideration that they would bring about a settlement of open matters, at a specified sum, between the defendant and another firm, of which Green was a partner; and that the plaintiffs caused the firm to pay said sum. *Held*, that a sufficient consideration for the new promise was alleged, if any other than the original indebtedness was necessary.
3. In a replication to a plea of the Statute of Limitations, wherein is set forth the defendant's promise to waive said statute, it is not necessary to allege that the promise was in writing.

(Filed March —, 1887.)

GENERAL ASSUMPSIT. Heard on demurrer to the plaintiffs' replication to the plea of the Statute of Limitations, April Term, 1886, Royce, *Ch. J.*, presiding. Judgment sustaining the demurrer and adjudging the replication insufficient. *Reversed.*

Plea, that the causes of action did not accrue within six years, etc.

Replication.

"For replication, etc. Because they say that prior to the commencement of this suit, to wit, on the 1st day of August, 1881, it was mutually agreed and understood by and between the said plaintiffs and the said defendant, for sufficient consideration then and there stated and expressed between them,—that is to say, the defendant then and there agreed to and with the plaintiffs, that, in consideration that the said plaintiffs would cause the said plaintiff E. G. Green, and one S. C. Green, then a partner with said E. G. Green, to pay to the said defendant a certain sum or balance in money, to wit, \$300, in full settlement of all accounts between the said defendant and the said E. G. and S. C. Green as such partners (which said settlement and the terms thereof are in writing; and are hereby referred to, and are not herein set forth, to avoid prolixity), that he, the said defendant, would take no advantage of the Statute of Limitations in the final settlement of the said several causes of action in the said declaration mentioned, and each and every one of them; and, in consideration of the said promise of the said defendant then and there made as

above said, they, the said plaintiffs, caused the said E. G. and S. C. Green to pay to the said defendant, said sum of money, to wit, \$300, in settlement of all accounts between the said defendant and the said E. G. and S. C. Green as such partners aforesaid," etc.

Messrs. Geo. T. Mooney and Cross & Start, for plaintiffs:

It was not necessary to allege that the promise was in writing.

1 Chitty, Pl. 804; *Hotchkiss v. Ladd*, 86 Vt. 598.

The fact that it is not in writing is a matter of defense, and may be waived.

Montgomery v. Edwards, 46 Vt. 151.

An agreement by a debtor that he will not take advantage of the Statute of Limitations removes the statute bar.

Paddock v. Colby, 18 Vt. 485; *Stearns v. Stearns*, 32 Vt. 678; *Burton v. Stevens*, 28 Vt. 181.

The consideration was sufficient.

Messrs. M. Buck & Son, for defendant:

The replication is obnoxious for duplicity.

1 Chitty, Pl. 579, 649.

It is uncertain.

Id. 648.

The replication is bad in that it is not alleged that the agreement was in writing and signed by the defendant, as required by the statute.

Rev. Laws, § 974; 1 Chitty, Pl. 480, 528, 584, 588.

Ross, J., delivered the opinion of the court:

The demurrer to the replication raises but two questions in regard to its sufficiency: (1) whether a sufficient consideration for the defendant's agreement to waive the Statute of Limitations is set forth; and (2) whether it is necessary to allege that such agreement is in writing, signed by the defendant. The question of the duplicity of the replication is not assigned as a special cause of demurrer. It cannot be raised by a general demurrer, except to pleas in abatement. 1 Chitty, Pl. 650; *Walker v. Sergeant*, 14 Vt. 247.

As said in 7 Bacon's Abridgment, 648: "But though duplicity in pleading be a fault, yet must the same be taken advantage of on a special demurrer,—that is, the party must show wherein the doubleness consists; and it is not sufficient to demur *quin duplex et caret forma*, etc., but he must lay his finger on the very point that is so." *Carpenter v. McClure*, 37 Vt. 127.

It is questionable if any consideration, other than the original indebtedness, is necessary to support a new promise to pay the debt, or, which in legal effect is the same, an agreement to waive the Statute of Limitations in regard to the debt. But if it is necessary to allege an independent consideration for such an agreement, the replication must be held good. It alleges that which might be both a damage to the plaintiff Green and a benefit to the defendant,—the bringing about of a settlement of open matters between another firm, of which the plaintiff Green was a partner, and the defendant, at a specified sum. Effecting a settlement of another independent, open matter, at a specific sum, between another party and the defendant, would seem of itself to be a sufficient consideration for the defend-

ant's agreement to waive the Statute of Limitations, in this matter in which the plaintiff was also interested. Hence, if a consideration—other than the original indebtedness—is necessary to sustain such an agreement, a sufficient independent consideration is alleged in the replication. To be effective to remove the Statute of Limitations, such agreement or promise must be in writing, signed by the party to be effected thereby. Rev. Laws, § 974. In this respect the statute is analogous to the Statute of Frauds, which declares that no action shall be maintained on certain promises, contracts, and agreements, unless in writing, signed by the party to be charged. At the common law the agreements or promises named in both statutes were binding, although unwritten and unsigned. These statutes provide that, to be operative to bind the party making them, the promises and agreements named must be evidenced by a written instrument signed by the party to be affected.

The general rule in regard to alleging, in pleading, matters affected by such statutes, is well stated in 4 Bacon's Abridgment, 655, as follows: "If a statute makes certain circumstances necessary to the validity of an act, which was valid at the common law without such circumstances, this does not alter the manner of pleading which was used before the making of the statute;" instancing that 29 Car. II., chap. 3, required a tenant for years to assign his term in writing, but that such assignment, being good by parol at the common law, may be pleaded without alleging it to be in writing.

In 1 Chitty on Pleading, 304, it is said: "The nature of the promise still remains the same in the eye of the law, which does not admit of any distinction between verbal and written agreements, except where the latter are under seal; and it should seem that the provisions of the statute only affect the rules of evidence, and not those of pleading." Yet, on page 534, the same author says: "Thus, in a declaration on a promise to pay the debt of another in consideration of forbearance, it is not necessary to show that the promise was in writing, according to the Statute of Frauds; but it is said to be otherwise in a plea." In a note a query is suggested, and 2 B. & B. 362, is cited. All the authorities, so far as observed, agree that in a declaration it is not necessary to allege that such agreements are in writing; and it has been so held by this court in *Hotchkiss v. Ladd*, 36 Vt. 593.

The only case I have found for the statement by Mr. Chitty, "but it is said to be otherwise in a plea," is *Case v. Barber*, 1d. Raym. 450. The action was assumptit, and the defendant pleaded that the cause of action had been adjusted and settled, in part, by an agreement between the plaintiff, defendant, and defendant's son, by which the son agreed to pay a certain portion of the debt at a future day; and that the son had offered to pay the same, but the plaintiff refused to receive it. To this plea the plaintiff demurred; the case does not say whether generally or specially. The plea was held bad: (1) because no consideration for the son's promise was alleged; and (2) because it was not alleged that the son's promise was in writing,—the court holding that unless the son's

agreement was in writing the plaintiff could have no remedy thereon; "and, though upon such an agreement the plaintiff need not set forth the agreement to be in writing, yet, when the defendant pleads such an agreement in bar, he must plead it so it may appear to the court that an action will lie upon it; for he shall not take away the plaintiff's present action and not give him another upon the agreement pleaded." In regard to this case, in a note to Stephens on Pleading, 376, it is said: "It is to be observed that the plea was at all events a bad one, in reference to the first objection. The case is perhaps, therefore, not decisive as to the validity of the record."

In *Peacock v. Purvis*, 2 B. & B. 362, on which the query is raised in the note to Chitty, the defendant pleaded, among other things, a sale of the property on a *feri facias*, by agreement, without alleging that the agreement was in writing, as required by statute. The plaintiff demurred to the plea. There was another question, whether the substance of the plea was a defense. The court does not allude to the fact that the agreement was not alleged to have been in writing, but assumes that the plea was good in that respect, and discusses at length the other question, and holds the plea bad in substance. Generally the same degree of certainty is required in a replication as is required in a plea. While in the text both Mr. Chitty and Mr. Stephens, by a qualified expression, state that it is not necessary in a declaration to allege that such an agreement or promise is in writing, where the writing is only required to evidence the agreement or promise, and not to make the agreement or promise legally binding, yet, in the note on the text, doubt is suggested in regard to the doctrine of the text; and the case in 2 B. & B., *supra*, seems to have disregarded the decision in Lord Raymond, from which the doctrine of the text seems to have been taken. Whatever may be said in regard to a plea, it is not apparent, on principle, why an allegation which would, confessedly, on both principle and authority, be sufficient in a declaration, should not also be sufficient in a replication. In this state of common-law authorities, it can hardly be said to be established that such an allegation is necessary in a plea. All the text-book writers fully recognize the general doctrine as stated by Mr. Stephens, *374: "With respect to acts valid at common law, but regulated as to the mode of performance by statute, it is sufficient to use such certainty of allegation as was sufficient before the statute." This general doctrine is applicable to the replication, so far as it is wanting in allegation that the defendant's agreement to waive the benefit of the Statute of Limitations was in writing; and seems to have been adopted by this court as applicable to a plea in *Carpenter v. McClure*, 37 Vt. 127. If a remark by Redfield, *Ch. J.*, in *Patrick v. Adams*, 29 Vt. 376, looks like a recognition of the contrary doctrine, it is to be observed that it was hardly required for the decision then made, and appears to have been made without examination. There is no valid reason why one rule should be applicable to a declaration and another to a plea or replication. A plaintiff ought not to be allowed to call a defendant into court and compel him to answer matter in a declaration, as

sufficient in law, which he would not be legally bound to reply to if interposed against him by a plea; nor can any good reason be assigned why the defendant should be held to answer matter, as legally sufficient, in a declaration, which would be insufficient in a replication. In either case he may answer that the alleged agreement is not in writing, or may traverse and object to the evidence if not in writing. We think the general doctrine applicable to the replication under consideration; and that, if the defendant would conclude the plaintiff on the pleadings, rather than object to the proof of the agreement by parol on a traverse of the replication, he should have rejoined that the alleged agreement was not in writing.

The judgment is reversed, the demurrer overruled, the replication adjudged sufficient, and the cause remanded.

Clark KING

v.

Timothy DAVIS, Admr., and A. O. Cummings, Admr.

To make a binding contract a party must possess capacity enough to understand and comprehend both the nature and effect of the transaction. Thus, the assignment of an expectancy will be set aside when executed by a woman whose mind was so impaired by age that, while she understood the effect of the assignment, she did not, its nature, and who was not able to distinguish her own debts from those of others, or to discriminate whether in equity they belonged to her to pay; and when undue influence was exercised to procure the assignment.

(Washington—Filed December 19, 1887.)

BILL of interpleader. Heard on the report of special masters, September Term, 1886, Washington County, Powers, Chancellor. *Affirmed.*

It was decreed that the assignment executed by Polly Gould and John Gould, to the said A. O. Cummings, administrator of Henry M. Cummings, of their expectancy in the estate of Lucinda Cutler, mentioned in said report, be set aside and held for naught; and that the defendant Davis, administrator of Polly Gould's estate, is entitled to the fund paid into the court by the orator, with its accumulations, and the same is decreed to him to hold as assets of said Polly's estate, and that the defendant Davis is entitled to recover his costs against the defendant Cummings, to this date.

The masters found:

"David Gould deceased some time in the fall of 1861, leaving a will whereby he bequeathed to his wife, Polly, a life estate in his home farm in East Montpelier, and to his son, John Gould, 2d, the remainder, subject to the payment by John of certain other legacies therein named. From David's decease to the death of John, some time in the spring of 1868, Polly and John occupied the farm together, John never having married; and, after the

death of John, Polly remained upon the farm until late in the fall of the same year, when she was removed to Montpelier into the family of a grandson-in-law, where she remained until her death, June 29, 1884, at the age of ninety-three years, lacking a month.

"Lucinda Cutler, a sister of Polly Gould, deceased April 4, 1874, leaving a will providing that the residue of her estate, after the payment of all other legacies, should remain in the hands of her executor, or, in case of his death, resignation, or inability, in the hands of a trustee to be appointed by the probate court, for a term of ten years after her decease, after the expiration of which term said residue with its accumulations 'to go and descend to her legal heirs to be divided according to law,' which will was duly probated, and Addison Peck appointed executor, who administered for a time and was succeeded by Clark King, duly appointed administrator with the will annexed.

"April 30, 1872, Polly and John mortgaged said farm to Lucinda Cutler, to secure their note of that date for the sum of \$700, signed by Polly and John. August 22, 1873, Polly and John again mortgaged the farm to H. W. Heaton to secure two notes of that date, one for the sum of \$730, one for the sum of \$115, and a note of April 29, 1873, for the sum of \$108.50,—all signed by Polly, and the first and last named by John. The \$115 note was witnessed; both these smaller notes were given for personal property, named in the notes, by said Heaton bid off at sheriff's sale upon executions against John, at the request of Polly and John, at the dates of the notes respectively; and a lien was reserved in the notes on the property in each note named. This mortgage also covered a piece of land in Montpelier known as the 'Somerby Place,' of which Polly then owned an undivided half. August 22, 1873, Polly and John again mortgaged said home farm to Dennison Taft to secure a note of that date for the sum of \$790, signed by Polly and John; which debt it appeared was incurred for improvement of the buildings on the place. September 19, 1874, John executed still another mortgage of the farm to Avery Cummings to secure a note of that date, signed by him, for the sum of \$800.

"The mortgage to Dennison Taft, at some time after its execution, came into the hands of William N. Peck and was by him foreclosed at September Term of Washington County Court of Chancery, 1875, at which term decree was passed with one year's redemption expiring November 10, 1876. Neither Polly and John nor Cummings redeemed, and the decree became absolute as against Polly and John and Avery Cummings. Soon after the decree became absolute, Henry M. Cummings purchased the rights of said Peck, taking from him a quitclaim deed of the farm, dated May 8, 1877; and March 1, 1877, said Henry M. also received a deed from Polly and John of the Somerby Place,—a quitclaim deed. The foreclosure against Polly and John bereft them of all their property, save, perhaps, a small amount of personal property and their interest in the Somerby Place, subsequently conveyed to Henry M. as above set forth. They were poor.

"The incumbrances prior to the Taft mort-

gage still existed; and Henry M. paid to the executor of Lucinda Cutler and to said Heaton their claims, and so secured to himself absolute title to the farm. The amount of incumbrances, including the decree, at the date of the expiration of the decree was \$3,019.48.

"After Henry became the owner of the farm in the manner above narrated, Polly and John continued to occupy the farm just as they had done before, presumably under some arrangement with Henry M.; but what that arrangement was cannot be stated, as there was neither writing nor living witness produced, with definite knowledge, to tell; nor can it be ascertained whether an arrangement of some kind was made before or after Henry M. purchased the Peck decree, or whether he purchased the decree by the procurement of Polly and John or at his own motion. All that was shown about this is learned from defendant, A. O. Cummings, who was a witness in his own behalf, and who had some knowledge in a general way of his brother Henry's affairs; and he supposes the arrangement to have been that Polly and John were to pay Henry M. 6 per cent on the money invested by him in the farm, and were permitted to stay there at the sufferance of Henry M., he being the absolute owner.

"Henry M. Cummings deceased about August 8, 1881, and immediately thereafter A. O. Cummings was duly appointed administrator of his estate. Among Henry M. Cummings's papers, his said administrator found the two smaller notes described in the Heaton mortgage, and a note for the sum of \$1,000, dated December 1, 1876, payable to Henry M. on demand, signed by Polly and John, and witnessed by F. V. Randall. This note was called in the trial 'the Randall note.' The \$115 Heaton note was payable to Heaton or order, and when found by A. O. Cummings did not bear Heaton's indorsement. A. O. Cummings procured Mr. Heaton to indorse this note without recourse after Henry's death and after the making of the assignment hereinafter spoken of. Within two or three days after the death of Henry M., A. O. Cummings, having then been appointed administrator, went up to the farm and had an interview with John about these matters, and also made some general talk with Polly about her remaining on the farm, and about paying for the use of farm. Subsequently A. O. Cummings had two or more interviews with John at Montpelier in relation to the business, and it was suggested that John and his mother make an assignment of their expectancy in the estate of Lucinda Cutler, to secure the said Cummings for the past indebtedness and for their future occupancy of the farm; and so it was arranged between Cummings and John that Cummings should come up to the farm and have writings executed to accomplish that purpose. According to this arrangement with John, on December 13, 1881, a time previously agreed upon between Cummings and John, Cummings with a lawyer repaired to the farm to consummate the business. On that day, at the farm, Polly and John executed to A. O. Cummings, as administrator of the estate of Henry Cummings, in writing, under seal, an assignment of all their interest in the estate of Lucinda Cutler, with power of attorney to receive and receipt for such sum

as should be coming to them, or either of them from the administrator of Lucinda Cutler's estate, to an amount sufficient to pay said Cummings the indebtedness therein named. The indebtedness named in the assignment is the said Randall note, the said two smaller notes named in the Heaton mortgage; a note of \$1,250 that day executed by said Polly and John to A. O. Cummings, administrator, and such further indebtedness as should arise under a lease of the farm that day executed and hereinafter more particularly described. At the same time A. O. Cummings, administrator, executed to Polly a lease of the farm from that time to the 1st day of April, 1884,—about the time the ten years after the death of Lucinda Cutler would expire,—with a provision that it should terminate at all events with the death of Polly, at an annual rental of \$175.

"After Polly's death, A. O. Cummings sold the home farm at forced auction sale for the sum of \$2,550, a sum which he testifies was 'a good deal less than its value,' though he got all he could for it, after making diligent effort to get more at private sale. After Polly's death, Timothy Davis was duly appointed administrator of her estate. Said Davis claimed from Clark King, administrator with the will annexed of Lucinda Cutler, whatever was coming to Polly as heir of Lucinda Cutler; and A. O. Cummings, administrator, claimed the same by virtue of said assignment. Thereupon King brought the bill in this case; and the court ordered the said Davis and Cummings to interplead, and these masters were appointed to hear them. King has paid into court the fund here in controversy, being the sum of \$3,370.90.

"Davis charges mental incapacity on the part of Polly at the time of the execution of the assignment, and, upon this charge of mental incapacity, rests the issue in the case. Upon either side of this issue was introduced a great number of witnesses, who gave their opinion respecting Polly's mental and physical condition during the last ten years of her life, with more or less detail of her circumstances and surroundings.

"From this testimony is found: Up to within fifteen years of her death, Polly was a woman of more than ordinary business capacity and understanding. John was her only living son; and for him she entertained great affection, and in him had great confidence. He was addicted to the excessive use of intoxicating liquor, and was 'easy-going' and shiftless. They lived together upon the farm; John having the outdoor and financial management of affairs, and Polly managing indoors herself doing such work as she was able, which for the four or five years next before John's death was very little. John became in his later years so shiftless that he neglected to cut the hay, and even gathered fence for firewood. His careless and unthrifty management of the farm and their financial affairs—his shiftlessness—brought them to a condition of poverty in 1875, when they were foreclosed as herein before set forth, notwithstanding that, with ordinary industry and management, the farm would have afforded them an abundant living. "Notwithstanding this, Polly's confidence in John was unshaken. After the foreclosure and up to John's death, his utter worthlessness

was apparent to all but his mother. Polly herself loved strong drink, and sometimes partook of it to intoxication. John ministered to his mother's desire in this behalf, and furnished her with her 'warm drink,' as she called it. The masters think that this attention on his part in no wise diminished her affection for or confidence in him. In 1838, during John's last sickness, some of the neighbors called the attention of the overseer of the poor of the town to the fact that Polly was in need, whereupon he, with one of the selectmen, went to the farm to look into the matter, and interviewed Polly respecting her needs and situation. Polly insisted to them that she had everything she wanted except that, since John had been sick, she had no one to bring her her warm drink. The fact is that at that time she was not comfortably provided for. The overseer at that time did nothing for her relief, and, as far as appeared, never did. This was after the execution of the assignment, but her condition of mind then was not substantially different from what it was at the time of the assignment. Polly was induced to execute the assignment by John. Cummings's negotiations were mostly with John, and John influenced his mother."

The masters do not think that John himself, who was present that day, had a very intelligent comprehension of the details of that business, though it is not claimed that he was incapacitated from transacting business affairs. It is not insinuated that Mr. Cummings intended any wrong, but it is stated that the making up of the \$1,250 note was in a great measure "guesswork" on his part. The masters entertain some doubt respecting the justice and equity of all the debts named in the assignment. They do not quite understand why the two smaller notes named in the Heaton mortgage were kept on foot as a subsisting debt. They were named in the mortgage, and, by Henry M. Cummings, paid when he redeemed the farm. It did not appear that either Heaton or Henry M. ever relied upon the security named in the notes, themselves, or pursued that personal property, but it did appear that the property was lost sight of, and nobody knows what became of it, or when it was lost sight of. The masters think the evidence warrants the presumption that John at some time disposed of it.

The circumstances surrounding the parties at and about the date of the Raudall note suggested to the mind of the masters some doubt as to whether Henry M. preserved that note as a subsisting debt against Polly and John. The evidence presents to the minds of the masters the conjecture that that note was given at the time Henry M. purchased the Peck decree, with a view, then entertained, but afterwards abandoned, that new notes should be given for all that Henry M. should pay out to redeem the farm, Polly and John still retaining an equitable interest in the property.

The other facts are sufficiently stated in the opinion of the court.

Mr. S. C. Shurtleff, for Cummings:

The question raised on the report is naturally divided into two parts: (1) How much mental capacity must a person possess to make a valid pledge of such person's property for the payment of debts? (2) How much mental

capacity must a person possess, who at the time is without present means, to make a valid pledge of an expectancy, to enable such person to live without becoming a public charge?

It is found in this case that Polly Gould knew what she signed, and that it bound her expectancy to pay the debts named in the contract; and realized and knew the difference between one sum of money and another. The only infirmity found by the masters is lack of memory.

If Polly Gould understood what she was doing, and the effect of the act, as the masters have found in this case in reference to the assignment, of what consequence is it whether she understood other things reasonably or unreasonably?

Different men come to different conclusions upon the same state of facts, as to what is reasonable or unreasonable; that is, they differ in judgment. This is not a valid excuse for not performing a contract understandingly made.

The issue in this case is the same as in *Allore v. Jewell*, 94 U. S. 506 (24 L. ed. 260), in which the court uses the following language in stating the issue: "The question presented for determination is whether the deceased, at the time she executed the conveyance in question, possessed sufficient intelligence to understand fully the nature and effect of the transaction; and, if so, whether the conveyance was executed under such circumstances as that it ought to be upheld, or as would justify the interference of equity for its cancellation."

The same doctrine is laid down in the case of *Harding v. Handy*, 24 U. S. 11 Wheat. 108 (6 L. ed. 429).

Imbecility or weakness of mind, not amounting to idiocy or lunacy, is not alone sufficient to avoid a deed.

Jackson v. King, 4 Cow. 207; *Smith v. Beatty*, 2 Ired. Eq. 456.

Unless there is inadequacy of consideration, or some other evidence of fraud, imposition, or over-reaching, any degree of imbecility or insanity short of total business incapacity, will not suffice to avoid a contract.

Henderson v. McGregor, 30 Wis. 78; *Dornell v. Rowland*, 30 Ind. 342; *Henry v. Ritenour*, 31 Ind. 136; *Hall v. Perkins*, 3 Wend. 626; *Odell v. Buck*, 21 Wend. 142; *Petrie v. Shoemaker*, 24 Wend. 85; *Person v. Warren*, 14 Barb. 488; *Hirsch v. Trainer*, 3 Abb. N. C. 274; *Clearwater v. Kimler*, 48 Ill. 272; *Sheldon v. Harding*, Id. 74; *Farnam v. Brooks*, 9 Pick. 212; *Beller v. Jones*, 22 Ark. 92; *Mann v. Beterly*, 21 Vt. 326.

The report finds that A. O. Cummings acted in good faith in this matter, so that there was no over-reaching or anything to put a prudent man on inquiry.

Absolute soundness of mind is not necessary to enable one to make a valid conveyance. It is sufficient if the mind comprehend fully the import of the particular act.

Rippy v. Gant, 4 Ired. Eq. 448; *Miller v. Craig*, 36 Ill. 109; *Dennett v. Dennett*, 44 N. H. 531; *Hovey v. Hobson*, 55 Me. 256; *Sprers v. Sewell*, 4 Bush, 289; *Creagh v. Blood*, 2 Jones & La. T. 509; *S. C. 8 Ir. Eq. 434*.

Messrs. Senter & Kemp and Pitkin & Huse, for Davis:

As to the measure of her capacity, the rule is that she must have had enough to enable her to understand and comprehend in a reasonable manner the nature and effect of the business which she was doing, as stated in *Stewart v. Flint*, 1 Vt. (L. ed.) 274, 4 New Eng. Rep. 120, 59 Vt. 144; or, as stated in *Hill v. Day*, 84 N. J. Eq. 150, approving *Loxear v. Shields*, 38 N. J. Eq. 509, "Where there is no reason to suspect fraud, the test, where mental incapacity is charged, is: Did the person whose act is challenged possess sufficient mind to understand in a reasonable manner the nature and effect of the act he was doing, or the business he was transacting?"—or, as Lord Hale would have put it, "Did she know what she was about?"

I. The whole case shows Polly's condition at the time of the assignment to have been one of great and real mental weakness, and, "in a case of real mental weakness, a presumption arises against the validity of the transaction; and the burden of proof rests upon the party claiming the benefit of the conveyance or contract, to show its perfect fairness and the capacity of the other party."

2 Pom. Eq. Jurisp. § 947; *Baker v. Monk*, 83 Beav. 419; *Wartemberg v. Spiegel*, 81 Mich. 400; Bigelow, Fr. 282; Kerr, Fr. 169, 190; Bailey, Onus Probandi, 858.

II. But if the statement quoted from Mr. Pomeroy is, without some element added thereto, too broad in any respect, the facts of this case supply the necessary additional element. It may be said, and certainly nothing more can be said, that, in addition to real mental weakness,—which is all that Mr. Pomeroy names,—there must be substantial inadequacy of consideration, or undue influence, or certain fiduciary relations between the parties. With any one of these three elements added, Mr. Pomeroy's statement cannot be considered too broad.

Among the relations named above as fiduciary, which include all those where there is influence on one side and confidence on the other, are those of parent and child, guardian and ward, attorney and client; as well as others of a class yet open, regarding which it was said by Lord Chelmsford in *Tate v. Williamson*, L. R. 2 Ch. App. Cas. 55, quoted in 2 Pom. Eq. Jurisp. § 956: "The jurisdiction exercised by courts of equity over the dealings of persons standing in certain fiduciary relations has always been regarded as one of the most salutary description. The principles applicable to the more familiar relations of this character have been long settled by many well-known decisions, but the courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise."

Mr. Pomeroy says, in the above section: "We are now to view fiduciary relations under an entirely different aspect; there is no intentional concealment, no misrepresentation, no actual fraud. The doctrine to be examined arises from the very conception and existence of a fiduciary relation. While equity does not deny the possibility of valid transactions between the two parties, yet, because every fiduciary relation implies a condition of superiority held by one of the parties over the other, in every transaction between them by which the

superior party obtains a possible benefit, equity raises a presumption against its validity, and casts upon that party the burden of proving affirmatively its compliance with equitable requisites, and of thereby overcoming the presumption." It should be noted that the application of this principle is made purely upon the fact of the fiduciary relation, and, indeed Mr. Pomeroy says that where this relation exists the existence of "mental weakness, old age, ignorance, pecuniary embarrassment, and the like" is "incidental, not necessary;" but we suggest that, where they exist to the extent shown in this case, they form a very important "incident."

III. The report finds "Polly was induced to execute the assignment by John. Cummings' negotiations were mostly with John, and John influenced his mother." We claim that this with what is elsewhere found in the report may be taken to be a finding of undue influence by John, with the effect of which Cummings was chargeable.

The following cases show that even imputed undue influence would put this burden on Cummings; much more is it put on him by the direct findings:

8 Lead. Cas. Eq. 123; 27 Moak, Eng. Rep. 417, note; 32 Moak, Eng. Rep. 821, note; *Huguenin v. Baseley*, 14 Ves. Jr. 278; *Maitland v. Irving*, 15 Sim. 487; *Maitland v. Backhouse*, 11 Sim. 58; *Eapey v. Lake*, 10 Hare, 261; *Archer v. Hudson*, 7 Beav. 551; *Cooke v. Lamotte*, 15 Beav. 284; *Hoghton v. Houghton*, Id. 278; *Blackie v. Clark*, Id. 595; *Cobbett v. Brock*, 20 Beav. 524; *Berdoo v. Dawson*, 34 Beav. 603; *Baker v. Bradley*, 7 De G. M. & G. 597; *Lyon v. Howe*, L. R. 6 Eq. 655; *Kempton v. Ashbee*, L. R. 10 Ch. App. Cas. 15; *Bainbridge v. Browne*, L. R. 18 Ch. D. 188; *Ross v. Ross*, 6 Hun, 80; *Leighen v. Orr*, 44 Iowa, 679; *Noble v. Moses*, 1 So. Rep. 217.

IV. But the burden is without question on Cummings, for the assignment was of an expectancy. One claiming under conveyance of an expectancy must show affirmatively its perfect fairness, and that a full and adequate consideration was paid. This Cummings has not done.

2 Pom. Eq. Jurisp. 953; 1 Story, Eq. Jurisp. 336; Bigelow, Fr. 274; *Bromley v. Smith*, 28 Beav. 664; Chitty, Eq. Index V. 3, 2794; Hill, Tr. 238; Adams, Eq. 5th Am. ed. 372; Bailey, Onus Probandi, 352.

ROSS, J., delivered the opinion of the court:

The contention is between the interpleading defendants,—Davis as the representative of Polly Gould's estate, and Cummings as the representative of Henry M. Cummings's estate,—and is, whether Polly Gould, December 13, 1851, possessed sufficient mental capacity to make binding the transaction then entered into by her with the defendant A. O. Cummings. She was then nearly ninety years old, and her mental faculties much enfeebled and obscured. The measure of capacity required to make a binding contract was recently before this court sitting in full bench at the last General Term, in *Stewart v. Flint*, 1 Vt. (L. ed.) 274, 4 New Eng. Rep. 120, 59 Vt. 144. It is there held that the party must possess capacity enough to enable her to understand and comprehend the

ature and effect of the business she was doing. The masters have found that, on the day of executing the assignment of her expectancy in her sister's estate, "Polly's memory of recent events was seriously impaired, though better touching occurrences of her earlier years, as is said to be often the case with old people." She was laboring under the impression that he was going to get the whole of the Lucinda Butler estate, amounting to about \$17,000, when the ten years expired; and, although Mr. Cummings in the interview when said assignment was executed, told her that she would not; that the children of the brothers and sisters would share in it,—she still persisted in the belief that she would get the whole of it, and Mr. Cummings could not make her see otherwise. The inducement held out to her for executing the assignment was that she could remain on the farm; and her desire to do so, with John as her companion, was the consideration in her mind that obscured all others. She understood that the signing of those papers obligated her to the payment of the indebtedness named therein, and pledged her interest in her sister's estate for such payment. She could distinguish in her mind the difference between one sum of money and another; but she had not sufficient memory and mental vigor to understand in a reasonable manner whether she owed the debts named in the assignment, or whether in justice and equity she ought to pay them."

The statement of her capacity in this quotation from the report is not in substance changed or varied by the other statements in the masters' report. While she understood the effect of the transaction in which she was engaged, did she understand and comprehend its nature? We think she did not. She did not comprehend, and, in her then condition, could not, whether she owed the debts she was binding herself to pay, or whether they were of such a nature that, in justice and equity, she ought to bind herself to pay them. In other words, she had not sufficient mental capacity to distinguish her own debts from the debts of others, or to discriminate whether they were of such a character that they equitably and justly belonged to her to pay, or had a moral claim on her for payment. She was without determining capacity in herself, and the judgment which she once possessed was gone. She did not, and could not, be made to understand her rights in her sister's estate; and her desire to be with her son John, as her companion, was a consideration in her mind that obscured all others; and that was the inducement held out to her for executing the assignment. This last indicates that undue influence was taken of her desire to be with John, as her companion, and partake of "the warm drink" which he furnished. Whether this undue influence was exerted by Mr. Cummings or John is left in doubt by the report of the masters. But, by whichever exerted, it controlled her,—rather than a reasonable comprehension of the nature of the transaction, of the property she possessed, even in prospect, and of its application or assignment for the payment of her own debts, or of the debts of others, which had some just and equitable claim upon her for payment,—in executing the assignment. The assignment must therefore be set aside. Whether the estate of

Henry M. Cummings has a valid claim against her estate, for the use of the farm from December, 1881, to April, 1884, notwithstanding her incapacity to enter into a valid contract, is not presented for consideration, and no opinion is expressed in regard thereto.

The decree of the Court of Chancery is affirmed, and the cause remanded.

Henry H. NYE

v.

BURLINGTON & LAMOILLE R. R. CO.

The defendant was sued as "the Burlington & Lamoille Railroad Company, a company organized under the laws of this State," etc. The service of the writ was like that required by the statute, on a corporation, by leaving a copy with its clerk. A motion was filed to dismiss on the ground that the service was illegal; but it did not specify any error, or the method of correcting it.

Held:

(a) That, as there is a general law under which railroad corporations can be organized, it is presumed that the defendant is a corporation organized under this law.

(b) That the motion—if the objection is available on motion—is faulty in not pointing out both the defect and its correction.

(Lamoille—Filed December 21, 1887.)

MOTION to dismiss a writ on the ground that the service was illegal; heard, December Term, 1886, Lamoille County, Veazey, J., presiding; motion overruled. *Affirmed.*

The substance of the motion was that the writ had not been legally served. It appeared from the officer's return that he attached one car, and that he lodged a copy of the writ in the town clerk's office, where the car was attached, and that he also left a copy with the clerk of the defendant company.

Mr. E. R. Hard, for defendant:

The defendant in the mandatory part of the writ is described as "the Burlington & Lamoille Railroad Company, a company," etc.; and there is nothing anywhere in the record which varies this description, or indicates what sort of a "company" the defendant is.

The question presented by this motion to abate must be determined by what appears upon the face of the process, unaffected by any extraneous fact or inference; and the motion should prevail unless it appears by the record that the requirements of the statutes respecting the service of attachment process have been strictly complied with.

It does not appear from the record in this case that the defendant is a corporation, an "association or joint-stock company consisting of five or more members," or a "partnership composed of five or more persons,"—in which cases, only, service can properly be made by copy to a clerk, etc., as provided by Rev. Laws, § 873, and by the Act of 1882.

Acts 1882, No. 71.

The suit must therefore be treated as one against a plurality of natural persons, insufficiently described; and the writ could be served only in the manner prescribed by Rev. Laws, §§ 871, 881, if, indeed, any service of so faulty a process could be effectual. The service, therefore, by copy to the clerk is insufficient.

Mr. B. A. Hunt, for plaintiff:

The writ was legally and sufficiently served. Rev. Laws, § 873; Acts 1884, No. 99.

It was personal property that was attached and should have been attached as such.

81 Barb. 590; 47 Barb. 104; 52 N. Y. 521; 57 N. Y. 814.

Ross, J., delivered the opinion of the court:

Conceding, without deciding, that the objection is available on motion, instead of plea, we do not think it is well taken. The defendant, as alleged in the writ, is the "Burlington & Lamoille Railroad Company, a company organized under the laws of this State." The name of the defendant, "Burlington & Lamoille Railroad Company," as well as the qualifying clause, "a company organized under the laws of this State," is consistent with the defendant being a corporation, upon which service of process can be legally completed only by delivering a copy to its clerk.

Pleas in abatement are not favored, and no presumptions are made to uphold them. We

have, and for several years have had, a general law under which railroad corporations could be legally organized. It is to be presumed, if any presumption is to prevail, that the defendant is a corporation organized under this law.

It is alleged to be a railroad company. The duties of such a company are more or less of a public nature, and of such a character that it is difficult to conceive of their exercise by a partnership. Nor have we any statute authorizing the organizing of copartnerships for the exercise of the functions required for the full construction, operation, and transaction of the business of a railroad company. This company is alleged to have been organized under the laws of this State, clearly referring to the general law enacted for the organization of railroad companies as corporations. The rule, applicable alike to motions and pleas in abatement, is that they must give the plaintiff a better writ, in that they not only point out his error, but also the method of correcting it. 1 Chitty, Pl. 446. The motion is faulty in both of these requisites. It neither alleges nor denies the corporate existence of the defendant, or in what respect the supposed service of the writ upon it is defective, or in what manner it can be corrected.

The pro forma judgment of the County Court is affirmed, and cause remanded to be further proceeded with.

MASSACHUSETTS.
SUPREME JUDICIAL COURT.

Josiah O. HINCKLEY

v.

Town of SOMERSET.

1. Damages for an injury received through want of a sufficient railing in or upon a highway may be recovered from the town obliged by law to repair the way, if the injury might have been prevented by reasonable care and diligence on the part of the town, and it had reasonable notice of the defect, or might have notice thereof by the exercise of proper care and diligence.
2. In such action it makes no difference whether the accident was occasioned by plaintiff's horse being frightened by an object either inside or outside of the limits of the highway.
3. It was the duty of the town to keep the way reasonably safe and convenient for travelers, and to put up a sufficient railing or barrier, if a railing or barrier was required to make the way reasonably safe.
4. If the injury was received by reason of the insufficient height of the railing or barrier, the plaintiff could recover if he was in the exercise of due care, and his horse was reasonably safe to drive, and he did not lose control of it, or lost control for a moment only, and either regained the control or would have regained it before the horse would have run against the barrier if it had been of sufficient height.
5. If the injury would not have been received if the wall had been of sufficient height, and this want of height rendered the way unsafe, then the insufficient wall was the immediate cause of the injury.
6. Notice to a town of a defect in a highway is notice of that condition of things which constitutes a defect; although the authorities of the town may think that it does not constitute a defect.
7. Where a wall was built in 1854 and was rebuilt and raised in 1885 by the town, and the plaintiff was injured in May, 1886, and the wall was insufficient, it must be held, as matter of law, that the town either had notice of the defect, or might have had notice by the exercise of proper care and diligence.
8. There is no occasion to prove actual notice to a city or town of its own acts, or acts which are constructively its own.
9. Mere proof of notice to one or more of the inhabitants does not establish requisite notice; but knowledge may be inferred from the length of time during which the defect has existed, and from other circumstances.
10. Conversations about an accident or injury in a way between persons none

2 Mass.

of whom is an officer of the town is not competent evidence to show notice to the town, although the conversations may have been had between many different persons.

11. Exceptions will not generally be sustained because incompetent evidence has been received to prove a fact which the conceded facts necessarily establish.

(Bristol—Filed November 23, 1887.)

ON defendant's exceptions. *Overruled.*

This was an action of tort for negligence.

The plaintiff introduced evidence that on May 29, 1886, between 5 and 6 o'clock P. M., he was traveling on the highway, from Somerset to Dighton, on the Somerset side, and along the causeway leading to the bridge; that his horse was gentle, his rate of speed being then six miles an hour; that he held a taut rein on his horse; that his horse was frightened by the oyster boats on the west side of the bridge, and suddenly shied out and over on to the east side of the way, and ran into and upon the wall or barrier on the east side; that his horse got up on to and astride of the wall with his hind legs, while his forefeet rested inside on the road; that the right forward wheel of his open buggy went on to the wall and over to the east side, and the axle rested on the wall, and left wheel was in the road on the inside, and his right hind wheel also went up on to the top of the wall; that he was thrown out, but still held the reins, and that his horse and wagon came back into the road; that it was all done and over in an instant. He also testified as to injury received. The accident occurred from 15 to 20 feet from the bridge. The plaintiff had traveled over the road more or less since April 1, 1885, to and from Somerset and Dighton, and knew of the oyster boats and walls of the bridge.

The defendant introduced evidence tending to show that the horse only reared up and placed his forefeet on the top of the wall. This was all the evidence in the case as to place, time, and cause of the accident, and as to the lay-out, construction, and repair of the bridge, road, causeway, and wall, railing, or barrier. The plaintiff claimed the wall was defective because too low, and that the accident was due to that defect.

For the purpose of proving that the town had notice of the defect, the plaintiff called one Dr. Shurtleff, and offered to show by him that he had met with an accident similar to that which befell the plaintiff, and at or near the same place. Subsequently he was recalled by the plaintiff, and upon the plaintiff's counsel stating that he expected to show that Dr. Shurtleff had spoken generally of the accident in the village of Somerset, where he lived, and where two of the three selectmen lived, and should claim it was competent for the jury to find, if such should appear to be the fact, that the selectmen either knew, or by the exercise of reasonable care might have heard, of the accident, the court ruled that it was competent for the plaintiff to put in evidence of the accident as bearing on the question of notice to the authorities of the town, but not to be considered by the jury as tending to show that there was

any defect, or that there had been any accident. The defendant duly excepted to this ruling. The plaintiff thereupon put the following question: "Without asking you what the accident was, how generally did you speak of it around the village?" and he answered, "Very little indeed,"—to which question and answer the defendant excepted. And the witness further stated that he had spoken of it "but very few times," and to but two or three persons, and the plaintiff put no further questions and pursued the matter no further.

At the close of the case the defendant asked the court to rule that, on the evidence, the defendant was not liable, and to direct a verdict for the defendant. The court refused so to rule. The defendant then asked, among other things, for the following instructions to the jury:

"2. If the plaintiff's horse was frightened by an object outside of the limits of the highway, and, while so frightened, and because of said fright, ran into and upon the railing or wall, and the injuries were received of which the plaintiff complains, the plaintiff cannot recover. Such injuries would not be caused solely by a defect in the highway, or want of sufficient railing or barrier."

"3. If the plaintiff's horse, wagon, or himself, would not have come in contact with the railing or wall, nor the accident have occurred, if the team had passed on in the course in which the plaintiff was driving, if the plaintiff's horse had not been frightened, the plaintiff cannot recover."

"5. If the highway and barriers where the plaintiff was injured were in good repair and in substantially the same condition as constructed and left by the county commissioners when they located the highway and built the barriers or walls, the plaintiff cannot recover."

"7. The defendant was not obliged to maintain a wall or barrier that under any and all circumstances—such as the rearing up of a horse—would prevent injury to those traveling on the highway. If the wall or barrier in question here was suitable for the ordinary purposes of travel upon such a road in a country town, it was sufficient. If the plaintiff's horse reared up and placed his forefeet on the top of the wall, but did not go over, and the injuries complained of were thus received, the plaintiff cannot recover."

The court gave the first, fourth, and sixth requests, and, on the other questions raised, instructed the jury as follows:

"For the purposes of this case I instruct you that it makes no difference whether the cause of the accident was occasioned by the plaintiff's horse being frightened by an object either inside or outside of the limits of the highway."

Messrs. Braley & Swift, for defendant:

The plaintiff's two causes—to wit, insufficiency of the barrier, and the want of a suitable railing or barrier—are in effect one, and claim to hold the town liable for want of a sufficient railing. The earlier statutes speak only of "want of rails on any bridge."

Stat. 1786, chap. 31, §§ 1, 8; Rev. Stat. chap. 25, § 1.

But Gen. Stat. chap. 44, § 23, and Acts 1877, chap. 384, § 2 (Pub. Stat. chap. 52, § 18) provide for recovery for want of a sufficient railing in or upon "a highway, townway, causeway, or

bridge." The object and purpose of this legislation as to railings is to prevent travelers, properly using a highway, causeway, or bridge, from going into, or falling into, a dangerous place not within the limits of the traveled way, but so near thereto that, through some of the mischances of travel, they may be injured.

Commonwealth v. Wilmington, 105 Mass. 599, 601; *Murphy v. Gloucester*, 105 Mass. 470, and authorities cited.

Any barrier, railing, or fence of suitable material, and properly constructed, that is sufficient for that purpose, is all that the law requires. The railing is to warn and detain the traveler from the dangerous object or place outside.

Stickney v. Salem, 3 Allen, 374, 377; *Alger v. Lowell*, Id. 402, 406; *Adams v. Natick*, 13 Allen, 429, 431, 432.

The plaintiff's case shows that the barrier here fully accomplished this purpose.

See Bigelow, *Ch. J.*, in *Stickney v. Salem*, *supra*.

Tried by this test, the plaintiff on his own evidence had no case. The ruling that, on the evidence, the plaintiff could not maintain his action, should have been given.

Marble v. Worcester, 4 Gray, 395, 402.

The only exception to the rule that a plaintiff cannot recover unless the defect in the highway was the sole cause of the injury, must be one where the contributing cause was a pure accident, and one which common prudence and sagacity could not have foreseen and guarded against.

Palmer v. Andover, 2 Cush. 600.

The contributing cause here was the boats anchored or moored outside of the highway.—acts of third parties.

Roswell v. Lowell, 7 Gray, 100, 105; *Barber v. Roxbury*, 11 Allen, 318, 321.

The fifth request called for proper instructions on the facts, that the jury might consider the acts of the commissioners "as persons skilled in the subject and competent to judge, but not conclusive."

Bliss v. Deerfield, 18 Pick. 102, 110; *Peterson v. Farnum*, 121 Mass. 416.

The instructions given were misleading, and tended to prejudice the defendant's side of the case. If any such instruction was called for by the case, it should have been properly qualified and limited, as in—

Adams v. Natick, and *Palmer v. Andover*, *supra*.

The instructions given held the defendant to a liability not imposed by law.

Stickney v. Salem, and *Adams v. Natick*, *supra*; *Howard v. North Bridgewater*, 16 Pick. 180.

The testimony of Dr. Shurtleff was not admissible for any purpose. It raised a collateral issue, and one the defendant could not anticipate.

Collins v. Dorchester, 6 Cush. 398; *Harriman v. Boston*, 114 Mass. 241, 245; *Blair v. Pelham*, 118 Mass. 420, 422.

The fact that the plaintiff pursued his inquiries no further does not render the testimony any the less objectionable, the evidence being in against the defendant's objection.

Maguire v. Middlesex R. R. Co. 115 Mass. 230, 241.

The testimony of Dr. Shurtleff hurt and

injured the defendant at the trial before the jury, and its admission was error.

Messa. Morton & Jennings, for plaintiff:

The instructions of the court regarding the purposes of a barrier were full and accurate, and the jury must have found "that the wall, as it was there, was not a suitable railing or barrier, taking into account the whole location of the place and the kind and amount of travel, and all those things;" and that the want in height in the railing was the sole cause of injury.

Adams v. Natick, 18 Allen, 432; *Stevens v. Barford*, 10 Allen, 25.

The court rightly refused to direct a verdict for the defendant.

There was no evidence of want of care on the part of the plaintiff; or, if there was, it was a question for the jury.

The defendant is not believed, because the accident was not more severe.

The second and third instructions asked for by the defendant were rightly refused because they assumed that the fright of the horse was sufficient to prevent a recovery.

Wright v. Templeton, 182 Mass. 49; *Babson v. Rockport*, 101 Mass. 98; *Stone v. Hubbardston*, 100 Mass. 55; *Lyman v. Amherst*, 107 Mass. 539; *Britton v. Cummington*, 107 Mass. 849. See *Quaking v. Bedford*, 125 Mass. 526; *Wright v. Templeton*, *supra*.

For the purpose of showing that the town authorities had notice, or by the use of reasonable diligence might have had notice, of the defect, it was competent for the plaintiff to introduce evidence that there had been a similar accident. Its weight was for the jury, but the testimony was admissible.

Reed v. Northfield, 18 Pick. 98; *Donaldson v. Boston*, 16 Gray, 511.

Both offer and ruling became immaterial, and defendant was not prejudiced thereby

Bates v. Barber, 4 Cush. 107.

Field, J., delivered the opinion of the court:

This is an action to recover damages for an injury received through want of a "sufficient railing in or upon a highway," "which might have been remedied, or which damage or injury might have been prevented by reasonable care and diligence on the part of the town." The damages are recoverable from the town "by law obliged to repair" the way if it "had reasonable notice of the defect, or might have had notice thereof by the exercise of proper care and diligence" on its part. Pub. Stat. chap. 52, § 18.

It was contended that the railing was insufficient because it was not of proper height. The second and third requests for instructions ought not to have been granted if the railing was insufficient, and the plaintiff did not lose control of the horse, and if the injury would not have been received if the railing had been sufficient. The instructions given, relating to the fact that the horse became frightened, and the effect of this upon the plaintiff's right of action, were correct. *Stone v. Hubbardston*, 100 Mass. 55; *Babson v. Rockport*, 101 Mass. 98; *Britton v. Cummington*, 107 Mass. 849; *Wright v. Templeton*, 182 Mass. 49.

The fifth request ought not to have been granted. It was the duty of the town to keep

the way "reasonably safe and convenient for travelers" (Pub. Stat. chap. 52, § 1), and to put up a sufficient railing or barrier, if the barrier constructed by the commissioners was not sufficient; and if a railing or barrier was required to make the way reasonably safe.

The seventh request ought not to have been granted, because, if the wall was insufficient, and the way not reasonably safe, it was not necessary that the horse "should go over the wall," in order to enable the plaintiff to recover. If the injury was received because the wall was not high enough, and the want of height made it insufficient as a railing or barrier, the plaintiff could recover if the horse was a reasonably safe horse to drive, and if the plaintiff was in the exercise of due care, and did not lose control of the horse; or lost control for a moment only, and either regained the control, or would have regained it before the horse would have run against the wall if it had been of sufficient height.

If the injury would not have been received if the wall had been of sufficient height, and this want of height rendered the way unsafe, then the insufficient wall was the immediate cause of the injury. We do not know that the plaintiff's horse would have run against the wall if it had been of sufficient height, and this defect in the height of the wall may have been the sole cause of the injury. We think that there was evidence for the jury of all the facts necessary to be proved, and that the court rightly refused to direct a verdict for the defendant.

It appears that certain evidence was introduced "solely on the question of notice;" which means notice to the town, of the height of the wall, and of the condition of the way. If the wall was insufficient, and the way unsafe, it is immaterial what the authorities of the town thought about it, if they knew the facts. Notice of a defect is notice of that condition of things which constitutes a defect, although the authorities of the town may think that it does not constitute a defect. This wall was a permanent structure, built in 1854, and was rebuilt and raised about six inches in height in 1885, by a highway surveyor of the defendant town. The plaintiff was injured on May 29, 1886. If the wall was insufficient as a railing or barrier, we have no doubt that on the undisputed facts it must be held as matter of law, that the town "either had reasonable notice of the defect, or might have had notice thereof by the exercise of proper care and diligence" on its part. The wall was a structure which was visible and conspicuous and had existed for so long a time that the town ought to have known its condition and height, and ought to have known that it was insufficient, if in fact it was insufficient. Besides, the fact that the wall had been rebuilt in 1885 by the highway surveyor of the town, and remained in the same condition as when rebuilt by him, was equivalent to a notice to the town of its condition and height. "There is no occasion to prove actual notice to a city or town of its own acts, or acts which are constructively its own." *Montes v. Lynn*, 119 Mass. 278, 275; *Brooks v. Somerville*, 106 Mass. 271.

In *Donaldson v. Boston*, 16 Gray, 508, 511, it was said "that mere proof of notice to one or more of the inhabitants does not estab-

lish the requisite notice, because it is not their duty to repair the defect or remove the obstruction. The facts must be such as to lead to the inference that the proper officers of the town, whose duty it is to attend to municipal affairs, did actually know of the existence of the defect, or with proper diligence and care might have known it. Such knowledge may be inferred from the length of time during which the defect has existed, from the central position and publicity of the place where it exists, and any other circumstances which tend to show its notoriety." This is the rule of law under existing statutes. *Hanacom v. Boston*, 141 Mass. 242.

The evidence of Dr. Shurtleff was admitted, not "as tending to show that there was any defect or that there had been any accident," but "as bearing on the question of notice to the authorities of the town;" and it appears that there was other testimony of the same kind. The presiding justice carefully limited the relevancy of this evidence to "the question of notice." We think that conversations about an accident or a defect in a way, between persons, none of whom is an officer of the town, is not competent evidence to show notice to the town, although the conversations may have been had between many different persons. It cannot be inferred that the conversations were heard by other persons than those shown to have heard them. Whether a public notice of a defect in a highway by advertisement in a newspaper, or in some other public manner, would be evidence to the town, need not be decided. The evidence therefore was inadmissible for the purpose for which it was received, and it is clear that it was not admissible for any other purpose. But it was evidence admitted to prove a fact which it was unnecessary to prove if the other facts we have referred to have been proved or admitted, and the exceptions so recite. Exceptions will not generally be sustained because incompetent evidence has been received to prove a fact which the conceded facts necessarily establish. The real complaint is that the evidence tended to prejudice the defendant with the jury, because, however careful the instructions of the court may have been, the jury would be likely to consider the evidence of a previous accident as evidence that the defendant was in fault, and ought to have repaired the way. There is some force in this, and it would undoubtedly be within the power of the court to sustain these exceptions, on this ground, if satisfied that injustice had been done; but we are not satisfied that injustice has been done.

Exceptions overruled.

COMMONWEALTH of Massachusetts

v.

James CLARK *et al.*

1. A complaint containing the general allegation that defendants, at the times and place therein stated, kept a house of ill fame, resorted to for prostitution, and used for the illegal sale of intoxicating liquors, etc., is sufficient, under Pub. Stat. chap. 101, § 6.

2. The objection that the time of the continuance of the offense, as alleged in the complaint, was too long, being over six months, is not good. Defendant could have moved for a specification of particulars.
3. Testimony of the reputation for chastity, of the women found in the house, was competent.
4. Where a defendant testified that he had never had any interest in the sale of liquor on the premises, it was competent for the court to allow a general cross-examination of him, as to his relations to the house prior to the time charged in the complaint. Entries by him of his purchase of liquor, etc., for the house, for the same time, were competent.
5. During the closing argument of counsel it is too late to ask the court to instruct the jury that testimony which was admitted without objection was incompetent for any purpose.
6. If a question of law arises for the first time during the closing argument for the prosecution, the defendant, it seems, would have the right to ask a ruling upon it.

(Essex—Filed November 22, 1887.)

ON defendants' exceptions. *Overruled.*

This was a complaint, appealed from the police court, for maintaining a nuisance by the illegal sale and keeping of intoxicating liquor, and also by keeping a house of ill fame, resorted to for prostitution, lewdness, and illegal gaming. The complaint is as follows:

"To the justices of the police court of the city of Gloucester within and for the county of Essex.

"George Douglass, of Gloucester, in said county, in behalf of the Commonwealth of Massachusetts, on oath complains that James Clark and William E. Wetmore, of Gloucester, in said county, on the 1st day of January in the year of our Lord 1886, at Gloucester, in said county, and on divers other days and times, between that day and the 26th day of July in the year of our Lord 1886, at said Gloucester, did keep and maintain a certain tenement, there situate, then and there used by said James Clark and William E. Wetmore as a house of ill fame, resorted to for prostitution, lewdness, and for illegal gaming, and then and there used by the said Clark and Wetmore for the illegal sale and for the illegal keeping of intoxicating liquor; said tenement, so used as aforesaid, being then and there a common nuisance, to the great injury and common nuisance of all the peaceable citizens of said Commonwealth, there residing, passing, and being, against the peace of said Commonwealth, and contrary to the form of the statutes in such case made and provided.

"He therefore prays that said defendants may be apprehended, and brought before said police court, and held to answer to this complaint, and further dealt with, relative to the same, according to law."

Officer Sullivan, for the government, testified to the location of the premises by street and number.

Defendants objected to proof of acts done at, and management of, the premises between the 1st and 26th days of July, 1886, on the ground that testimony covering a period of more than six months after January 1 was improper.

The court overruled the objection, received the testimony, and defendants excepted. Witness further testified to what females were found on the premises on the 13th of July in the sleeping-rooms; and, on being questioned as to their reputation for chastity in Gloucester, defendant objected; the court overruled the objection, and defendant excepted. The witness testified that their reputation in respect to chastity was bad; to which answer defendant objected, and excepted to the ruling of the court.

Sullivan also testified to seeing defendant Clark, on one occasion, late at night, come from the depot on the arrival of a Boston train, with a woman, and go with her to the premises in question. Clark, upon his own examination, admitted he brought the woman from Boston as a housekeeper for the premises charged, but said he did so at the request of defendant Wetmore.

Defendant Clark claimed the premises were no nuisance, by whomever kept; that he had nothing to do with the keeping and maintaining of the place during the period covered by the complaint, and testified his wife owned them, and as agent for her he leased them to the defendant Wetmore, who managed and conducted the place during that time; that he had no interest in the sale of any liquor on the premises at any time. The prosecution cross-examined defendant Clark, and asked if he had run the place or had anything to do with the premises prior to January 1, 1886. Defendant objected to the question, the court admitted it, and defendant excepted. Witness answered he had not. This evidence was supplemented by the testimony of defendant Wetmore, who testified he alone was the keeper and maintainer of the premises in question during the time specified in the complaint.

The prosecution presented books of account purporting to be entries for expenditures for the premises in question prior to January 1, 1886, as far back as September, 1885, during which time the prosecution claimed the place was kept alone or in part by one Coombs, and that defendant Clark was interested with Coombs. When Clark was asked whose writing these books contained, defendant objected to the question, but it was admitted, and defendant excepted. Defendant admitted the entries were his, and were largely for purchases of liquor, and cash received. Various questions were asked this defendant on cross-examination about the entries in the books and his connection with Coombs during the time between September, 1885, and January 1, 1886, all of which were objected to, and admitted by the court, and excepted to by defendant. Subsequently these books were offered in evidence by the prosecution, to which the defendant Clark objected; they were admitted, and defendant excepted.

In summing up, the prosecution commented on the management and proprietorship of the premises prior to January 1, 1886, and from the entries in these books claimed defendant Clark was jointly interested with Coombs, when

Clark's attorney, without interrupting, passed to the court, in writing, the requests to instruct the jury: "Neither of the books claimed to be put in the case by the government is competent for any purpose." The court refused to so charge upon the ground that, not having been submitted until nearly the close of the government's argument, it is not allowed. The court gave no instruction on the permit to the jury, nor was exception taken on the refusal to give these later instructions.

While the prosecution was arguing the case to the jury, and commenting on the event of the woman coming from Boston, and as being unchaste, etc., defendants' attorney again, without interrupting, handed to the court, in writing, a request to charge: "The testimony in regard to the woman is incompetent for any purpose, and the argument for the government in regard to it should be disregarded by the jury." The court declined to give the request, for the reasons stated in the last preceding objection, and gave no instruction whatever.

The jury convicted the defendants.

Messrs. Searle, French, & Woods, for defendants:

I. The defendants' motion to quash the complaint should have been sustained. It is wholly uncertain whether the complaint is under Pub. Stat. chap. 101, § 6, or under Pub. Stat. chap. 207, § 18; and, when such is the case, a complaint is fatally wanting in certainty. The penalties are entirely different in the two statutes. The complaint uses the words "so used," but entirely omits the statutory words of chap. 101, § 6,—"*resorted to*." There is also fatal ambiguity as to what statute the defendants are charged with violating.

II. The complaint improperly extended the *continuando* beyond the 1st of July, 1886. The testimony of officer Sullivan was incompetent and inadmissible. Six months is the established and reasonable limit of a *continuando*, and any expansion of that limit is unreasonable and improper.

III. His testimony as to the two women extended in time beyond the proper limitation of six months, and, besides, their reputation in Gloucester for chastity was incompetent.

(a.) The question was not as to their general reputation, nor their character, but the reputation, which might have meant merely the opinion of the witness as to their chastity.

(b.) No preliminary question was asked as to whether the witness knew their reputation.

IV. The questions put to Clark, in cross-examination, in regard to a period anterior to the 1st of January, 1886, were incompetent; it was an immaterial and collateral point and, on his negative answer, was conclusive.

The entries in the books from September, 1885, to the 1st of January, 1886, were incompetent and immaterial for any purpose. The questions in regard to Coombs, etc., were alike incompetent and inadmissible.

V. The proceedings of the government and the court in regard to the books and their entries were erroneous, and to the prejudice of the defendant Clark, who duly excepted.

VI. The conduct of the court in first admitting the books and then not sending them to the jury room was equivocal, contradictory, and absurd. If they were in evidence they

should have gone to the jury. Making the sending them to the jury dependent upon the request and desire of defendants' counsel was absurd. The procedure of the court in regard to the books, their reading to the jury in argument, and the comments upon them by the government, were improper. The two requests to rule were immediately passed up on the point being made in argument to the jury, and such a use of the books could not have been anticipated so as to ask a ruling at an earlier period. No rule of practice requires a request to be handed in before it is made necessary.

VII. The conduct of the court and government in regard to the woman seen late at night to come from the depot was erroneous, and highly prejudicial to the defense. There was no testimony that the woman was unchaste.

Mr. Andrew J. Waterman, Atty. Gen., for the Commonwealth:

I. The motion to quash the complaint was properly overruled.

The complaint is in the language of the statute, and the offense is "fully, directly, and expressly alleged, without any uncertainty or ambiguity."

Commonwealth v. Richardson, 1 Mass. (L. ed.) 415, 2 New Eng. Rep. 153, 143 Mass. 75; *Commonwealth v. Ashley*, 2 Gray, 357; *Commonwealth v. Welsh*, 7 Gray, 324; *Commonwealth v. Barrett*, 108 Mass. 302; *Commonwealth v. Tiffany*, 119 Mass. 300.

II. "The allegation of various purposes for which the premises were used constituted the means by which the nuisance was created," and does not render the complaint bad for duplicity.

Commonwealth v. Kimball, 7 Gray, 380; *Commonwealth v. Ismahl*, 134 Mass. 201; *Commonwealth v. Ballou*, 124 Mass. 26.

III. The tenement and locality were sufficiently described.

Commonwealth v. Lamb, 1 Gray, 495; *Commonwealth v. Hersey*, 2 Mass. (L. ed.) 306, 3 New Eng. Rep. 910, 144 Mass. 296; *Commonwealth v. Bennett*, 108 Mass. 30; *Commonwealth v. Logan*, 12 Gray, 138.

IV. It was competent, on cross-examination of Clark, to inquire what were his relations to the place immediately before the period of the alleged offense.

Commonwealth v. Haier, 118 Mass. 207; *Commonwealth v. Kelley*, 116 Mass. 341; *Commonwealth v. Dearborn*, 109 Mass. 369; *Commonwealth v. Stoer*, 109 Mass. 365.

And in this field to inquire as to previous statements or entries of his, in writing; and to offer such writings in evidence.

Roscoe, Cr. Ev. p. 132.

V. The refusal of the presiding judge to comply with requests of counsel for defendant as to argument of counsel for Commonwealth, was a matter within the discretion of the judge in the conduct of the trial.

VI. The requests to charge respecting testimony relating to the woman from Boston, was not timely made, and otherwise was properly refused.

Proof of the reputation of women who frequent a house is pertinent to establish the character of the house.

Commonwealth v. Kimball, 7 Gray, 380; *Com-*

monwealth v. Gannett, 1 Allen, 7; *Commonwealth v. Connors*, 116 Mass. 85.

The evidence offered in the testimony of Sullivan was within the period specified in the complaint, and was properly admitted.

O. Allen, J., delivered the opinion of the court:

1. The motion to quash was properly overruled. The complaint was sufficient, under Pub. Stat. chap. 101, § 6. *Commonwealth v. Ballou*, 124 Mass. 26.

2. The objection that the time of the continuance of the offense as alleged in the complaint was too long, cannot prevail. The defendant cites no authority in support of his view that six months is the longest time that can be legally covered by a complaint. He might have moved for a specification of particulars. See *Commonwealth v. Giles*, 1 Gray, 466, where the offense was alleged to have extended over a period of sixteen months.

3. The testimony as to the reputation for chastity, in Gloucester, of the three women who were found in the house was competent. Their general reputation in Gloucester was fairly implied; and the question could not reasonably be supposed, as the defendant argues, to call merely for the individual opinion of the witnesses.

4. It was entirely competent for the court to allow a general cross-examination of the defendant Clark, as to his relations to the house prior to the time charged in the complaint. He had testified in chief that "he had never had any interest in any sale of liquor, or at any time on these premises." The cross-examination was proper, both for the purpose of contradicting his testimony in chief, and also on mere general grounds. *Commonwealth v. Haier*, 118 Mass. 207; *Commonwealth v. Kelley*, 116 Mass. 341.

His entries in the books of account, and his connection with Coombs, were also competent, and might properly be commented upon in argument to the jury.

5. No request was made that the books be sent to the jury. The presiding judge virtually offered to send them out, if desired; and all objection to the omission to do so, even if otherwise tenable, was thereby waived.

6. The testimony of the officer, Sullivan, that he saw the defendant Clark come from the depot, on the arrival of a train from Boston, accompanied by a woman, and go with her to the premises, must be assumed to relate to a time within the period covered by the complaint. The testimony appears to have been admitted without objection; but in the course of the closing argument of the district attorney the defendant asked the court to instruct the jury that the testimony was incompetent for any purpose, and that the argument in regard to it should be disregarded by the jury. It was then too late to ask a ruling that the testimony was incompetent for any purpose. Besides, it was clearly competent, as tending to show the defendant's connection with the house, and the business carried on there. In reference to the suggestion of unchastity, we do not know that all the evidence is reported, and the request was not put on the ground that this

suggestion was unfounded. The point taken was, not that the argument went too far, but that the district attorney had no right to argue at all upon the testimony in regard to the woman. If a question of law arises for the first time during the closing argument of the district attorney, we should not wish to say that the defendant would have no right to present it in a proper manner to the court, and ask a ruling upon it. But in the present case the objection was substantially to the competency of testimony which had been admitted without objection. There was no occasion for the court to give any instruction to the jury upon this objection; and, in reference to the suggestion of the woman's unchastity, the bill of exceptions does not contain enough to show that it was the duty of the court to caution the jury that the suggestion was unwarranted. *Commonwealth v. Cunningham*, 104 Mass. 545.

Exceptions overruled.

William WHEATON
v.

Margaret TRIMBLE.

1. A mechanic's lien will attach to the property of a married woman for labor performed at the husband's request and with her knowledge.
2. An agency to bind a married woman's estate for labor expended thereon at the instance of the husband may be inferred from the fact that he had been entrusted with the general management of the property.

(Bristol—Filed November 23, 1887.)

ON respondent's exception to the ruling of the Superior Court upon petition to enforce a mechanic's lien for labor and materials.

The facts and case sufficiently appear in the opinion.

Messrs. H. J. Fuller and J. H. Galligan, for respondent:

The only facts relied upon to establish the issue that "the respondent's husband was the duly authorized agent of the respondent, and did in fact act as her agent in employing the petitioner," are that she signed a note and mortgage, occupied the upper part of the house after it was finished, lived near by while the work was going on, saw the plaintiff at different times during the work, gave "some directions about the work in the upper rooms," picked out the paper for five rooms, and allowed her husband to manage the property just as he used to when it was his.

It is submitted that the court was not warranted, upon this evidence and under all the circumstances of the case, in finding the issue in the plaintiff's favor.

Arnold v. Spurr, 180 Mass. 347; *Hunt v.*

Pool, 189 Mass. 224; *Barto's App.* 55 Pa. 386; *Bliss v. Patten*, 5 R. I. 880; *Hughes v. Peters*, 1 Cold. 69; *Phill. Mech. Lien*, § 105.

Mr. Laurens N. Francis, for petitioner:

The following cases rule that the evidence was competent to prove agency, and also decide that it is a question of fact whether agency exists:

Merrick v. Plumley, 99 Mass. 566; *Westgate v. Munroe*, 100 Mass. 227; *Paine v. Farr*, 118 Mass. 74; *Lovell v. Williams*, 125 Mass. 439; *Arnold v. Spurr*, 180 Mass. 347.

In jury-waived cases, the finding of the court below upon questions of fact is final.

Boston v. Benson, 12 Cush. 61; *Walker v. Penniman*, 8 Gray, 288; *Whiton v. Nichols*, 3 Allen, 588; *Cochrane v. Boston*, 4 Allen, 177; *Jamaica Pond A. Corp. v. Chandler*, 9 Allen, 166; *Crocker v. Foley*, 18 Allen, 876; *Robbins v. Potter*, 98 Mass. 532; *O'Connell v. Jacobs*, 115 Mass. 21; *Smith v. Collins*, Id. 388; *Lawrence v. Lewis*, 138 Mass. 561; *Edmundson v. Bric*, 136 Mass. 189.

Whether, from the above facts, agency should be inferred, is not open to the respondent on a bill of exceptions.

Polley v. Lenox Iron Works, 4 Allen, 829; *Westgate v. Munroe*, 100 Mass. 227; *Clark v. Burns*, 118 Mass. 275; *Reed v. Ashburnham R. R. Co.* 120 Mass. 48; *Cook v. Union R. Co.* 125 Mass. 57.

Even a finding upon a mixed question of law and fact should not be revised unless the law was erroneous; and, if nothing appears in the report to the contrary, the rulings of the court below on law are presumed to be correct.

Turner v. Wentworth, 119 Mass. 459.

Morton, Ch. J., delivered the opinion of the court:

The labor for which the plaintiff seeks to enforce a lien was performed by him upon the house of the defendant. He was employed by the defendant's husband; and the presiding justice, who tried the case without a jury, has found that, in employing the plaintiff, the husband acted as the duly authorized agent of the defendant. The only question before us is whether there was evidence to justify this finding. There was evidence tending to show that the work was done upon her house and was for her benefit; that she knew that the plaintiff was working upon the house, and was present at different times and personally gave him directions as to parts of the work; that she selected the papers for the upper rooms, and the bills for them were afterwards paid by her husband. The husband and wife both testified that he was not her agent, but, upon cross-examination, she testified that "her husband manages the property just as he used to when it was his; that she allows him to go ahead and do just as he pleases with the whole property; and that, ever since it has been in her name, he has managed it just as he did before." It was for the court to determine what credit

NOTE—The precise question involved in this case was decided in *Haupman v. Catlin*, 30 N. Y. 247. The provision of the Massachusetts statute, however, giving a lien when labor is performed by "consent" of the owner, would sustain the court's conclusion without the specific finding of agency. This consent may be evidenced by the fact of a wife's knowledge and absence of objection (*Husted v. Mathes*, 77 N. Y. 389); the principle involved in 3 Mass.

this statutory provision being that a person who knowingly takes the benefit of the labor of another upon his land should have it subjected to a lien therefor (*Otis v. Dodd*, 30 N. Y. 396).

As to cases in which a consent was inferred from the acts of the parties, see *Hilton v. Merrill*, 108 Mass. 523; *Smith v. Morris*, 120 Mass. 56; *Davis v. Humphrey*, 112 Mass. 309.

should be given to their testimony. Considering the relation which she bore to her husband and to the estate; that she knew the plaintiff was working for her benefit, and took part in directing his work; and that she substantially testified that she had put the general management of the property in the hands of her husband,—it is not an unreasonable inference that, in contracting with the plaintiff, the husband was acting as her authorized agent. The evidence is quite as strong as it was in the case of *Arnold v. Spurr*, 180 Mass. 847, in which it was held that the question of agency should have been submitted to the jury.

Exceptions overruled.

COMMONWEALTH of Massachusetts

v.

Edward INGERSOLL.

1. If the defendant in a criminal case **pleads guilty**, he cannot afterwards retract his plea and **plead anew**, except by leave of the court.
2. So, when defendant **pleads guilty** in a municipal or police court, and **appeals** from the sentence to the superior court, he cannot of right claim a trial by jury, but is liable to be sentenced upon his original plea in the court below, unless the court gives him leave to plead anew.
3. A plea of *nolo contendere*, when accepted by the court, is, in its effect upon the case, equivalent to a plea of guilty. It is an implied confession of guilt only, and cannot be used against the defendant as an admission in any civil suit for the same act.
4. But there is a difference between the two pleas, in that defendant cannot plead *nolo contendere* without the leave of the court. If such plea is tendered, the court may accept or decline it at its discretion.
5. If the plea is accepted, it is not necessary or proper that the court should adjudge the party to be guilty, but the court proceeds thereupon to pass the sentence of the law.
6. If the record does not certainly show that the plea *nolo contendere* was accepted, and sentence passed thereupon, in the police court, the defendant has the right to plead anew in the superior court, and to have a trial by jury.

(Essex—Filed January 2, 1888.)

ON defendant's exceptions. *Sustained.*
Complaint to the Police Court of the City of Gloucester, under Pub. Stat. chap. 100, for the unlawful keeping of intoxicating liquors. From the sentence of the police court the defendant appealed, and, at the May Term, 1886, of the superior court, at the request of the defendant, this complaint was placed on file; and at the January Term, 1887, the defendant having been convicted in the superior court upon

another complaint, the district attorney moved for sentence upon this complaint, whereupon the defendant claimed the right to plead anew, and filed a motion therefor upon the ground (1) that it did not appear, by the record of said police court, that the plea of *nolo contendere* was received with the consent of the public prosecutor, or accepted by the Commonwealth or by the court; and (2) that no plea had been entered in said police court upon which the defendant could be legally tried. The court overruled the motion, and the defendant alleged exceptions.

Other facts appear in the opinion.

Mr. F. L. Evans, for defendant:

The plea of *nolo contendere* is an implied confession of the offense charged. It is discretionary with the court to receive it or not.

Commonwealth v. Horton, 9 Pick. 206. See 2 Hawk. P. C. chap. 81, § 8; 1 Chitty, Cr. L. 481.

That such a plea can be received only with the consent of the court, is but another statement of the same proposition. Such exercise of discretion on the part of the court, or consent, must, it is submitted, appear of record.

Commonwealth v. Adams, 6 Gray, 259.

Stat. 1885, chap. 215, § 35, under which the decision in *Commonwealth v. Adams*, *supra*, was made, provided that "no admission of the defendant, made in court, shall be received on the trial without the consent of the prosecutor, except a plea of guilty." The defendant claims that this provision of law was no new legislation, but merely declaratory of the common law, with this exception, however,—that the consent of the prosecutor was made necessary instead of that of the court. The motion for leave to plead anew was addressed to the discretion of the court. It is submitted that, unless the ruling of the court was made in the exercise of its discretion, it cannot be sustained.

Mr. Andrew J. Waterman, *Atty-Gen.*, for the Commonwealth:

To the provisions of Acts 1852, chap. 322, § 18, relative to the entry of a *nolle prosequi*, was added—when the law pertaining to the sale and manufacture of spirituous and intoxicating liquors was amended in 1855 (chap. 215)—a provision that, "in all cases arising, under this Act, before a justice of the peace or police court, no admission of the defendant made in court shall be received on the trial without the consent of the prosecutor, except a plea of guilty."

§ 35.

The same provision was retained in the General Statutes, chap. 86, § 58; also in the amended Statute of 1869, chap. 415, § 60. Acts 1869, chap. 415, was repealed by Acts 1875, chap. 99, § 22; and in said chapter, which was an Act to regulate the sale of intoxicating liquors, there was no provision like unto Acts 1855, chap. 215, § 35. There is no similar provision in the Public Statutes. At common law the plea of *nolo contendere* was receivable only within the discretion of the court.

Commonwealth v. Horton, 9 Pick. 206; Bish. Cr. Proc. 8d ed. §§ 802, 804.

There being now no statutory provision relative to the consent of the prosecutor to the filing of such a plea, the question of receiving it was for the court alone. The record shows

that the plea was received, and that the trial proceeded thereon. There being no error upon the face of the record, there was nothing to be done but to pass sentence.

Commonwealth v. Mahoney, 115 Mass. 152;
Commonwealth v. Winton, 108 Mass. 485.

Morton, Ch. J., delivered the opinion of the court:

If the defendant in a criminal case pleads guilty, he cannot afterwards retract his plea and plead anew, except by leave of the court. If, therefore, a defendant pleads guilty in a municipal or police court, and appeals from the sentence to the superior court, he cannot of right claim a trial by jury, but is liable to be sentenced upon his original plea in the court below, unless the court gives him leave to plead anew. *Commonwealth v. Mahoney*, 115 Mass. 151.

A plea of *nolo contendere*, when accepted by the court, is, in its effect upon the case, equivalent to a plea of guilty. It is an implied confession of guilt, only, and cannot be used against the defendant as an admission, in any civil suit for the same act. The judgment of conviction follows upon such a plea as well as upon a plea of guilty; and such plea, if accepted, cannot be withdrawn, and a plea of not guilty entered, except by leave of court. But there is a difference between the two pleas in that the defendant cannot plead *nolo contendere* without the leave of the court. If such plea is tendered, the court may accept or decline it in its discretion.

If the plea is accepted, it is not necessary or proper that the court should adjudge the party to be guilty, for that follows as a legal inference from the implied confession; but the court proceeds thereupon to pass the sentence of the law. *Commonwealth v. Horton*, 9 Pick. 206.

In *Commonwealth v. Adams*, 6 Gray, 359, the complaint was founded upon the Statute of 1866, chap. 215, which provided that "no admission of the defendant made in court, shall be received on the trial, without the consent of the prosecutor, except a plea of guilty." The defendant pleaded *nolo contendere* in the police court, but the record did not show that the plea was received with the consent of the prosecutor. This court held that such consent must appear of record; and that, as it did not so appear, judgment entered by the court of common pleas, to which the defendant had appealed upon his plea, was erroneous; and that he had the right to plead anew, and to be tried by a jury.

Applying these principles to the case at bar, it follows that, if it appeared by the record of the police court, to which the complaint was made, that the defendant's plea of *nolo contendere* was accepted by the court, the superior court, upon appeal, could sentence him upon his plea and decline to permit him to plead anew. The only difficulty arises from the obscurity of the record of the police court. It recites that the defendant, "being asked whether he is guilty or not of the offense within charged upon him, pleads *nolo contendere*; but, after hearing divers witnesses duly sworn to testify the whole truth, and fully understanding the defenses of said defendant, it is adjudged by the said court that said defendant is guilty of 2 Mass.

said offense." This record does not state that the court accepted the plea. The latter part of the record above cited implies that the court did not accept the plea, but proceeded to hear witnesses, and adjudged the defendant to be guilty, as if he had pleaded not guilty, or stood mute. If the record had stated that the defendant pleads *nolo contendere*, and thereupon the court passes sentence upon him, it might be held that it showed an accepted plea, although not directly stated to have been accepted, because in such case the action of the court upon the plea would import that it was accepted. But in this case the record implies, not that the court passed sentence upon the plea of *nolo contendere*, but upon an adjudication, after hearing witnesses, that the defendant was guilty. To say the least, the record does not certainly show that the plea was accepted, and sentence passed thereupon; and we are of opinion that the defendant had the right to plead anew in the superior court, and to have a trial by jury.

Exceptions sustained.

COMMONWEALTH of Massachusetts v.

Bealy F. FOWLER.

1. When the government wishes to avail itself of the special statutory provisions respecting a sale or delivery of intoxicating liquors to a minor, the fact of minority must be set forth in the complaint.
2. Where there is a sale of intoxicating liquors by an unlicensed person to an agent of an undisclosed principal, the complaint should charge the sale as having been made to the agent; but, if the principal be disclosed, the complaint should charge the sale as having been made to him. If the agent be named as the one to whom the liquor was sold, an objection that an instruction authorized a finding against the defendant, unless the agent himself disclosed his principal, will be unavailing unless made in the trial court.

(Middlesex—Filed January 2, 1888.)

ON defendant's exceptions. *Overruled.*

Complaint alleging that defendant, not having a license or authority, did sell intoxicating liquor to Michael O'Marra.

Michael O'Marra testified for the government that he was eleven years of age, and lived at Newton, with his father, who on said day gave him fifty cents and instructed him to get from defendant,—who had been in the habit, from time to time, of passing by the house, driving a beer wagon—six bottles of ale; that witness took the money, and afterwards met defendant with the beer wagon in the public street in front of the house; that defendant asked witness, "What will you have to-day, Mickey?"—and witness replied, "One half-dozen of ale," and gave defendant the money and went away, but not to his house; that as he was going away he looked and saw defendant, or a man who

had been with him just before, carrying what he supposed to be the ale towards his father's house.

Witness testified that he did not during the above transaction inform defendant that his father wanted the ale, or that he bought it for his father, or that his father had sent him to get it. And, testifying with reference to other previous transactions substantially similar, said that, while he had always procured the liquor for his father, at his request and for his use, he had never informed defendant of the fact.

The sister of the witness testified that the six bottles of ale were brought by defendant to the house, and that she put them in the cellar for her father, who was away from home at work.

Defendant testified that the delivery was at the house on all occasions, and not to the son; that he had on his wagon at the time of the sale of six bottles, a large number of bottles of ale and beer.

The jury returned a verdict of guilty, and defendant alleged exceptions.

Mr. J. L. Eldridge, for defendant:

A sale of intoxicating liquor is a delivery thereof upon compensation made; an agreement to sell it is not a sale.

Commonwealth v. Packard, 5 Gray, 101-108.

The title did not pass to the boy, and there was no acceptance by him. A sale without delivery is not prohibited by the statute.

Commonwealth v. Finnegan, 124 Mass. 824.

Questions of fact were taken from the jury. The whole question was made to depend solely on what the boy said, and "at that time."

Commonwealth v. Finnegan, *supra*.

Matters which were *res gestæ* were treated as immaterial. Notice or disclosure of agency may be implied from circumstances. The defendant's and boy's intention and understanding were matters to be considered. There was clearly a misapprehension of the meaning of disclosure or notice, and to such an extent as to show that the case resulted in a mistrial.

Bond v. Bond, 7 Allen, 1-6.

Suppose the boy's and the father's name to be the same, then the presumption would be that the father was the person referred to.

Singleton v. Johnson, 9 Mees. & W. 67.

Mr. Andrew J. Waterman, *Atty-Gen.*, for the Commonwealth:

A sale of intoxicating liquor by an unlicensed person is a prohibited sale, without regard to the person to whom the sale is made.

Pub. Stat. chap. 100, § 1; *Commonwealth v. O'Leary*, 1 Mass. (L. ed.) 820, 8 New Eng. Rep. 198, 143 Mass. 98.

A sale by an unlicensed person to the agent of an undisclosed principal may be alleged, either as a sale to the agent or to the principal; and a complaint charging a sale by an unlicensed person to A is sustained by evidence that A bought the liquor of the defendant for B at B's request and with his money, without disclosing the fact to defendant.

Commonwealth v. Kimball, 17 Met. 808; *Commonwealth v. O'Leary*, 1 Mass. (L. ed.) 820, 3 New Eng. Rep. 198, 143 Mass. 97, and cases cited; *Commonwealth v. Gormley*, 133 Mass. 580.

C. Allen, J., delivered the opinion of the court:

The fact that Michael O'Marra, the alleged

purchaser, was a minor, must be disregarded, it not having been averred. When the government wishes to avail itself of the special statutory provisions respecting a sale or delivery of intoxicating liquors to a minor, the fact of minority must be set forth.

The case as proved, then, was a sale by an unlicensed person under a contract made with Michael. If Michael was the agent of an undisclosed principal, the complaint properly charged the sale as having been made to him; but if he was the agent of a disclosed principal, the complaint should have charged the sale as having been made to the principal. See *Commonwealth v. O'Leary*, 1 Mass. (L. ed.) 820, 8 New Eng. Rep. 198, 143 Mass. 95, and cases there cited. The defendant now contends that the instruction to the jury was too limited, and that it authorized a conviction unless Michael himself disclosed his principal at the time of the alleged sale, without adverting to the consideration that his agency for his father might have been well understood from a previous course of dealing, or otherwise. This distinction, however, was not taken at the trial, but the court was asked to rule that there was no evidence of a sale to Michael, or, at any rate, no sufficient evidence of a sale and delivery to him. The instruction actually given may properly be considered with reference to the requests made; and, if regarded in this manner, may fairly be understood to mean that, if Michael's father was not in any manner disclosed or known at the time as the principal in the transaction, then the charge of a sale to Michael was supported by the evidence. If the defendant had wished to take the distinction upon which he now relies, he should have called attention to it at the trial. The language used by the court was quite similar to that used in *Commonwealth v. Gormley*, 133 Mass. 580.

The evidence was sufficient to warrant a verdict of guilty; provided Michael was acting for an undisclosed principal.

Exceptions overruled.

Richard GIROUX

v.

Phineas STEDMAN *et al.*

Mary GIROUX v. SAME.

Joseph PECORD v. SAME.

Mary GIROUX, *per Pro. Ami* v. SAME.

Where the defendants' herd had been exposed to hog cholera, and there was evidence that a portion of them only had been affected by it and that, even if affected by it, the meat of the animals was not necessarily unwholesome, and there was no evidence that the animals whose meat was sold had ever, so far as the defendants knew, actually had the disease, and the verdict of the jury has established that they were ignorant that the meat sold by them was unwholesome; the defendants not being common dealers in

provisions, or marketmen, but farmers selling a portion of the products of their farms, and no representation of the quality of the meat sold having been made by them,—they cannot be held to an implied warranty that the meat sold was fit for food, although they had knowledge that such was the purpose of its purchase.

(Hampden—Filed January 4, 1886.)

ON plaintiffs' exceptions. *Overruled.*

These were actions of tort. The plaintiffs claimed to have purchased from the defendants certain quantities of dressed pork; that said pork was tainted and unfit for food; that they ate of said pork and were made sick thereby. The evidence showed that the defendants were farmers in Chicopee, and jointly interested in raising pigs; that, about the middle of September, 1885, the defendants found that an infectious disease known as hog cholera existed upon their farm, and that their entire herd had been exposed to the disease; that, on the 3d day of October, 1885, the defendants killed two of their hogs, dressed them, and sold one half of one of said hogs to the plaintiff Richard Giroux, and one half of the other hog to the plaintiff Joseph Pecord; that on the 5th day of October the defendants killed and dressed two other hogs, one of which was sold to the plaintiff Pecord. The evidence showed further that, at the time of the several sales to the plaintiffs, no representations as to the quality of the meat were made, and no notice given to the plaintiffs, at the times of the sales, of the existence of the disease among the herds owned by the defendants; but it appeared that the defendants knew, at the time of the several sales to the several plaintiffs, that the meat so sold by them to the plaintiffs was to be used by the plaintiffs for provisions.

Judgment for defendants, and plaintiffs alleged exceptions.

Further facts appear from the opinion.

Mr. W. W. McClench, for plaintiffs:

Any purchase of food for domestic consumption is protected, and a warranty arises from all such sales. Sufficient authority for such claim is found in the books.

3 Bl. Com. p. 165; 2 Kent, Com. p. 478; Add. Cont. § 621; Hill, Sales, p. 278; Hare, Cont. p. 535; *Burch v. Spencer*, 15 Hun, 504; *Van Bracklin v. Fonda*, 12 Johns. 468; *Hoover v. Peters*, 18 Mich. 51; *Divine v. McCormick*, 50 Barb. 116; *Hart v. Wright*, 17 Wend. 272; *Moses v. Mend*, 1 Den. 378; *Emerson v. Brigham*, 10 Mass. 197; *Winsor v. Lombard*, 18 Pick. 62.

The plaintiffs were not bound to prove more than was necessary to make out their case, the rule in actions of tort being that the plaintiff is not bound to prove allegations not essentially descriptive, or so connected with material averments that they cannot be separated.

Lyons v. Merrick, 105 Mass. 71; *McDonald v. Snelling*, 14 Allen, 290.

Messrs. Ely Brothers and E. W. Chapin, for defendants:

The judge's instruction to the jury was explicit that "the plaintiffs are not entitled to prevail in these cases, if they have failed to

prove the allegations in their declarations, that the defendants knew the meat sold by them to the plaintiffs was unwholesome, and improper meat to be used as provisions."

The *scienter* is not only a material, but a vital part of the case.

French v. Vining, 102 Mass. 136.

Reasonable cause to know is not the same thing as knowledge.

Carroll v. Hayward, 124 Mass. 120.

There was no implied warranty, in the sale made by the plaintiffs, that the meat was fit for food, and under all the circumstances of the case the maxim of *caveat emptor* applies.

Howard v. Emerson, 110 Mass. 320; *Emerson v. Brigham*, 10 Mass. 197.

The exceptions to the general rule as to implied warranty does not apply to the present case, because of the pleadings; and even if a wrong reason was given in the instruction to the jury, the plaintiff was not injured by the same.

Fuller v. Ruby, 10 Gray, 285; *Burke v. Savage*, 18 Allen, 408.

If the instructions as a whole were not erroneous, the plaintiffs cannot succeed in their exceptions, although a single passage of the instructions, if taken abstractly, may be erroneous.

Jackman v. Bowker, 4 Met. 236.

As "full instructions" were given, it does not appear but that plaintiffs' rights were fully protected under them.

Woods v. Woods, 127 Mass. 141.

Devens, J., delivered the opinion of the court:

It was known to the defendants that the plaintiffs purchased the meat to be used as provisions, but, in order that they should recover, it was held by the presiding judge that they must prove the allegations in their declaration, that the defendants knew the meat sold by them was unwholesome and improper to be used as provisions. He instructed the jury that, at common law, the general rule is, that where personal property is sold in the presence of buyer and seller, each having an opportunity to see the property, and there is nothing said as to the quality, the only implied warranty on the part of the seller is that he has a valid title in, or has a right to sell, the chattel. He added that there is an exception to this general rule, where a provision-dealer or marketman sells provisions—as, meat and vegetables—to his customers for immediate use; and that in such case there would be an implied warranty that they were fit for use, and wholesome. Whether this exception exists or not, it is not important in the case at bar to inquire, as it cannot be, and was not, claimed that the defendants were brought within it. The contention of the plaintiffs is that—even if the rule is well established that, where there is no express warranty and no fraud, no warranty of the quality of the thing sold is implied by law, and the maxim of *caveat emptor* applies—there is a more general exception which excludes from its operation all sales of provisions for immediate domestic use, no matter by whom made.

That, in a sale of an animal by one dealer to another, even with the knowledge that the latter dealer intends to convert it into meat for

domestic use, or in the sale of provisions in the course of commercial transactions, there is no implied warranty of the quality, appears well settled. *Howard v. Emerson*, 110 Mass. 320, and cases cited; *Burnby v. Bollett*, 16 Mees. & W. 645.

While occasional expressions may be found, as in *Van Bracklin v. Fonda*, 12 Johns. 468, which sustain the plaintiff's contention, we have found but one decided case which supports it. In *Van Bracklin v. Fonda*, *supra*, it is said that in a sale of provisions the vendor is bound to know that they are sound, at his peril; but the case shows that the defendant, who had sold beef for domestic use, knew the animal from which it came to be diseased. This had been found by the jury, and the remark is made in connection with the facts proved. The case of *Hoover v. Peters*, 18 Mich. 51, does sustain the plaintiff's contention, as it is there held that where articles of food are bought for domestic consumption, and the vendor sells them for that express purpose, the law implies a warranty that they are fit for such purpose, whether the sale be made by a retail dealer or any person. This case imposes a heavier liability on a person not engaged in the sale of provisions as a business, than he should be called on to bear. The opinion is not supported by any citation of authorities. In a dissenting opinion by *Mr. Justice* Christy, it is said: "Had it appeared that he (the defendant) was the keeper of a meat market or a butcher's shop, and was engaged in the business of selling meat for food, and therefore bound, or presumed, to know whether it was fit for that purpose, I should have concurred in the opinion my brothers have expressed." If there is an exception to the rule of *caveat emptor*, which grows out of the circumstances of the case and the relations of buyer and seller, where the latter is a general dealer, and the former a purchaser for immediate use, there appears no reason why it should be further extended.

In the case at bar the defendants were not common dealers in provisions, or marketmen. They were farmers selling a portion of the produce of their farms. No representations of the quality of the meat sold was made by them. In making casual sales from their farm, of its products, to hold them to the duty of ascertaining, at their peril, the condition of the articles sold, and of impliedly warranting, if sold with the knowledge that they were to be used as food, that they were fit for the purpose, imposes a larger liability than should be placed upon those who may often have no more means of knowledge than their purchasers. The plaintiffs contend that the case of *French v. Vining*, 102 Mass. 192, is decisive in their favor; but it appears to us otherwise. In that case the defendant sold hay which he knew had been poisoned, for the purpose of being fed to a cow, although he had carefully endeavored to separate the damaged portion from the rest, and supposed he had succeeded. From the effect of eating the hay, the cow died, and the defendant was held liable. His knowledge of the injury to the hay was certain and positive: his belief that he remedied the difficulty was conjectural, uncertain, and proved to be wholly erroneous.

In the case at bar, while the defendant's herd had been exposed to hog cholera, there was evidence that a portion of them only had been affected by it, and further, that, even if affected by it, the meat of the animals was not necessarily unwholesome. There was no evidence that the animals whose meat was sold had ever, so far as the defendants knew, actually had the disease; and the verdict of the jury has established that they were ignorant that the meat sold by them was unwholesome. In *French v. Vining*, the defendant knew what the condition of the hay had been, and this is a vital part of the case. He sold an article which he knew had been poisoned, and from which he had taken no effectual means to remove the poison. His belief or supposition that his effort had been successful could not relieve him from liability for the consequences that ensued if it had been unsuccessful, and if he sold the hay without informing the purchaser of the dangerous injury which it had received.

Exceptions overruled.

COMMONWEALTH of Massachusetts v.

James Henry McCAFFERTY.

1. The charter of Lynn does not require publication as a condition precedent to the validity of its ordinances. The ordinances of Lynn take effect upon their passage, if no time is therein mentioned or named, notwithstanding that Gen. Stat. chap. 18, § 16, requiring publication, was in force when the ordinances were passed.
2. The ordinance of the city of Lynn, that "no person shall place or carry, or cause to be placed or carried, on any sidewalk, any showboard, placard, or sign, for the purpose" of displaying the same, was enacted under authority of Stat. 1850, chap. 184, § 20; Gen. Stat. chap. 18, § 11; Pub Stat. chap. 27, § 15; and is not repugnant to the laws of the State and not unreasonable, and is valid.
3. Where defendant walked upon the sidewalk of a street, having over his shoulders a piece of oilcloth which he wore like a vest or coat, on which was printed the inscription: "Lasters on strike. All lasters are requested to keep away from P. P. Sherry until the present trouble is settled. Per order L. P. U.,"—it was held to be a placard or sign, and that bearing it upon his person like a vest or coat was carrying it for the purpose of displaying it, and that the natural tendency was to collect a crowd and create disorder; and it falls within the letter and spirit of the ordinance.

(Essex.—Filed January 2, 1888.)

ON defendant's exceptions. *Overruled.*
The facts appear from the opinion.
Mr. John R. Baldwin, for defendant:
The ordinance, not having been published,

has no legal effect. "All by-laws made by a town shall be published in one or more newspapers printed in the county where the town is situated."

Pub. Stat. chap. 27, § 23; Gen. Stat. chap. 18, § 16; Rev. Stat. chap. 15, § 15.

This provision is applicable to the ordinances of cities.

Pub. Stat. chap. 28, § 2; chap. 3, § 8; chap. 15, § 28.

The purpose of publication is to give notice. Horr & Bemis, Mun. Police Ord. p. 49.

A sign or placard might have obstructed a right of way to passengers on the sidewalk. This oilcloth did not. Even if it did, by causing a collection of people to gather, the crowds thus collected are prohibited by another ordinance of the city of Lynn. Such an instance is amply provided for.

Stat. and Ord. of Lynn, p. 300.

Mr. Andrew J. Waterman, Atty-Gen., for the Commonwealth:

The organic Act (chap. 184, § 20, 1850) incorporating the city of Lynn, conferred upon the city council certain legislative powers, sufficient "to make all such salutary and needful by-laws as towns, by the laws of the Commonwealth, have power to make and establish, and to annex penalties not exceeding \$20 for the breach thereof; which by-laws shall take effect and be in force from and after the time therein respectively limited, without the sanction of any court or other authority whatever."

There is no law, of which this court can hereinafter take cognizance, requiring any publication of the ordinance, further than what was necessary for its promulgation. And the law was sufficiently promulgated when it was signed and became a part of the public records of this city.

See Bl. Com. bk. 1, chap. 6.

An ordinance takes effect from its passage, if no time was limited, and there was nothing in the ordinance to show that it was not intended to take effect immediately.

Commonwealth v. Brooks, 109 Mass. 355; *Commonwealth v. Davis*, 1 Mass. (L. ed.) 94, 1 New Eng. Rep. 380, 140 Mass. 485.

The ordinance was clearly within the legislative powers of the city council respecting police matters. There is a presumption that the by-law is valid. The burden is with the defendant to prove the contrary.

Commonwealth v. Patch, 97 Mass. 222.

The authority of the court to declare a by-law void should be exercised with caution.

Commonwealth v. Robertson, 5 Cush. 488.

Within the ancient offense of nuisance was the exhibition of caricatures which caused crowds to collect and obstruct a way. In *Rev v. Curdise*, 4 Carr. & P. 415, the question is fully discussed. See also 2 Dill. Mun. Corp. § 521.

Morton, *Ok. J.*, delivered the opinion of the court:

This is a complaint for a violation of an ordinance of the city of Lynn. The part of the ordinance which applies to the case is as follows: "No person shall place or carry, or cause to be placed or carried, on any sidewalk, any show-board, placard, or sign, for the purpose of there displaying the same."

2 MASS.

The ordinances were proved by the production, by the clerk, of the original records of the city, and we do not understand that the defendant now insists upon his objection to the sufficiency of the proof. He contends that the ordinance in question has no legal effect, because it has not been published according to the provisions of Gen. Stat. chap. 18, § 16, which was in force when the ordinance was passed. The provisions of the charter of Lynn, as to the power to make ordinances, are, in effect, the same as those contained in the charter of Boston, as to which it has been decided that no publication is necessary as a condition precedent to the validity of the ordinances. The ordinances of Lynn take effect upon their passage, if no time is therein limited or named. Acts 1850, chap. 184, § 20; *Commonwealth v. Davis*, 1 Mass. (L. ed.) 94, 1 New Eng. Rep. 380, 140 Mass. 485; *Commonwealth v. Brooks*, 109 Mass. 355.

The defendant also contends that the ordinance is unreasonable, and therefore void. The city is authorized "to make all such salutary and needful by-laws" as towns have power to make and establish. Stat. 1850, chap. 184, § 20.

Towns have power to "make such necessary orders and by-laws, not repugnant to the laws of the State, for directing and managing the prudential affairs, preserving the peace and good order, and maintaining the internal police thereof, as they may judge most conducive to the welfare of the town." Gen. Stat. chap. 18, § 11; Pub. Stat. chap. 27, § 15.

The purpose of the ordinance in question is to prevent the placing of showboards and signs upon the sidewalks so as to obstruct them, and also to prevent the carrying of placards and signs for the purpose of displaying them; of which the tendency and effect might be to collect crowds and thus to interfere with the use of the sidewalks by the public, and lead to disorder. We cannot say that such a provision, applicable to the crowded streets of a populous city, is unreasonable.

The remaining question is whether the defendant was known to have violated the ordinance. It appeared that the defendant walked upon the sidewalk in Munroe Street, having over his shoulders a piece of oilcloth, which he wore like a vest or coat, on which was printed the inscription: "Lasters on strike. All lasters are requested to keep away from P. P. Sherry until the present trouble is settled. Per order, L. P. U."

It does not require argument to show that this is a placard or sign, and that bearing it upon his person like a vest or coat was carrying it for the purpose of displaying it. The natural tendency of his act was to collect a crowd and create disorder, and it falls within the letter and spirit of the ordinance.

Exceptions overruled.

Charlotte A. RING *et al.*

v.

PHENIX ASSURANCE CO., *Appt.*

1. Where the policy, after describing the house containing the property insured, adds the words "and occupied all the

year round," an instruction was sufficient, in a suit to recover for a loss on the policy, occurring May 4, which directed the attention of the jury to the fact that during the previous October, and for a few days before and after, the family in charge lived in the adjoining laundry building, and not in the house, as a circumstance to be considered by them in determining whether it properly could be called a building "occupied all the year round." The stipulation must be taken to have been satisfied if the permanent occupation was resumed so long before the fire that the temporary absence of the occupant plainly appears to have had no connection with the loss. The words in the policy, applying its terms to the articles insured,—**"while contained in"** governing the whole clause,—while fairly enough confining the operation of the policy to such times as the articles are contained in a house answering to the whole of the description, **cannot do more than suspend the insurance while the articles are not contained in such a house.**

2. The effect of Pub. Stat. chap. 119, § 181, is that, if the matter misrepresented increases the risk of loss, it still may defeat the policy although not made with intent to deceive. The provision of § 188, that the application shall not be considered a warranty, means only that an inquiry into the effect of matters there represented upon the risk of loss shall not be cut off, and that substantial accuracy as to material facts shall be sufficient. While misrepresentations which form no part of the contract in any sense, but merely offer motives for making it, ordinarily do not affect its validity unless fraudulent, it is still possible to require the insured to see, at his peril, that his material statements are true. The language of § 189, fixing the form of the standard policy, the material language of which is, "this policy shall be void if any material fact or circumstance stated in writing has not been fairly represented by the insured," should be read as giving the word "fairly" a meaning requiring a fair correspondence between the representation and the fact.

(Suffolk—Filed January 2, 1888.)

ON defendant's exceptions. *Sustained.*

Action upon a policy of insurance issued by the defendant company to the plaintiffs. Verdict for plaintiff.

So much of the policy as is material to the case, and not contained in the statutory form, is as follows: "On household furniture, useful and ornamental, gas fixtures, bed, bedding, linen, and family wearing apparel, silver and plated ware, printed books and family stores, including pictures, paintings, engravings, and their frames, crockery, glass and china ware, watches and jewelry in use, musical instruments, statuary, bronzes, sewing-machine, and fuel, all while

contained in the frame dwelling-house known as the 'Pebble Beach House,' Bass Rocks, Gloucester, Mass. (on Ocean Avenue), and occupied all the year round." Plaintiffs claim total loss of said property by fire.

Further facts material to the questions raised appear from the opinion.

Messrs. J. D. Bryant, I. H. Sweetser, and Augustus Russ, for defendant:

In the absence of question as to the fact of misrepresentation, the question whether the same was material or not has frequently been determined by the court.

Levis v. Eagle Ins. Co. 10 Gray, 508; *Wood v. Firemens Ins. Co.* 128 Mass. 316. See also *Davenport v. New England Mut. Ins. Co.* 6 Cush. 841; *Hayward v. New Eng. Mut. F. Ins. Co.* 10 Cush. 444, 445.

The instruction given by the judge, as to the meaning of the words "fairly represented," and that an innocent mistake would not avoid the policy, was erroneous, and calculated to mislead the jury.

The risk by nonoccupancy was increased.

Mulry v. Mohawk Ins. Co. 5 Gray, 545; *Luce v. Dorchester Mut. F. Ins. Co.* 105 Mass. 801.

Occupancy involves care and supervision, to which the insurer had a right under a contract stipulating for occupancy.

Ashworth v. Builders Mut. F. Ins. Co. 112 Mass. 422; *Poor v. Humboldt Ins. Co.* 125 Mass. 274; *Litch v. North British & M. Ins. Co.* 186 Mass. 491; *Sleeper v. New Hampshire F. Ins. Co.* 58 N. H. 401. See also *Cook v. Continental Ins. Co.* 70 Mo. 610.

"Place and situation, as given in the application (and, in this case, as afterwards incorporated in the policy), constituted an essential element in the description of the property insured, and, as that description is part of the contract, it was necessarily material, for it was the property so situated, and no other, that was included in the risk."

Eddy St. Iron Foundry v. Hampden S. & Mut. F. Ins. Co. 1 Cliff. 300, 307.

The substantial misstatement of a fact which the insurer has made essential by a precise interrogatory, in the absence of anything which qualifies or limits the obligation to answer correctly, avoids the contract, without an express stipulation to that effect.

Towne v. Fitchburg Mut. F. Ins. Co. 7 Allen. 58; *Campbell v. New England Mut. L. Ins. Co.* 98 Mass. 381, 398.

The purpose of the statute is not to change the established law on that subject, but to define what facts shall be deemed material.

Pub. Stat. chap. 119, § 181.

"Representations ought consequently to be fair, and to omit nothing which it is material for the underwriters to know. * * * Fair dealing requires that he should state everything which might influence, and probably would influence, the mind of the underwriter in forming or declining the contract."

Columbian Ins. Co. v. Lawrence, 27 U. S. 2 Pet. 25 (7 L. ed. 835); *S. C.* 35 U. S. 10 Pet. 507 (9 L. ed. 512).

Fairness or not is to be determined with reference rather to the effect of the representation on the underwriter than to the intent or frame of mind of the maker of the representation.

Clarke v. Boehm, 8 Burr. 1909; *Clark v. New*

England Mutual Fire Ins. Co. 6 Cush. 351, 353; *Kimball v. Aetna Ins. Co.* 9 Allen, 543; *Livingston v. Maryland Ins. Co.* 11 U. S. 7 Cranch, 535 (8 L. ed. 480); *Baxter v. New England Ins. Co.* 3 Mason, 96; *Carpenter v. American Ins. Co.* 1 Story, 57; *Stetson v. Massachusetts Mut. F. Ins. Co.* 4 Mass. 336; *Bryant v. Ocean Ins. Co.* 22 Pick. 900; *Vose v. Eagle L. & H. Ins. Co.* 6 Cush. 48; *Davenport v. New England Mut. F. Ins. Co.* 6 Cush. 341; *Sawyer v. Coasters Mut. Ins. Co.* 6 Gray, 221, 223; *Lewis v. Eagle Ins. Co.* 10 Gray, 513; *Kimball v. Aetna Ins. Co.* 9 Allen, 540; *Wood v. Firemen's Ins. Co.* 126 Mass. 316.

It is impossible to make it certain that some effect may not have been produced upon the minds of the jurors by these instructions; and, as the instruction was in itself incorrect, it seems to be necessary that the verdict should be set aside.

Campbell v. New England Mut. L. Ins. Co. 98 Mass. 397.

The jury should have been instructed that the principal was responsible for the act of the agent within the scope of his agency; and that a material representation, not fairly made, by an agent in procuring insurance he was authorized to procure, would be a representation not fairly made by the principal.

Carpenter v. American Ins. Co. 1 Story, 57; *Sawyer v. Coasters Mut. Ins. Co.* 6 Gray, 223.

The importation into the contract of the words "on household furniture, * * * and occupied all the year round," etc., which, in the application, may have been regarded as words of representation only, supersedes all questions as to their materiality, and makes them essential parts of the contract, and warranties.

Fox, Warranty in F. Ins. and cases cited *passim*; *Sillem v. Thornton*, 3 El. & Bl. 868; *Hazard v. New England M. Ins. Co.* 33 U. S. 8 Pet. 557 (8 L. ed. 1049); *Fowler v. Aetna F. Ins. Co.* 6 Cow. 671, 676; *S. C.* 7 Wend. 270; *Roberts v. Chenango County Mut. Ins. Co.* 3 Hill, 501; *Jennings v. Chenango County Mut. Ins. Co.* 2 Den. 75; *Burrill v. Saratoga County Mut. F. Ins. Co.* 5 Hill, 188; *Frost v. Saratoga Mut. Ins. Co.* 5 Den. 154; *Egan v. Mutual Ins. Co.* 5 Den. 326; *Kennedy v. St. Lawrence County Mut. Ins. Co.* 10 Barb. 285; *Duncan v. Sun F. Ins. Co.* 6 Wend. 488; *Sargefield v. Metropolitan Ins. Co.* 61 Barb. 479; *Vandervoort v. Smith*, 2 Cai. 155; *Bryce v. Lorillard F. Ins. Co.* 55 N. Y. 240; *Wood v. Hartford F. Ins. Co.* 13 Conn. 533; *Lyons v. Providence Wash. Ins. Co.* 14 R. I. 109; *Higginson v. Dall*, 13 Mass. 96; *Higgins v. Livermore*, 14 Mass. 106; *Ather-ton v. Brown*, Id. 152; *Houghton v. Manufacturers Mut. F. Ins. Co.* 8 Met. 114; *Vose v. Eagle L. & H. Ins. Co.* 6 Cush. 42; *Daniels v. Hudson River F. Ins. Co.* 12 Cush. 416; *Blood v. Howard F. Ins. Co.* Id. 472; *Lee v. Howard F. Ins. Co.* 3 Gray, 533; *Kimball v. Aetna Ins. Co.* 9 Allen 540; *Campbell v. New Eng. Mut. L. Ins. Co.* 98 Mass. 389; *Goddard v. Monitor Mut. F. Ins. Co.* 103 Mass. 56; *Commonwealth v. Hyde & L. Ins. Co.* 112 Mass. 189; *Taylor v. Aetna Ins. Co.* 120 Mass. 254; *Wheeler v. Watertown F. Ins. Co.* 131 Mass. 1.

Any statement or description on the face of the policy which relates to the risk is a warranty.

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Wood v. Hartford F. Ins. Co. 13 Conn. 533; *Fowler v. Aetna F. Ins. Co.* 6 Cow. 673, 676; *McCluer v. Girard F. & M. Ins. Co.* 43 Iowa, 849; *Hoxsie v. Providence Mut. F. Ins. Co.* 6 R. I. 517; *Foot v. Aetna L. Ins. Co.* 61 N. Y. 595; *Eddy St. Iron Foundry v. Hampden S. & Mut. F. Ins. Co.* 1 Cliff. 300, 306.

The fair implication from the language of the statute is that, so far as the application is incorporated into the policy it shall, to that extent, be considered part of the contract, and a warranty.

Pub. Stat. chap. 119, § 133; *Campbell v. New England Mut. L. Ins. Co.* 98 Mass. 381; *Vose v. Eagle L. & H. Ins. Co.* 6 Cush. 42, 47; *Daniels v. Hudson River F. Ins. Co.* 12 Cush. 416; *Miles v. Connecticut Mut. L. Ins. Co.* 3 Gray, 580, 582; *Kennedy v. St. Lawrence County Mut. Ins. Co.* 10 Barb. 285, 290.

The place where personal property which is the subject of insurance is situated, is as material as if that place were itself the subject of the insurance; and when that description is made part of the policy, it is a warranty that the personal property shall continue so situated during the term of the policy.

Lyons v. Providence Wash. Ins. Co. 14 R. I. 109; *Eddy St. Iron Foundry v. Hampden S. & Mut. F. Ins. Co.* 1 Cliff. 305; *Wall v. East River Mut. Ins. Co.* 7 N. Y. 370; *Kennedy v. St. Lawrence County Mut. Ins. Co.* 10 Barb. 285; *Haws v. Fire Asso. of Philadelphia*, 1 Pa. (L. ed.) 341, 5 Cent. Rep. 713, 16 Ins. L. J. 402; *North American F. Ins. Co. v. Zaenger*, 63 Ill. 465; *McCluer v. Girard F. & M. Ins. Co.* 43 Iowa, 849; *Pearson v. Commercial U Assur. Co.* L. R. I. App. Cas. 498; *Sampson v. Security Ins. Co.* 133 Mass. 49.

The words "occupied all the year round" had reference to the future of the policy as well as to the condition of the house at its date, and the instruction tended to mislead the jury.

Sillem v. Thornton, 3 El. & Bl. 868.

There was no disputed fact left for the jury upon which they could be permitted to find occupancy of the house the year round; and the judge erred.

See *Fletcher v. Commonwealth Ins. Co.* 18 Pick. 419, 421; *Commonwealth v. Ober*, 12 Cush. 493; *Lane v. Old Colony & F. R. R. Co.* 14 Gray, 147; *Commonwealth v. Farnum*, 114 Mass. 267, 271.

The use of the word "void" by the court is exceptional, and not in accordance with its ordinary meaning, as established by judicial decisions in this Commonwealth and elsewhere, and by common usage.

Bouv. L. Dict. Void, and cases cited; *Carpenter v. American Ins. Co.* 1 Story, 57, 62; *Clark v. New England Mut. F. Ins. Co.* 6 Cush. 342, 352; *Bonditch Mut. F. Ins. Co. v. Winslow*, 3 Gray, 415; *Hale v. Mechanics Mut. F. Ins. Co.* 6 Gray, 169; *Edes v. Hamilton Mut. Ins. Co.* 3 Allen, 362; *Harrison v. City F. Ins. Co.* 9 Allen, 281; *Lawrence v. Holyoke Ins. Co.* 11 Allen, 337; *Ather-ton v. Phenix Ins. Co.* 109 Mass. 32; *Flote v. Springfield F. & M. Ins. Co.* 119 Mass. 259; *Smith v. Union Ins. Co.* 120 Mass. 90; *Oakes v. Manufacturers F. & M. Ins. Co.* 131 Mass. 165.

The evils consequent on departure from established rules of construction, to meet the hard-

ship of particular cases, are ultimately greater than could result from the uniform application of those rules.

Broom, Leg. Max. p. 111; Oakes v. Manufacturers F. & M. Ins. Co. 131 Mass. 164.

The policy has become void in the sense in which that word is commonly understood and used, and the underwriter is thenceforth freed from liability thereunder.

Glidden v. Manufacturers Ins. Co. 1 Sumn. 232; Martin v. Delaware Ins. Co. 2 Wash. 254; Hearne v. New England Mut. M. Ins. Co. 87 U. S. 20 Wall. 488 (22 L. ed. 395); Brazier v. Clap, 5 Mass. 1; Coffin v. Newburyport Mut. Ins. Co. 9 Mass. 449; Breed v. Eaton, 10 Mass. 21; Kettle v. Wiggin, 13 Mass. 68; Burgess v. Equitable M. Ins. Co. 126 Mass. 70.

This instruction and submission to the jury apparently proceeded upon the ground that the plaintiffs must show that their case came within the written provisions written in the contract. Juries in such cases need no judicial invitation to such a finding.

See remarks of Bigelow, *Ch. J.*, in *Dean v. American Mut. L. Ins. Co. 4 Allen, 96, 103.*

Wherever it has been held that a policy would reattach or revive after a temporary suspension, it has been only on the condition that the risk remained the same.

Worthington v. Bearse, 12 Allen, 382, 385.

The plaintiff's evidence showed, affirmatively, noncompliance with the terms of the contract.

Lee v. Howard F. Ins. Co. 8 Gray, 588, 592.

Messrs. L. W. Howes and J. H. Millett, for plaintiffs:

The jury must have found that all the answers and representations of the plaintiffs were fairly made, within the meaning of the clause in the policy stating what will avoid it; and that, whether any of them were erroneous or not, the risk was not increased by any erroneous statement or answer. Ring's answers to Powell's questions were at most but representations, and were not warranties.

Pub. Stat. chap. 119, § 138; Daniels v. Hudson River F. Ins. Co. 12 Cush. 416; Luce v. Dorchester Mut. F. Ins. Co. 105 Mass. 301.

No reference is made in the policy to any application, representations, or answers to defendant's letters by the plaintiffs, and none are incorporated into the policy.

Eastern R. R. Co. v. Relief F. Ins. Co. 98 Mass. 426.

Answers by the plaintiffs under a mistake of the full meaning of the questions put, with no intent to deceive, even though erroneous, would not affect the policy.

Corrigan v. Connecticut F. Ins. Co. 122 Mass. 299; Hinckley v. Germania F. Ins. Co. 140 Mass. 38.

These contracts are to be not only fairly, but liberally, construed, being often made by persons but little acquainted with legal forms and technicalities. The extreme doctrine of literal warranty should not be applied to them.

Allen v. Charlestown Mut. F. Ins. Co. 5 Gray, 384, 389.

The court will lean against such a construction as to impose upon the assured the burden of a warranty, and will neither create nor extend a warranty by construction.

Alabama Gold Life Ins. Co. v. Johnson, 36 Alb. L. J. 46.

Statements are representations, and not warranties, unless clearly made so by the policy.

Pub. Stat. chap. 119, § 138; Daniels v. Hudson River F. Ins. Co. 12 Cush. 416; Houghton v. Manufacturers Mut. F. Ins. Co. 8 Met. 114, 120-122; Elliott v. Hamilton Mut. Ins. Co. 13 Gray, 139.

No application for fire insurance shall be considered as a warranty or part of the contract, unless incorporated in full into the policy.

Pub. Stat. chap. 119, § 138.

No oral or written misrepresentation made in obtaining or securing a policy of fire or life insurance shall be deemed material, or defeat or avoid the policy, or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter misrepresented increases the risk of loss.

Pub. Stat. chap. 119, § 181; Daniels v. Hudson River F. Ins. Co. 12 Cush. 416.

The laundry was a part and parcel of the premises; and the Frost family being in charge of the premises in place of the plaintiffs, as they were, living in the laundry during that time was the same as if they had lived in the main house, so far as occupancy of the premises was concerned.

Harrington v. Fitchburg Mut. F. Ins. Co. 124 Mass. 126.

Dwelling-house embraces the entire congregation of buildings, main and auxiliary, or of separate rooms under one roof; the result is the same.

34 Alb. L. J. 284; Bish. Stat. Cr. 2d ed. § 278; Chase v. Hamilton Mut. Ins. Co. 20 N. Y. 52.

The name, "the Pebbly Beach House," itself was notice to defendant what it was, and what it was used for, and that, of necessity, it embraced not only the main house, but such other small structures as were used and are commonly used as appurtenant to such establishments *Blake v. Exchange Mut. Ins. Co. 12 Gray, 365; White v. Mut. F. Assur. Co. 8 Gray, 566.*

"Occupied all the year round" is mere description; but even though a warranty, and the premises were unoccupied, within the meaning of the law, for some period of time after the policy was issued, and preceding the fire, the policy would only be suspended or inoperative for the time being, and would be revived again when the occupancy was restored, unless the premises were left unoccupied for such length of time, and at a time so near the time of the fire, as to increase the risk.

Hinckley v. Germania F. Ins. Co. 140 Mass. 38; 1 Phill. Ins. § 975.

A temporary noncompliance with any of the stipulations of the policy, after its date, and before the fire, would not affect the policy (except during the period of such noncompliance) unless such noncompliance was at a time so near the time of the fire as to increase the risk, and did increase the risk.

Ibid.

Whether the kind of occupancy of the premises, or nonoccupancy, or whatever in law it may be called, from the last of September to the first part of November, had any tendency

to increase the risk at the time of the fire, was a question of fact submitted to the jury, and settled by their verdict.

Gamwell v. Merchants & Farmers Mut. F. Ins. Co. 12 Cush. 167; *Luce v. Dorchester Mut. F. Ins. Co.* 105 Mass. 298.

Answers to questions propounded by the insurers, unless clearly shown by the form of the contract to have been intended by both parties to be warranties, to be strictly and literally complied with, are to be construed as representations, as to which substantial truth in everything material to the risk is all that is required of the insured.

Moulton v. American L. Ins. Co. 111 U. S. 335 (28 L. ed. 447); *Campbell v. New England Mut. L. Ins. Co.* 98 Mass. 381; *Daniels v. Hudson River F. Ins. Co.* 12 Cush. 416.

Holmes, J., delivered the opinion of the court:

The policy sued upon is a Massachusetts Standard Policy. Pub. Stat. chap. 119, § 139.

The "description of property insured" describes various chattels, "all which contained in the frame dwelling-house, known as the 'Pebble Beach House,' Bass Rock, Gloucester, Mass. (on Ocean Avenue), and occupied all the year round." The judge instructed the jury that the plaintiffs must satisfy them that the building containing the property insured answered the above description at the time when the contract was made, and also at the time of the fire. The fire took place on May 4, 1884, and the attention of the jury was directed to the fact that during the previous October, and for a few days before and after, the family in charge lived in the adjoining laundry building, and not in house where the insured property was, as a circumstance to be considered by them in determining whether it properly could be called a building "occupied all the year round."

These instructions were sufficiently favorable to the defendant. Assuming that the jury could not have found that the breach in October was of so trifling a nature as not to prevent its remaining a house "occupied all the year round," or that the house was occupied in October; assuming also that the words quoted look to the future occupation of the house, and that the plaintiff could not have recovered for a loss while the house was unoccupied,—the stipulation must be taken to have been satisfied if the permanent occupation was resumed so long before the fire that the temporary absence of an occupant plainly appears to have had no connection with the loss. *Hinckley v. Germania F. Ins. Co.* 140 Mass. 38.

The description is not a description of the insured articles, but of the house where they are contained; and although the introductory words, "while contained in," governing the whole clause, fairly enough may be held to confine the operation of the policy to such times as the articles are contained in a house answering to the whole of that description, we see no reason why they should do more than suspend the insurance while the articles are not contained in such a house. The fact that the house was unoccupied for a short time, six months before the fire, can have no greater effect than removing the goods to safety-deposit

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vaults would have done. In either case we assume the goods would not have been covered by the insurance for the time being; but it would be a startling proposition that in the latter the insurers would have had a right to repudiate the policy after the goods had been brought back to the place mentioned in it.

After instructing the jury concerning the contract, the court proceeded to deal with certain representations made by one who, as the court stated, "was confessedly the authorized agent and representative of the plaintiffs." These were contained in a paper headed "Application for Insurance," and a letter and a plan accompanying it. Some of these representations were similar to the statements in the policy already discussed, and necessarily fell under considerations with the rest as representations. But all that was said plainly referred to the contents of these other papers, and did not qualify or change the instructions with regard to the stipulations of the contract.

So far as the occupation of the house was concerned, the representation seems to have been of no importance, as such, since the clause was made a part of the contract, and the plaintiffs were held to the rules applicable to such a clause when part of the contract. *Goddard v. Monitor Mut. F. Ins. Co.* 108 Mass. 56, 59.

But there was also a representation, not made part of the contract, that there were no houses within 100 feet, which may not have been literally accurate, because the poolroom belonging to the house, but in a separate building, was not mentioned.

The jury were instructed to consider whether the facts stated were matters material to the risk,—“whether insurance companies are accustomed to charge more when there are wooden buildings near to that which they are about to insure” (*Luce v. Dorchester Mut. F. Ins. Co.* 105 Mass. 298, 301); if the facts were material, whether the representations were false; and, if false, whether the representations were made innocently and by mistake, and so fairly made. We are of opinion that there was error in putting the last question to the jury, and in thus allowing them to find for the plaintiffs, if they had made misrepresentations on matters which increased the risk of loss, provided they had not been guilty of fraud.

It is true that Stat. 1864, chap. 196, now Pub. Stat. chap. 119, § 138, enacts, with regard to fire insurance, that the application shall not be considered as a warranty or a part of the contract. But it seems to have been thought in *Eastern R. R. Co. v. Relief F. Ins. Co.* 98 Mass. 420, 426, that this statute did not change the common-law rule bearing upon this case, concerning representations forming the basis of a policy. *Kimball v. Aetna Ins. Co.* 9 Allen, 540, 542; *Campbell v. New England Mut. L. Ins. Co.* 98 Mass. 381, 390, 396; *Moens v. Heyworth*, 10 Mees. & W. 147, 157, 158.

However this may be, the effect of the later statute, 1878, chap. 157, now Pub. Stat. chap. 119, § 181, is that, if the matter misrepresented increases the risk of loss, it still may defeat the policy although not made with intent to deceive. The provision of § 138, that the application shall not be considered a warranty, means only that an inquiry into the effect of matters there represented upon the risk of loss shall not

be cut off, and that substantial accuracy as to material facts shall be sufficient. Perhaps the rest of the section makes it more difficult to say, as in the decisions cited, that in case of a material misrepresentation there has been no agreement upon the subject-matter of the contract; because that form of statement seems to imply that material representations are tacitly incorporated into the description in the contract of the property insured, and thus to bring the cases within the principles of *Goddard v. Monitor Mut. F. Ins. Co. supra*; *Gardner v. Lane*, 98 Mass. 517; *S. C. 13 Allen*, 89; and 9 Allen, 492, where there was a disagreement between the express words of the description and the designated object. But although misrepresentations which form no part of a contract in any sense, but merely offer motives for making it, commonly do not affect its validity unless fraudulent, it is perfectly possible to require the insured to see, at his peril, that his material statements are true, if it is thought politic to do so, because of the necessity which the insurer is under of seeking the information, and of getting it in that way. So the law stood after the statute of 1878, and probably before *Eastern R. R. Co. v. Relief F. Ins. Co. supra*; and whether it required a change in the mode of statement or not is unimportant for our present purposes. The substantive reasons which led to the common-law rule are still recognized as in full force.

There has been no change in the law since, unless one was made by Stat. 1881, chap. 166, now Pub. Stat. chap. 119, § 189, fixing the form of the standard policy. The material language is: "This policy shall be void if any material fact or circumstance stated in writing has not been fairly represented by the insured." Of course it is possible to read the word "fairly" as meaning "honestly," and as cutting down the effect of misrepresentations which form the basis of insurance to the single case of fraud. But it is just as possible to read the word as requiring a fair correspondence between the representation and the fact; and in view of the well-known reasons for requiring it, to which we have referred, and of the fact that the Act of 1878 stands upon the statute book in § 181 unmodified, although manifestly inconsistent with the former interpretation, we are of opinion that this latter reading must be adopted.

Exceptions sustained.

Helen E. PHELPS

v.

George W. PHELPS *et al.*

1. It is not the right of parties or their counsel to submit the case upon a statement of facts which is imperfect and inconclusive in itself, with an agreement that, if upon any facts the plaintiff's case can be maintained, the case may be referred to a master or assessor to determine whether such vital facts exist. This is asking the court to pass upon a case which may never arise, and to decide questions which may be purely speculative.

2. Where, under the terms of a will, a

defendant against whom a decree for alimony has been taken has the right to appropriate the whole of the income coming to him under a will for the support of his son, if it is reasonably needed for that purpose; and the plaintiff alleges that "the income of one half thereof is largely in excess of the amount needed for the proper support of the said Willis Phelps" (the son), "named herein as defendant, and largely in excess of any sum by the said John W." (against whom the decree in alimony is entered) "used or appropriated therefor;" and the statement of facts does not show what the amount of the trust fund is, what the income is, what the age or condition of the son is, or what is needed for his support, or whether the whole, or any part of it, has or has not been appropriated for that purpose,—the facts stated are not sufficient to entitle the plaintiff to reach any portion of the income in satisfaction of her decree for alimony.

(Hampton—Filed January 3, 1888.)

RESERVED for the full court. *Reservation and case stated discharged.*

The case was presented upon the following agreed statement of facts:

This was a bill in equity brought by plaintiff, a creditor of John W. Phelps, by virtue of a decree for alimony obtained by plaintiff against said John W., as stated in the bill, to obtain payment of the amount due and to become due her, under said decree, from property belonging to the estate of Willis Phelps, deceased, in which, it is claimed by plaintiff, said John W. Phelps has an interest not attachable at common law. The bill and the answers of the several defendants may be referred to. Copy of the bill is annexed and made a part of this statement.

John W. Phelps has paid nothing under the decree for alimony. Willis Phelps is a minor, under the care of his father, and without means of support except under the provisions of said will. More than two years have elapsed since the executors gave bonds for the performance of their trust, and due notice was given of the appointment; and all claims against the estate have been paid, and there is a large amount of personal and real estate in the hands of the executors in this State to which the residuary clause of said will applies.

If, in the opinion of the court, plaintiff's bill can be maintained, the case may be referred to a master to determine the amount of the income of said estate, and what part thereof should be applied for the maintenance of Willis Phelps, and what part for the satisfaction of plaintiff's claim, subject to such rights as the executors of said will, or any person interested in said will, may have (if any), to retain or hold any sums due said John W., under said will, for any debts or sums owing by him to said estate, or to the testator in his lifetime.

Mr. Gideon Wells, for plaintiff:

Plaintiff's decree for alimony is a judgment against defendant, enforceable by these proceedings.

Allen v. Allen, 100 Mass. 373; *Livermore v. Boutelle*, 11 Gray, 217; *Chase v. Chase*, 105 Mass. 385; *Howard v. Howard*, 15 Mass. 196; *Hangford v. Van Auken*, 79 Ind. 802; *Boulough v. Boulough*, 68 Pa. 495.

If plaintiff is not technically a creditor of defendant, this proceeding is the proper method for enabling this court to compel him to perform its decree.

Slade v. Slade, 106 Mass. 499; *Barber v. Barber*, 62 U. S. 21 How. 582 (16 L. ed. 226).

The balance of the income is subject to his absolute disposal. The statement in the will that the income is given to John W. Phelps for his support is the statement of a purpose or motive of the gift, but does not amount to a limitation, or prevent its vesting absolutely in him.

Gibbins v. Shepard, 125 Mass. 541; *Youngusband v. Gisborne*, 1 Coll. 400; *Snordon v. Dales*, 6 Sim. 525; *Graves v. Dolphin*, 1 Sim. 66.

The question whether or not a fund is alienable depends upon whether the beneficiary can control it (in this case the income), or whether the trustees have both the custody and control.

Leavitt v. Beirne, 21 Conn. 1; *Farmers & M. Sav. Bank v. Brewer*, 27 Conn. 600; *Nichols v. Eaton*, 91 U. S. 716 (23 L. ed. 254).

There is no discretion vested in the executors or trustees, or in anyone else, as to the amount, or time when the income is to be paid, as in—

Hall v. Williams, 120 Mass. 344; *Godden v. Crouchurst*, 10 Sim. 648; *Twopeny v. Peyton*, Id. 468.

The fact that Willis is entitled to support out of the income paid to John W. does not affect the nature or quality of John W.'s title.

Hyde v. Wason, 181 Mass. 450.

There is nothing in the will which provides that the income cannot be anticipated, assigned, or subjected to the claims of creditors. Such exemption will not be presumed, but must be clearly expressed.

Broadway Nat. Bank v. Adams, 183 Mass. 171; *Parkins v. Dorris*, 1 Mo. (L. ed.) 296, 2 West. Rep. 420, 20 Mo. App. 1; *Sparhawk v. Cloon*, 125 Mass. 263; *Nichols v. Eaton*, 91 U. S. 716 (23 L. ed. 254).

Should John W. fail to support Willis in a proper manner, this court can interfere and make suitable provisions for his maintenance out of the income.

Davey v. Ward, L. R. 7 Ch. D. 754; *Wainford v. Heyl*, L. R. 20 Eq. 321; *Ireland v. Ireland*, 84 N. Y. 321; *Bohon v. Barrett*, 79 Ky. 378; *Cromie v. Bull*, 81 Ky. 646.

It is not a new thing to ask the court to make an apportionment, when different persons are entitled to support, to the end that creditors may obtain their debtor's proper share.

Page v. Way, 3 Beav. 20; *Kearsley v. Woodcock*, 3 Hare, 185; *Lord v. Bunn*, 2 Younge & C. 98; *Wallace v. Anderson*, 16 Beav. 538.

Mr. George M. Stearns, for John W. Phelps and Willis Phelps:

"The principal object in construing a will is to ascertain the intention of the testator. This being ascertained will prevail unless it is inconsistent with some fixed rule of law."

Brown v. Merrill, 181 Mass. 324; *Phelps v. Phelps*, 2 Mass. (L. ed.) 378, 4 New Eng. Rep. 183, 143 Mass. 570.

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The decisions of this court recognize the principle that, if the intention of the founder of a trust is to give to the equitable life tenant a qualified and limited, and not an absolute, estate in the income, such life tenant cannot alienate it by anticipation, and his creditors cannot reach it at law or in equity.

Broadway Nat. Bank v. Adams, 183 Mass. 170-178; also *Foster v. Foster*, Id. 179.

"It is clear that, if the trustee was to pay the income to plaintiff under an order of the court, it would be in direct violation of the intention of the testator and of the provisions of the will. The court will not compel the trustee thus to do what the will forbids him to do, unless the provisions and intentions of the testator are unlawful."

Broadway Nat. Bank v. Adams, *supra*.

Morton, Ch. J., delivered the opinion of the court:

The statement of facts upon which the case is submitted to the court is imperfect, and does not contain enough to enable us to determine the rights of the parties. It has been held that, under the will of Willis Phelps, his son, John W. Phelps, does not take the income of one half of the residue absolutely, but it comes into his hands charged with a trust for the support of his son, Willis Phelps, who could enforce its due appropriation, in part, for his benefit in a court of equity. *Phelps v. Phelps*, 2 Mass. (L. ed.) 378, 4 New Eng. Rep. 183, 143 Mass. 570.

Under the terms of this will, John W. would have the right to appropriate the whole of the income coming to him for the support of Willis, if it was reasonably needed for that purpose. The plaintiff's bill proceeds upon this view of the will, and alleges that "the income of one half thereof is largely in excess of the amount needed for the proper support of the said Willis Phelps, named herein as defendant, and largely in excess of any sum by the said John W. used or appropriated therefor." But the statement of facts does not show what the amount of the trust fund is; what the income is; what the age or condition of Willis is; or what is needed for his support; or whether the whole, or any part of it, has or not been appropriated for that purpose. It is not the right of parties or their counsel to submit a case upon a statement of facts which is imperfect and inconclusive in itself, with an agreement that, if upon any facts the plaintiff's case can be maintained, the case may be referred to a master or assessor to determine whether such vital facts exist. This is what the parties have attempted in this case. It is asking the court to pass upon a case which may never arise, and to decide questions which may be purely speculative. *Smith v. Cudworth*, 24 Pick. 196.

We can only decide now that upon the facts stated the plaintiff cannot maintain her bill. Whether she can do so upon any state of facts cannot be decided until the facts are settled. But, as the case was probably presented in this form under a misapprehension as to the rights of the parties, we are of opinion that the just and proper result is that the reservation and case stated should be discharged. *Old Colony R. R. Co. v. Wilder*, 137 Mass. 586.

Order accordingly.

William D. PICKMAN *et al.*, *Appts.*,
v.

Inhabitants of PEABODY.

Where the purpose for which the original charter was granted was that of "conveying fresh water, by subterranean pipes, into the towns of Salem and Danvers;" and the statute of 1850, § 1, so far as it expressly touches the pond from which the water is to be taken, confers the authority to conduct off its waters, by subterranean pipes, into the land owned by the parties conveying such water, for the purposes and objects for which the original charter was granted; and the parties chartered are authorized to construct, lay down, and maintain any dam or dams, pipes, fountains, or reservoirs, whatsoever, upon and over any land whatsoever,—the only purpose contemplated by the Act for which there was any apparent need of dams was to build reservoirs upon the chartered parties' own lands; and, as nothing is said about flowing lands of other people, and the only compensation provided is for damage by taking the water, the authority conferred will not be construed to admit of a right to build dams and sluiceways at the mouth of the pond, and to carry out a new scheme which plainly never entered the mind of the Legislature. For damages resulting from the erection of a stone dam along the shores of the pond, and setting the waters of said pond back upon, and overflowing large quantities of, the plaintiff's land, the remedy is not under the Act creating the proprietors a corporation and the several Acts in addition thereto and the Acts of 1881, chap. 171.

(Essex — Filed January 4, 1896.)

ON report upon judgment for defendants.
Judgment set aside.

The declaration charges that the defendants broke and entered a parcel of land in the town of Peabody, described by metes and bounds, the property of the plaintiffs, in July, 1882, and dug up and removed large quantities of earth and soil, and put thereon large quantities of stones, and erected thereon a stone dam along the shores of Spring Pond, and built thereon a building, and have maintained the dam and building until the date of the writ; and charges that, long before the acts above complained of, plaintiffs were owners of large tracts of lands in said Peabody and Lynn, bounding on Spring Pond, so called; that, by doing the acts above set forth, and by erecting and maintaining a permanent dam across the outlet of said Spring Pond, the defendants had set the waters of said pond back upon, and overflowed large quantities of, their said lands. The defendants' answer claimed that they purchased all the franchises, rights, and property of the Proprietors of the Salem & Danvers Aqueduct, a corporation created by an Act passed March 9, 1797, and the several Acts in addition thereto; that said corporation was duly organized under said Acts;

and that whatever acts were done by the defendants, upon or affecting the property of the plaintiffs, were done under said Acts and chapter 171 of the Acts of 1881, and by virtue thereof and authority of law. They also claimed by prescription the right to maintain the dam across the outlet of Spring Pond. Upon the proofs, and offers of proof, the court ruled that the defendants became the owners of the franchises, rights, and privileges of the property of the original proprietors, and that the plaintiffs could not maintain this action, but that their only remedy was under the Acts creating said proprietors a corporation, and the several Acts in addition thereto, and said chapter 171 of the Acts of 1891.

The plaintiffs excepted to the rulings of the court; and the court gave judgment for the defendants, and reports the case and its findings and rulings to the Supreme Judicial Court. If said rulings and findings are correct, the judgment is to stand; but if wrong, the judgment is to be set aside and the case to stand for trial.

Messrs. J. G. Abbott, S. A. B. Abbott, and C. G. Saunders, for plaintiffs:

If the defendants exceeded the power and authority given them by the statutes referred to, they are clearly liable in an action of tort (*Brickett v. Haverhill A. Co.* 1 Mass. (L. ed.) 714, 2 New Eng. Rep. 819, 142 Mass. 394; *Blood v. Nashua & Lowell R. R. Corp.* 2 Gray, 187; *Warren v. Spencer Water Co.* 1 Mass. (L. ed.) 775, 3 New Eng. Rep. 111, 148 Mass. 155); or if, in taking private property, they did not comply with the terms of the Act giving the power (*Wameit Power Co. v. Allen*, 120 Mass. 352; *Lund v. New Bedford*, 121 Mass. 286).

The power to appropriate private property to public use must be clearly and certainly given.

Thacher v. Dartmouth Bridge Co. 18 Pick. 501; *Glover v. Boston*, 14 Gray, 282. See also *Fertilizing Co. v. Hyde Park*, 97 U. S. 606 (24 L. ed. 1039); *Atty-Gen. v. Jamaica Pond A. Corp.* 123 Mass. 865; *Glover v. Boston*, 14 Gray, 282-288; *Wilson v. Lynn*, 119 Mass. 178; *Brigham v. Edmands*, 7 Gray, 363; *Newton v. Mahoning County*, 100 U. S. 548 (25 L. ed. 710); *Inland Fisheries v. Holyoke W. P. Co.* 104 Mass. 446; *Lewiston v. Lincoln County*, 30 Me. 29.

The defendants have not complied with the terms and conditions of the Act giving them the power to take the water, and are liable to an action of tort.

Wameit Power Co. v. Allen, 120 Mass. 352; *Lund v. New Bedford*, 121 Mass. 286; *Brickett v. Haverhill A. Co.* 1 Mass. (L. ed.) 714, 2 New Eng. Rep. 819, 142 Mass. 394; *Warren v. Spencer Water Co.* 1 Mass. (L. ed.) 775, 3 New Eng. Rep. 111, 148 Mass. 9.

A grantee of the right to appropriate property other than his own is strictly confined to the terms of the grant. To justify himself in doing any acts under it, he must show the acts are clearly authorized by the language used, or are absolutely necessary in order to give the grant effect.

Blood v. Nashua & L. R. R. Corp. 5 Gray, 187; *Lawrence v. Fairhaven*, 5 Gray, 110; *Perley v. Ohandler*, 5 Mass. 454; *Roue v. Granite Bridge Corp.* 21 Pick. 844; *Mellen v. Western R. R. Corp.* 4 Gray, 301.

The corporation conducted the waters of the

pond by underground pipes to its own lands, and did not undertake to dam the outlet or raise it above high-water mark, and so cover private lands with water. This exhausted the authority given by the Act. It was an election of the manner of taking the water of the pond which bound the corporation and its successors.

Cambridge v. Middlesex County, 117 Mass. 79; *Brigham v. Agricultural B. R. R. Co.* 1 Allen, 316; *Grew v. Broadway R. R. Co.* 23 L. R. N. S. 841.

Usually, in statutes like the one in question, the law requires a taking, with a full description of the property taken to be filed with some public office; and the courts have holden that the description must be clear and precise, or it will not justify any action under it.

Wilson v. Lynn, 119 Mass. 174-178; *Housatonic R. R. Co. v. Lee & H. R. R. Co.* 118 Mass. 391.

The cases before cited, requiring the utmost clearness and certainty of language when private property is taken, sustain the proposition that the property taken must be clearly and certainly described and defined.

Glover v. Boston, 14 Gray; 288, and the cases before cited.

The two former cases against the aqueduct corporation have no applicability to the contention in this case.

The first, *Fay v. Salem & D. Aqueduct*, 9 Allen, 577, merely decided that the corporation had the right to take the water of Spring Pond, and that the statute gave a remedy for such taking.

The second, *Fay v. Salem & D. Aqueduct*, 111 Mass. 27, decides that the Legislature had the right to authorize the drawing off the waters of a great pond, without paying damages to riparian owners. Neither touches the question whether the statute gives the authority to raise the pond and flow riparian lands.

Meers. W. C. Endicott and H. Wardwell, for defendants:

The town, by the purchase, became entitled to all the rights and privileges, and subject to all the duties and liabilities, of said aqueduct corporation.

Acts 1870, chap. 98, § 1; Pub. Stat. chap. 27, § 27.

Under these various legislative Acts, the town has two kinds of rights concerning the taking or using lands: (1) to take and hold lands in fee (Act 1797, § 2; 1881, chap. 171, §§ 1, 3); (2) to make erections upon and under lands, and to use the lands for the purposes named in the Acts, leaving in the owners the fee and the right to use the land for purposes consistent with the use by the town (Act 1797, § 6; 1839, chap. 114, § 1; 1850, chap. 273, § 1; 1881, chap. 171, § 2).

The following provisions are clearly sufficient to give the right to raise the water of the pond and to flow adjoining land:

Act 1850, § 1; Act 1881, § 2.

Building a dam across the outlet of Spring Pond for the purpose of reserving and storing the waters of the pond was making of the pond a reservoir, within the terms and meaning of the Acts of the Legislature; and it is admitted that the defendants had this purpose in what it did.

That the water of the pond should be raised,
2 Mass.

and adjoining land flowed, was but the natural and necessary consequence of these Acts.

See *Sudbury Meadows v. Middlesex Canal*, 23 Pick. 36, 48, 49.

In the legislative Acts in this case, there is no restriction on the right to raise water, as there is in certain water Acts which have been considered by this court; for example, the Act concerning the Haverhill Aqueduct Company, 1867, chap. 78 § 5; *Brickett v. Haverhill A. Co.* 1 Mass. (L. ed.) 714; 2 New Eng. Rep. 819, 142 Mass. 394, 395.

In the case of *Fay v. Salem & D. Aqueduct*, 9 Allen, 577, and 111 Mass. 26, between these same trustees, plaintiffs, and this aqueduct company, both relating to the same land and the same estate of the plaintiffs, complaint was not made of raising the water of the pond, but of taking the water away. But other acts complained of in the case first named are shown by the record to be the same in character as those alleged here.

The acts of the aqueduct company complained of in said cases in 9 Allen and 111 Mass. were all at the pond, and long after the acts of the aqueduct company between 1850 and 1853 above mentioned.

Continued exercises of the powers given in these Acts of the Legislature are necessary for the continued and increased use of the aqueduct, and no such limitation is to be implied.

Sudbury Meadows v. Middlesex Canal, 23 Pick. 36, 52, 58; *Ipswich Mills v. Essex County*, 108 Mass. 363, 365.

Even if it could be proved, as the plaintiffs offered, that they received no notice of the acts of the defendants until more than a year after the same were done, the rights of the plaintiffs for any injury sustained are fully protected by the provisions of the various Acts.

Act 1839, chap. 114, § 2; 1850, chap. 273, § 2; 1881, chap. 171, § 6.

The sufficiency of these provisions is recognized in the cases above cited between the plaintiffs and the aqueduct company.

In *Brickett v. Haverhill A. Co.* 1 Mass. (L. ed.) 714, 2 New Eng. Rep. 819, 142 Mass. 394, similar provisions for compensation in the statute there in question are declared to be adequate, and the statute held to be constitutional.

See also *Worcester G. L. Co. v. County Commrs.* 138 Mass. 289, 291; *Cambridge v. Middlesex County*, 6 Allen, 134.

Holmes, J., delivered the opinion of the court:

This is an action of tort for entering and building a dam upon the plaintiffs' land, and for flowing other land belonging to the plaintiffs, on the borders of Spring Pond, in Peabody, Salem, and Lynn. The defendants, as allowed by Stat. 1870, chap. 98, § 1; Stat. 1878, chap. 255 (Pub. Stat. chap. 27, § 27), have purchased all the rights and franchises of the Proprietors of the Salem & Danvers Aqueduct; and justify under the Acts giving that corporation its powers (viz., Stat. March 9, 1797; 1839, chap. 114; 1850, chap. 273), and also under Stat. 1881, chap. 171; and set up that the remedy, if any, is by petition under those Acts.

Stat. 1881, chap. 171, may be laid out of the case, because, if the authority given by that Act applies to any of the Acts complained of,

we must assume that it was not pursued, as no description of the lands taken for the dam or by flowing was filed as required by § 5. *Keniston v. Arlington*, 2 Mass. (L. ed.) 494, 4 New Eng. Rep. 340, 144 Mass. 456. Of the other Acts mentioned, Stat. 1850, chap. 278, is the only one relied on as authorizing what the defendants have done.

The first section of the Statute of 1850 is as follows: "The said corporation is hereby empowered to conduct, by subterranean pipes, into its own land in Salem and Danvers, the waters of Spring Pond and Brouns Pond, so-called, and also the waters of the brook in the towns of Danvers and Salem, now dammed by said aqueduct corporation, which it now has, or may acquire the right to take and use, for the purposes and objects for which the original charter was granted; and for said purposes may construct, lay down, and maintain any dam or dams, pipes, fountains, or reservoirs, whatsoever, upon and over any land whatsoever, subject to the following provisions hereinafter contained." Section 2 provides a remedy, "if any person or corporation shall suffer damage by the taking the water aforesaid." No other remedies are provided, and the remaining sections are immaterial. See *Fay v. Salem & D. Aqueduct*, 9 Allen, 577; *Same v. Same*, 111 Mass. 27.

The authority to construct dams upon any land whatsoever "for said purposes,"—that is, it would seem, "for the purposes for which the original charter was granted,"—is broadly expressed; but upon a consideration of the whole section, and of what was done under it at the time, we are of opinion that it does not justify the defendant's acts.

The purpose for which the original charter was granted is that of "conveying fresh water by subterranean pipes into the towns of Salem and Danvers." The power given by the Act of 1850, so far as it expressly touches the pond, is to conduct off its waters by subterranean pipes. It hardly can have been deemed necessary to dam the pond, still less to raise it above its natural level, as has been done, in order to carry off its water in this way. The only purpose contemplated by the Act, for which there was any apparent need of dams, was to build reservoirs. The reservoirs contemplated by the Act would seem to be reservoirs upon the corporation's own land, as the power given is to conduct the waters "into its own land." Nothing is said about flowing land of other people. The only provision for compensation is for damage by taking the water. When the Act was passed, the company simply built a series of reservoirs on its own land; and thus things remained until 1882. It seems to us more reasonable to construe the power to build dams as limited to the scheme contemplated and carried out, and by the absence of express powers to flow, and of provisions for damages caused by flowing, rather than to extend by implication the powers to flow and the remedies for the damage caused by their exercise, so as to admit of a right to build dams and sluiceways at the mouth of the pond, and to carry out a new scheme, which plainly never entered the mind of the Legislature.

Judgment set aside, and case to stand for trial.

COMMONWEALTH of Massachusetts v.

John McNEFF

1. On the trial in the superior court, on appeal, of a complaint against defendant, who had a license of the first class to sell liquors to be drunk on the premises, for keeping and maintaining a common nuisance, consisting of a tenement used for the illegal sale and illegal keeping of intoxicating liquors, on the 1st day of May, 1886, and on divers other days between that day and November 1, 1886, evidence was properly received of sales made to one O'Brien, who testified that he had been a drunkard during the past year, and had been convicted several times of drunkenness during the same period, and that he was known to have been a drunkard, by the defendant, although the evidence was not of the same offense of which the defendant had been convicted before the trial justice. The evidence was admissible as tending to prove the offense alleged in the complaint. If the sales were before the time laid in the complaint, they would have been admissible upon the question whether the defendant kept the house.
2. Although there was an oversight in an instruction that "evidence of sales to a person who was a drunkard or a person intoxicated and known to the defendant to be intoxicated would be evidence," etc.,—as it did not explicitly require that the drunkard should "be known to be a drunkard," in the language of Pub. Stat. chap. 100, § 9, cl. 4,—yet, as an important part of the evidence was admitted to prove that the person to whom defendant sold was a drunkard, and the jury were told that they must be satisfied that the defendant knew it, and the defendant's knowledge was one of the controversies in the case, and he failed to call the judge's attention to the slip of language, it will be assumed the instruction was properly understood by the jury.
3. Evidence was admissible that the defendant testified in another case, in October, 1886, "that he knew said O'Brien had frequently been intoxicated, but that he had never sold to him when he was intoxicated, although he had sold to him when he was not intoxicated."

(Middlesex—Filed January 2, 1888.)

ON defendant's exceptions. *Overruled.*
This was a complaint against defendant for keeping and maintaining a common nuisance, to wit, a certain tenement in Hopkinton used for the illegal sale and illegal keeping of intoxicating liquors, on the 1st day of May, 1886, and on divers other days between that day and November 1, 1886.
It was agreed that the defendant had a license of the first class to sell liquors to be drunk on the premises.

At the trial in the superior court the government put in evidence tending to prove one sale at 5 o'clock in the morning of July 3, 1886, and another sale made at about the same hour on July 4, 1886, which was on Sunday. This was the evidence on which the defendant was convicted before the trial justice.

The government also offered evidence of sales made to one O'Brien, a person who testified that he had been a drunkard during the past year, and had been convicted several times of drunkenness during the same period, and that he was known to have been a drunkard by the defendant.

The defendant objected to this evidence on the ground that it was not evidence of the same offense of which he was convicted before the trial justice. The court ruled that the evidence was admissible as tending to prove the offense alleged in the complaint. To this ruling the defendant excepted.

There was evidence that in the trial of another case, in October, 1886, the defendant testified that he knew said O'Brien had frequently been intoxicated, but that he had never sold to him when he was intoxicated, although he had sold to him when he was not intoxicated.

The defendant objected to the admission of this testimony on the ground that there was nothing to show that it referred to the time mentioned in the complaint. The court ruled that the evidence was admissible, but that the jury must be satisfied that the defendant knew he was a drunkard or that he had been intoxicated within six months; and the defendant excepted.

The defendant asked the court to instruct the jury that "a building cannot be said to be used for the illegal sale of intoxicating liquors, within the meaning of Pub. Stat. chap. 101, § 6, which makes it a nuisance; nor can the proprietor be said to keep or maintain such common nuisance, within § 7, on the strength of casual sales, made without premeditation, in the course of a lawful business. Not only do the words 'keep or maintain' import a certain degree of permanence, but the same idea is usually a part of the conception of a nuisance."

The court refused so to rule, and instructed the jury that "evidence of more than one sale of intoxicating liquors by the defendant contrary to the terms of his license would be evidence for the jury to consider upon the question whether he kept a liquor nuisance, and that evidence of one sale would not be sufficient to convict the defendant. Evidence of sales to a person who was a drunkard or a person intoxicated and known to the defendant to be intoxicated would be evidence on which the jury might convict the defendant if he kept the premises for the purpose of making such sales."

The jury returned a verdict of guilty, and defendant alleged exceptions.

Mr. P. J. Doherty, for defendant:

Until the license is revoked by the authority empowered to issue it, it remains in full force and virtue, notwithstanding there may have been made an illegal sale on the premises.

See *Commonwealth v. Patterson*, 138 Mass. 498, 500.

By the statute (Pub. Stat. chap. 100, sec. 9, subsec. 4), sales "to a person known to be a

drunkard" are made illegal. It is not a sale to a drunkard which the law forbids, because such a sale may be innocently made to a person who is a drunkard, but who is not known to the person making the sale to be a drunkard. As the defendant is not alleged to have stated that he sold to said O'Brien within the time mentioned in the complaint, the evidence was inadmissible.

Commonwealth v. Adams, 4 Gray, 28.

Mr. Andrew J. Waterman, Atty-Gen., for the Commonwealth:

The evidence objected to was competent upon the question whether the defendant kept the house at the time alleged in the indictment.

Commonwealth v. Kelley, 116 Mass. 841.

The evidence offered of the defendant's knowledge as to a witness being an habitual drunkard was properly admitted, and its limitations duly brought to the attention of the jury.

Commonwealth v. Carney, 108 Mass. 417.

The court properly refused, as within its discretion, to give the ruling asked for by the defendant. The court is never called upon to give instructions in the language requested.

Commonwealth v. Cobb, 120 Mass. 856.

In the present case the instructions given embraced substantially, though in different language, all the material instructions requested by the defendant, and were clearly correct.

Commonwealth v. Tabor, 188 Mass. 496; *Commonwealth v. Murray*, 138 Mass. 508; *Commonwealth v. Patterson*, 138 Mass. 498; *Commonwealth v. Kerrissey*, 141 Mass. 110; *Commonwealth v. Coolidge*, 138 Mass. 198.

Holmes, J., delivered the opinion of the court:

Commonwealth v. Patterson, 138 Mass. 498, did not decide that even a single illegal sale might not be evidence of maintaining a liquor nuisance (*Commonwealth v. Coolidge*, 138 Mass. 198); but simply that a single sale, made, it might be, casually and without premeditation, could not be said necessarily, and as matter of law, to make the seller guilty of maintaining such a nuisance. If illegal sales on two different days were proved, the elements of continuing use of the building for that purpose, which would not necessarily follow from one sale, would be inferred more easily, and might be inferred by the jury. *Commonwealth v. Tabor*, 188 Mass. 496; *Commonwealth v. Murray*, 138 Mass. 508. The ruling of the court on this point was sufficiently favorable to the defendant.

There was an oversight in the instruction that "evidence of sales to a person who was a drunkard or a person intoxicated and known to the defendant to be intoxicated would be evidence," etc., as it did not explicitly require that the drunkard should be "known to be a drunkard." Pub. Stat. chap. 100, § 9, cl. 4. But an important part of the evidence was admitted, as we admitted it, partly, at least, for the purpose of showing that the defendant knew that a person to whom he sold was a drunkard; and the jury were then told that they must be satisfied that the defendant knew it. The defendant's knowledge seems to have been one of the controversies in the case; and, as the judge's attention was not called to this

slip of language, we think it fair to assume that the words "known to the defendant to be intoxicated" were understood to extend the requirements of knowledge by implication to the case of the drunkard also, or at least that the omission was not understood to overrule the requirement of knowledge, which had been laid down before, and which the whole course of the case had shown to be insisted on as material.

The exceptions do not show when the sales to O'Brien took place. We infer that they were not the same sales which were proved before the trial justice; but if, as may be presumed, they were sales within the time during which the defendant is alleged in the complaint to have maintained the nuisance, they tended to establish the same offense of which the defendant was convicted below. *Commonwealth v. Ronan*, 126 Mass. 59. The sales were not the offense, as in *Commonwealth v. Blood*, 4 Gray, 81, but only evidence of the offense. But if the sales had been before the time laid in the complaint, they would have been admissible, so far as appears, upon the question whether the defendant kept the house. *Commonwealth v. Kelley*, 116 Mass. 341.

The evidence that the defendant testified, in another case, in October, 1886, "that he knew said O'Brien had frequently been intoxicated, but that he had never sold to him when he was intoxicated, although he had sold to him when he was not intoxicated," was admissible as tending to show that the defendant knew that O'Brien was a drunkard, between May 1 and November 1, 1886, if the other testimony showed sales to O'Brien during that time, which must be presumed, if material, against the excepting party. But, if the sales to O'Brien were not made at that time, still, so far as appears, the evidence was admissible "as tending to show, in the absence of any apparent charge, the nature of the defendant's continuous occupancy of the premises as keeper." *Commonwealth v. Carney*, 108 Mass. 417.

Exceptions overruled.

Josiah D. RICHARDS

v.

Bernard GAUFFRET et al.

1. An owner of a pond and the land under it has the right to dispose of the water, and of the ice which might form upon it.
2. Where such an owner executed a lease under seal, whereby he demised and let "the sole and exclusive right to cut and carry away" from his said pond "all such ice as can be so cut in form and shape to use either for private use or as merchandise;" and it contained a provision "that the lessor may cut all ice needed for his own use from and off said pond,"—the lessee acquired a valuable right to use or sell all such ice, except what the lessor needed for his private use.
3. The interest of the lessee was greater than a mere revocable license; and he

could bring an action against the lessor if he interfered with his rights under the lease.

4. And where a stranger unlawfully entered and cut and carried away ice from the pond so leased by plaintiff, the latter may maintain an action against such person, and recover such damages as he shows he has sustained by such unlawful violations of his rights.

(Bristol—Filed January 4, 1888.)

ON plaintiff's exceptions. *Sustained.*

This is an action of tort brought to recover damages for the cutting and carrying away by defendants of ice from a pond leased by the plaintiff.

The plaintiff asked the court to rule that under this lease, if the defendants entered upon the pond and cut and carried away ice therefrom, the plaintiff is entitled to recover in this action—which was refused, and plaintiff excepted.

The defendants asked the court to rule that the indenture of the plaintiff had no other effect than as a license to the plaintiff to cut and carry away the ice from the said pond; it conveyed no interest in the premises to him; he acquired no title to any ice in the pond under it until the same was cut and taken possession of by him, and cannot maintain this action upon either count in the declaration; which ruling was given by the court, and a finding rendered for the defendants, and the plaintiff excepted.

Further facts appear from the opinion.

Messrs. Edward Avery and J. E. Pond, for plaintiff:

That Daggett, who owned the land and the water over and above it, became the owner of the ice as soon as it was formed, and could sell it, is beyond question.

Paine v. Wood, 108 Mass. 172, 173.

Having such an interest, the right to the thing sold, when it shall come into existence, is a present vested right, and the sale of it is valid.

Low v. Pew, 108 Mass. 850.

In *Jones v. Richardson*, 10 Met. 488, Wilde, J., says: "A person may grant personal property of which he is potentially, though not actually, possessed."

See *Wheeler v. Wheeler*, 2 Met. (Ky.) 471.

One may sell wool to grow upon his own sheep, crops upon his own land, or the milk that a cow may yield during the coming year.

Andrew v. Newcomb, 82 N. Y. 417; *Bellows v. Wells*, 36 Vt. 599; *McCarthy v. Blerina*, 5 Yerg. 195; *Sanborn v. Benedict*, 78 Ill. 309.

So he may assign wages to be earned under an existing contract.

Hartley v. Tupley, 2 Gray, 565; *Tripp v. Brownell*, 12 Cush. 376.

Daggett was the owner of the land under the water; he could sell the water that was over the land, and all that might be formed therefrom. He could sell the ice that was, or that might hereafter be, formed from the water.

Rice v. Stone, 1 Allen, 566.

The form of this contract is not material, except as indicating the extent of the right granted as incident to the sale.

White v. Foster, 102 Mass. 875.

The case at bar differs materially from *Parsons v. Smith*, 5 Allen, 578. In that case the action was trespass on the land, and the only claim made by the plaintiff was that he had authority from the owner of a beach or shore to gather the seaweed that might be cast upon it. The seaweed was not a product of the soil from which it was gathered, nor was the use of the soil necessary to its production. This, independent of the form of action.

The case of *White v. Foster*, 102 Mass. 375, seems directly in point. In that case a contract in the form of a deed was given under seal, conveying the trees and timber growing on the land described. The deed was not recorded.

In the case at bar we have an agreement in writing and under seal, which was clearly intended to vest in the plaintiff a present title to a thing then the subject of a grant, which could not be produced without the use of the grantor's land, to hold the element out of which it was produced, to hold and support the thing itself until it became of sufficient thickness to be valuable, to hold, store, or support it when it became valuable, until the purchaser saw fit to remove it, with a right of access and egress to and from the land. These facts would seem to make the authority conclusive.

Alexander v. Toileston Club, 110 Ill. 76; *Wilmington v. Lawrence*, 1 Ill. (L. ed.) 432, 3 West. Rep. 472, 116 Ill. 20; Washb. Easem. p. 39; *Sawyer v. Wilson*, 61 Me. 529; *Fiske v. Small*, 25 Me. 453.

Whether or not the effect of the lease was to pass an absolute title to the ice, when formed, to the plaintiff, may depend on the intent of the parties. It is clear that Daggett intended to relinquish to the plaintiff all control over and interest in the ice when formed, and that the plaintiff had the absolute right, so far as Daggett was concerned, to take it.

Riddle v. Varnum, 20 Pick. 283; *Denny v. Williams*, 5 Allen, 3, 4; *Chapman v. Shepard*, 39 Conn. 418; Benj. Sales. § 332.

Mr. H. J. Fuller, for defendants:

The lease from Daggett to the plaintiff conveyed no interest in the premises, but is only a license.

Stockbridge Iron Co. v. Hudson Iron Co. 107 Mass. 290, 322; *Whitmarsh v. Walker*, 1 Met. 313; *Clafin v. Carpenter*, 4 Met. 580, 588; *Silaby v. Trotter*, 29 N. J. Eq. 228; *Shepherd v. McCalmont*, 88 Hun. 87.

The plaintiff acquired no sufficient title, interest, or possession of the premises to maintain trespass *quare clausum*.

Parsons v. Smith, 5 Allen, 578; *Hill v. Tupper*, 2 H. & C. 121; *Boone v. Storer*, 66 Mo. 430.

While the plaintiff might cut and carry away the ice, under his license, he acquired no title to it, nor any possession of it, until he exercised such right, and cannot maintain trover.

Stockbridge Iron Co. v. Hudson Iron Co.; *Silaby v. Trotter*; and *Shepherd v. McCalmont*, *supra*.

Morton, Ch. J., delivered the opinion of the court:

One Daggett, the owner of a millpond and the land under it, executed an indenture under seal, by which he leased, demised, and let to 2 Mass.

the plaintiff "the sole and exclusive right to cut and carry away from the Falls Pond, so called, situate in Attleboro Falls in said Attleboro, all such ice as can be so cut in form and shape to use either for private use or as merchandise." The lease also contained the provision "that the lessor may cut all ice needed for his own use from and off said pond." Daggett, as owner of the pond, had the right to dispose of the water, and of the ice which might be formed upon it, and there can be no doubt that it was the purpose of the indenture to transfer to the plaintiff the sole and exclusive right to cut and use or sell all such ice except what the lessor needed for his private use.

Paine v. Woods, 108 Mass. 173.

By the lease, therefore, the plaintiff acquired a valuable right, and it would be a reproach to the law if it did not furnish him a remedy for an unlawful encroachment upon this right by a stranger. It is not necessary to discuss the somewhat nice questions whether the plaintiff had such an interest in the land that he could bring trespass *quare clausum*, or whether he had such property in the ice that he could maintain an action of trover against the defendant. He had an interest greater than a mere revocable license, and could bring an action against Daggett if he interfered with his rights under the lease. He had, as we have said, a valuable right; and if a stranger unlawfully encroached upon this right, we can see no reason why he may not maintain a proper action therefor.

The second count of the plaintiff's "declaration substantially sets out his rights and the violation of them by the defendant, and we are of opinion that under it the plaintiff may recover such damages as he shows he has sustained by reason of such unlawful violation of his rights.

Exceptions sustained.

John MURPHY *et al.*, Appts
v.

Patrick H. McNULTY.

1. The plaintiffs cannot maintain an exception to the refusal of an instruction which embraced, in a single paragraph, three different assumptions of fact, based upon the ground that a portion of their request, if it had been separately made, should have been granted.
2. Where plaintiffs had what is termed a fourth-class license, which authorized them to sell liquor only upon the premises designated in, and covered by, their license; and they sent out liquors, that their customers might be supplied, by the teamster, from their wagon, if they so desired,—such a transaction with the teamster constituted a peddling of the articles sold, and was a carrying on the licensed business of the plaintiffs, not at their own store, and on their own premises, but on the premises of their customers. The fact that the teamster was to fill the orders only of regular customers, which were

then given to the teamster, and not of chance or occasional customers, did not render the transaction the less a sale on the premises of the customer, or authorize a recovery for the liquors so sold.

(Bristol—Filed January 4, 1888.)

ON plaintiffs' exceptions. *Overruled.*

This is an action brought to recover on an account annexed for intoxicating liquors sold and delivered by the plaintiffs to the defendant under a fourth-class liquor license. The plaintiffs introduced testimony tending to show that defendant (who was a liquor-dealer, and conducted his business under a first-class liquor license) called upon John Murphy, one of the partners of the copartnership, at their place of business, and where they were licensed to sell liquors under a fourth-class liquor license issued by the city of Fall River, and made a contract with said Murphy to furnish and supply him with ales and liquors; and that plaintiffs directed their teamsters to call upon defendant on their rounds to customers, and supply him with such liquors as he might order.

Defendant had a pass-book given to him by the plaintiffs, on the cover of which appeared, "Patrick McNulty in account with John Murphy & Co., wholesale liquor-dealers, 141 South Main Street, Fall River, Mass." The pass-book was in the possession of defendant, and the entries made by plaintiffs' teamsters. There was evidence also tending to show that the teamsters, who acted as agents of the plaintiffs, did load four or five barrels of ale on their wagons daily, except Sundays, and did drive around to their regular customers, and, if any of them were out of ale, they would deliver what was needed by the customer, and at other times they would take an order from said customers at their stores, and go to the plaintiffs' store, and return with the order filled, and deliver the liquors at the customer's store.

There was no evidence of teamsters delivering liquors to anybody except regular customers, or receiving orders from other than regular customers.

It also appeared that defendant ordered liquors a few times at the store of plaintiffs. Four witnesses for plaintiffs testified that all of the liquors, except ales, were ordered, by defendant, of plaintiffs, at the store of defendant, the order being given to the drivers, taken to the store of the plaintiffs and filled, and then taken back to the store of defendant and delivered; but defendant testified that he ordered and received such liquors from the teamsters while the teamsters were at his store.

The case was heard by the court, and judgment was given to defendant, and plaintiffs alleged exceptions.

Mr. D. V. Sullivan, for plaintiffs:

The liquors sold by plaintiffs to defendant, and for which they seek to recover, were legally sold. Such sales were protected by the license of the plaintiffs, in view of the surroundings of the sales and the relations of the parties.

Pub. Stat. chap. 100, §§ 9, 10, *Fourth Class*, and § 17.

Under the agreement plaintiffs were bound to supply defendant with such ales and liquors as defendant required.

It was a continuing contract, and all deliveries made under and in pursuance of said contract, and accepted by defendant, were valid.

Clark v. Russel, 8 Watts, 213.

The contract between plaintiffs and defendant, under which these sales were effected, was made at the place of business of plaintiffs, where they were licensed to make such contracts.

Lynch v. O'Donnell, 127 Mass. 311; *Frank v. Hoey*, 128 Mass. 263.

Messrs. Braley & Swift, for defendant:

The plaintiffs could legally sell the intoxicating liquors in question only at the particular place designated in and covered by their license, viz.: 141 South Main Street.

Pub. Stat. chap. 100.

As between vendor and vendee, title to specific personal property passes by the contract of sale. But where the sale is of goods generally, no property in them passes till delivery, because, until then, the very goods sold are not ascertained. The contract remains executory so long as anything remains to be done to identify them.

Abberger v. Marrin, 102 Mass. 70; *Goddard v. Binney*, 115 Mass. 455.

In order that the sales should be made at plaintiffs' store, not only the contract of sale, but the actual or constructive delivery of the liquors to the defendant, must be made there, so as to vest them in him.

Dolan v. Green, 110 Mass. 323; *Suit v. Woodhall*, 113 Mass. 392; *Commonwealth v. Burgett*, 136 Mass. 450.

But there was no sale of specific goods, and there was no appropriation of particular property in this case at the plaintiffs' licensed place of business.

Commonwealth v. Greenfield, 121 Mass. 40.

The test would be whether defendant, by anything transacted between him and plaintiffs' place of business, acquired any right in the property against plaintiffs.

Finch v. Mansfield, 97 Mass. 89.

Devens, J., delivered the opinion of the court:

The plaintiffs had what is termed a fourth-class license, which authorized them to sell spirituous liquors, not to be drunk upon the premises. They could conduct this business lawfully only upon the premises designated in and covered by their license. Pub. Stat. chap. 100, §§ 9, 10, cl. 1. Upon sales there made they could recover as legal; upon those made elsewhere they could not, as such sales would not have been authorized by their license.

The request for a ruling made by the plaintiffs embraced, in a single paragraph, three different assumptions of fact. The request, as made, was refused, and the instruction actually given dealt only with the third assumption. It was evidently upon the state of facts thus assumed that the plaintiffs sought to recover. The plaintiffs, in their argument at bar, also have relied solely upon the failure to give the instruction based upon the third assumption, and that actually given in lieu thereof. The request was made as a whole, and was refused as such; and the plaintiffs could not be allowed to maintain an exception to such refusal, based upon the ground that a portion of his request,

if it had been separately made, should have been granted. It is by no means impossible that such instructions may actually have been separately given. The defendant was, himself, a liquor-dealer, conducting his business under a first-class liquor license; and the ruling asked upon the third assumption of facts was, in substance, that "if the plaintiffs, at the beginning of the dealing with the defendant, agreed to furnish the defendant with ales and liquors as a regular customer," and, in pursuance of said agreement, "at times the plaintiffs' teamsters brought, upon their regular rounds, ales and liquors of the plaintiffs, in plaintiffs' teams, to the defendant's shop (which ales and liquors had not been previously ordered by the defendant), and then, at the defendant's shop, filled, from such ales and liquors, orders then and there given to plaintiffs' teamsters,—such sales would be legal, and the plaintiffs could recover therefor." The court refused so to rule, and ruled that "sales so made by teamsters from the plaintiffs' wagon, of ales and liquors not previously ordered by the defendant, would be illegal." A general agreement by plaintiffs that they would furnish the defendant with such ales and liquors as he might desire to use in his business could not identify any of these articles as the subject of a contract mutually assented to by the parties. It would not authorize the plaintiffs to set apart any such goods at their place of business as the defendant's property, or to cause any to be transported to defendant's shop as if the same had been ordered or purchased by him; nor did the plaintiffs attempt anything of the sort.

The case at bar does not require us to consider whether, if orders had actually been given at, or sent to, the store of the plaintiffs, and the liquors sent in response thereto (this being in accordance with the usual conduct of such business), such a transaction could be considered a sale at the plaintiffs' place of business, under the statute, even if the plaintiffs did not authorize any delivery of the goods sent, unless paid for upon such delivery; or even if the defendant had the right to reject the goods, if not satisfactory, when they arrived. The plaintiffs sent out the liquors, that their customers might be supplied from the wagon, if they so desired. This was simply making it convenient for them to purchase on their own premises, if the customers saw fit so to purchase. Such transaction with the teamster as described, constituted a peddling of the articles sold, and was carrying on the licensed business of the plaintiffs, not at their own store, and on their own premises, but on those of the defendant.

The fact that the teamster was to fill the orders only of regular customers,—that is, of those who habitually bought of the plaintiffs,—and not of chance or occasional customers, did not render the transaction the less a sale on the premises of the customer.

Exceptions overruled.

COMMONWEALTH of Massachusetts

v.

James W. CROWLEY.

1. Where the question was whether or not the defendant came within the meaning

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N. E. R., V. V.

of the Statute of 1886, chap. 82, which allows bakers to keep open their shops certain hours on the Lord's Day, for the sale "of bread and other articles of food usually dealt in by them;" and the defendant requested the court to submit to the jury the question whether, upon the testimony, the defendant was a baker under said statute; and the court declined so to do, and instructed the jury that, if they believed the testimony of the defendant to be true, they might return a verdict of guilty,—such action of the judge was merely a refusal to leave the jury uninstructed as to the meaning of the word "baker," as used in the statute, and not an interference with their right to pass upon all the questions at issue between the parties.

2. The word "baker" is used in its ordinary signification, and means one whose occupation is to bake bread and other articles of food.

3. The object of the statute is to permit freshly-cooked food to be obtained on the Lord's Day; but this reason does not apply to sales of provisions which do not require preparation by the dealer for the immediate use of the purchaser, and does not extend to all persons who deal in the products of bakeries.

4. So, where one kept a shop for the purpose of selling groceries, fancy articles, bread, pastry, and milk, but did not make, or cause to be made, the bread and pastry which he sold, but bought it from time to time from other parties, the fact that he had a small store in the rear part of his shop, in which his wife sometimes baked a few cookies and gingersnaps, which he placed in his showcases and sold with the bread and pastry, was not of such importance as to characterize his business, or warrant the jury in finding that he was a baker.

(Suffolk—Filed January 3, 1888.)

ON defendant's exceptions. *Overruled.*

This was a complaint under Pub. Stat. chap. 98, § 2, as amended by Acts and Resolves of 1886, chap. 82.

Defendant testified that on Sunday, March 13, 1887, between the hours of 8 and 9 o'clock in the forenoon, he kept a shop, situated on Cambridge Street, in Boston, in said county, and of which he was the proprietor, open for the purpose of selling therein, on said day, bread, pastry, and milk; that he also had in said shop certain groceries and fancy articles, which he sold on other days, but not on Sunday, and that he did not keep his shop open for the purpose of selling these last-mentioned articles on said Sunday; that he did not make, or cause to be made, the bread and pastry which he was thus selling and intending to sell, but bought the same from time to time of other parties, for the purpose of reselling, as he did also the milk sold by him; and that milk was usually sold by bakers of Boston to their customers.

Defendant further testified that he had a small stove in the rear part of his shop in which his wife sometimes baked a few cookies or gingersnaps, which he placed in his showcases and sold with the bread and pastry.

The Commonwealth offered no evidence tending to controvert the defendant's testimony.

The defendant requested the court to submit to the jury the question whether, upon the foregoing testimony, the defendant was a baker, under said chapter 82 of the Acts and Resolves of 1886; but this the court declined to do, and instructed the jury that, if they believed the testimony of the defendant to be true, they might return a verdict of guilty.

The jury rendered a verdict of guilty, and defendant alleged exceptions.

Mr. C. B. Loud, for defendant:

There is reason for construing the words of the statute against their natural meaning; and such a construction is plainly necessary, because of great inconvenience resulting to the public if not so construed (*Ayers v. Knox*, 7 Mass. 810); and said statute must of necessity include as bakers all who may choose to deal in baker's goods, whether they manufacture the same or not (*Richards v. Dagget*, 4 Mass. 534).

Said statute is to be construed liberally, and according to the understanding of its terms by the community.

Packard v. Richardson, 17 Mass. 148; *Whitney v. Whitney*, 14 Mass. 91; *Op. of Justices*, 7 Mass. 523. See *Ex parte Hall*, 1 Pick. 261.

It was a question of fact for the jury, under the evidence and the Statute of 1886, chap. 82, whether the defendant was a baker; and the court should have submitted it to the jury.

Ocean Ins. Co. v. Francis, 2 Wend. 73; *Dow v. Platner*, 10 N. Y. 567; *O'Callaghan v. Booth*, 6 Cal. 63; *Wharton v. Mackenzie*, 5 Q. B. 606; *Backus v. Shepherd*, 11 Wend. 629.

Mr. Andrew J. Waterman, Atty-Gen., for the Commonwealth:

There was nothing to indicate that the word "baker" is not used in the statutes in its usual sense. And it was the province of the court to give it its usual meaning.

Eaton v. Smith, 20 Pick. 157; Sedg. Stat. & Const. L. p. 220.

Knowlton, J., delivered the opinion of the court:

Pub. Stat. chap. 98, § 2, which forbids keeping open one's shop on the Lord's Day, or doing "any manner of labor, business, or work, except works of necessity and charity," was amended by Stat. 1886, chap. 82, which pro-

vides that "this section shall not apply to sales by bakers, between the hours of 6 and 10 o'clock in the forenoon, and 4 and 6.30 o'clock in the afternoon, of bread and other articles of food usually dealt in by them."

The refusal of the judge to rule as requested, taken in connection with his instruction to the jury that, "if they believed the testimony of the defendant to be true, they might return a verdict of guilty," we understand to have been merely a refusal to leave the jury uninstructed as to the meaning of the word "baker" as used in the statute, and not an interference with their right to pass upon all the questions at issue between the parties. In this view, the only question in the case is whether, upon the defendant's own testimony, he was a baker within the meaning of the amendment. There is nothing to indicate that this word is used in any other than its ordinary signification. A baker is one whose occupation is to bake bread and other articles of food. The statute which we are considering may be presumed to have been founded upon the desirability and propriety of permitting freshly-cooked food to be obtained on the Lord's Day, as well from the shop of the manufacturer as from the kitchen of the householder. That the interval may be short between the preparation of the food, and the appearance of it on the table of the consumer, the baker is permitted to do his work, and deliver his viands, on the Lord's Day. But this reason does not apply to sales of provisions which do not require preparation by the dealer for the immediate use of the purchaser. We cannot believe that the Legislature intended to include in the exception of the amendment all persons who deal in the products of bakeries. Such a construction of the statute would allow a large proportion of the grocers and provision dealers of the Commonwealth to open their shops every Lord's Day.

The defendant was not a baker in any sense. He kept a shop for the purpose of selling groceries, fancy articles, bread, pastry, and milk. He did not make, or cause to be made, the bread and pastry which he sold, but bought it from time to time from other parties. The fact that he had a small store in the rear part of his shop, in which his wife sometimes baked a few cookies and gingersnaps, which he placed in his showcases and sold with the bread and pastry, was not of such importance as to characterize his business, or warrant the jury in finding that he was a baker.

Exceptions overruled.

CONNECTICUT.

SUPREME COURT OF ERRORS.

George W. CHADEAYNE *et ux.*

v.

Philander ROBINSON *et ux.*

Where the parties were severally owners of adjoining village lots, with a house upon each, and the surface water flowed naturally from the plaintiffs' lot upon that of the defendants; and they made an agreement as to the portion of division fence to be built and maintained by each, and the defendants built a tight board fence, two or three feet longer than the arrangement required from them, for the purpose of closing an opening left by the plaintiffs; and the agreed place of the division of the fence was at or near the place where the greater part of the surface water flowed; and the defendants' fence prevented the usual flow, and ponded the water on the plaintiffs' land, to their material damage,—no action would lie by the plaintiffs for the injury.

(New Haven—Decided July 15, 1887.)

APPEAL from a judgment of the Superior Court for New Haven County against the plaintiffs for obstructing the passage of surface water flowing upon the defendants' land, whereby it was set back upon the land of the plaintiffs. Argued before Park, *Ch. J.*, Carpenter, Pardee, Loomis, and Beardsley, *JJ.* *Affirmed.*

The facts are fully stated in the finding, as follows, by Stoddard, *J.*, before whom the case was tried in the superior court.

The plaintiffs and defendants owned and occupied their respective dwelling-houses on adjoining lots in the borough of Fair Haven. The lots were each about 50 feet front on Prospect Street, and 200 feet deep. The plaintiffs' premises are situated south of the defendants'. A lot similar in character, owned and occupied by Mrs. Vreeland, is next south of the plaintiffs, and adjoining Mrs. Vreeland on the south was a similar lot owned and occupied by Mrs. Manning. Still further to the south was a vacant lot not yet cut up into building lots. The surface of the lots above described, and of the land in that locality, slopes slightly towards the north. Along the rear of the lots is a sharp ridge sloping to the west and towards the front of said lots. Said slope stops at a distance of about 100 feet from the said Prospect Street.

From a distance of about 100 feet from Prospect Street the surface originally of all the lots lay nearly level east and west, but was slightly lower at said distance of 100 feet from said street line; but, as houses were built at the usual distance of 15 or 20 feet from the street line, and the grading of the lots consequent thereon, corresponding depression existed towards the rear of the lots.

When the ground was frozen (and occasionally in small quantities after prolonged rains which could not be absorbed, as it fell, by the

earth) the falling water and melted ice and snow accumulated in considerable quantities upon the ground south of the plaintiffs' property, and upon the plaintiffs' and defendants' property, and originally spread and flowed over, and covered a large part of, the level land owned by both the plaintiffs and the defendants; but the greater part of such accumulations flowed and ponded along and across said lots at said distance of about 100 feet from said street.

After said houses were built, the grade on the front part of the premises was materially raised, say from 1½ to 2½ feet, which forced the water towards the east, and into more confined and definable limits. Such water is strictly surface water; there has never been any defined watercourse or channel with banks, nor at any time any accurately-defined limits within which said water accumulated and ran, but its course and direction depended almost wholly upon artificial things, such as the erection of outhouses of one character and another, or of fences, and upon the cultivation of the ground in the several gardens, and the flow of the water was thus temporarily and arbitrarily checked and diverted.

There was no permanent accumulation of water; and such flow or accumulating in noticeable quantities occurred only occasionally during the frozen season, and rarely, and never in considerable quantities, at other times.

Before the erection of the houses, the northwest corner of the defendants' lot was slightly elevated,—say about one foot,—and the general course or tendency of the water before said houses of the plaintiffs and the defendants were built, and before changes were made in the surface of the ground, was on to and largely across the easterly part of the plaintiffs' lot, and thence in considerable part on to the defendants' lot.

The larger portion of the water flowed on to the defendants' land, and thence westerly on the land of the defendants to Prospect Street, though some portion of said water flowed to said Prospect Street on the plaintiffs' land, the dividing line between the plaintiffs and defendants being in general the course taken by the water, though the greater portion passed on to and over the defendants' lot until it nearly reached the street, when nearly but not quite all of the flow passed on to the defendants' lot. A small portion of the water coming on to the defendants' lot occasionally passed across the rear of the defendants' lot and on to the land next adjoining to the north, and thence to the street.

Thirteen years ago a well was dug upon what is now the dividing line between the plaintiffs and the defendants, and the excavated material turned the water somewhat from its wonted course, further on to the land of the plaintiffs. That well is now disused and filled up, and the natural course of the water is not now affected thereby.

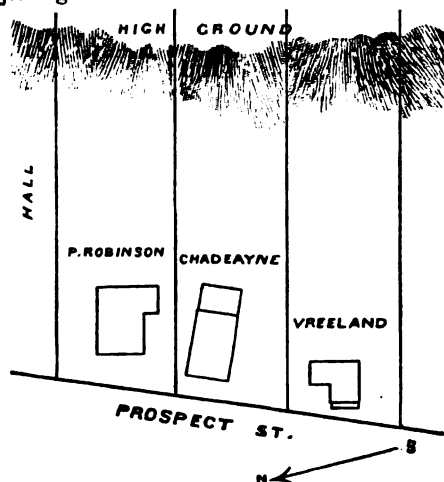
The plaintiffs purchased their premises of the defendants July 31, 1883. In August, 1883, the plaintiffs built their house and graded their lot. In 1884 the parties agreed upon a division of the divisional fence between them, the plaintiffs taking the easterly, and the defendants the westerly, part. The defendants

first erected a wire fence on their part, and after that was destroyed the defendants built a close board fence,—higher, better, and tighter than the fence of the plaintiffs, and extended easterly two or three feet beyond said point of division, and uniting with the plaintiffs' board fence then existing. Said fence of the defendants had a solid baseboard of two-inch stuff, reaching wholly to the ground, and forming a substantial obstruction to the flow and movement of said waters. After the defendants built said wire fence, the plaintiffs built a close board fence on their portion, but leaving an opening of two or three feet between their fence and said wire fence of defendants.

The agreed place of dividing said divisional fence was at or very near the place where the greater quantity of water was accustomed to flow from the plaintiffs' to the defendants' land, and the defendants' divisional fence constituted the substantial obstruction to its flow, although the plaintiffs' fence in some degree assisted in stopping said flow. But except for the erection of said fence by the defendants, the damage to the plaintiffs would not have occurred; and relief might have been had from such danger and damage by the plaintiffs' making a suitable hole through their own fence, by which the water could have gone on to the defendants' land. The plaintiffs might also, without unreasonable expense, have laid a tile drain alongside the divisional fence on their own land to the street, and thus rid their land of said water, and escaped said danger.

On the 11th day of February, 1886, there was a large fall of water, which, coming to and accumulating on the plaintiffs' land, was stopped by said divisional fence, and ponded to a depth of about two feet. The water, by reason of such ponding, found its way into a cesspool near said divisional fence, and west of the point of division in said fence, and from said cesspool followed the drainpipe and around the same to and into the plaintiffs' house, doing material damage to and in the same.

A diagram of the premises and of the adjoining land is annexed hereto.



Messrs. Harrison & Zacher and Jason P. Thomson, for plaintiffs, appellants:

By the civil law, the lower of two adjacent

estates owes a servitude to the upper to receive all the natural drainage. Interference with the natural flow of surface water is a nuisance for which nominal damages may be recovered without proof of actual damage, under the rulings of the courts of Pennsylvania, Illinois, North Carolina, California, and Louisiana. The courts of Ohio and Missouri have referred to this rule with approval.

Gould, Waters, § 266.

The common-law rule permits the owner to change the surface, or, by the erection of buildings, to so alter it that the water which may accumulate thereon by rains and snows, falling on its surface or flowing on it over the surface of adjacent lots, may pass upon other lots in greater quantities or in other directions than they were accustomed to flow.

Id. § 267.

In this State the rule of the civil law would seem to have been adopted (*Adams v. Walker*, 84 Conn. 467); but in the case of *Grant v. Allen*, 41 Conn. 156, where the court held that "the right of the owner of land to determine the manner in which he will use it or the mode in which he will enjoy it, the same being lawful, is too high in character to be affected by considerations growing out of the retention, diversion, or repulsion of mere surface water, the result of falling rain or melting snow," this decision would seem to reverse the decision in 84 Conn. 467; and it would perhaps be decisive in this case were it not for other facts that appear in the finding. We submit that the construction of the fence, by the defendants, beyond the point of division, was not a lawful use of their own land so as to bring the case within the decision in 41 Conn., but it was an unlawful use of the land of the plaintiffs; and, as the finding of the court states that "but for the erection of said fence by the defendants, the damage to the plaintiffs could not have occurred," the defendants are liable notwithstanding the rule at common law. The cases cited in support of the doctrine laid down in 41 Conn. show that all the acts by which the water was obstructed, retained, or directed, where no liability was incurred, were done in the lawful use of the land by the defendants.

Dickinson v. Worcester, 7 Allen, 19; *Gannon v. Hargadon*, 10 Allen, 109.

Messrs. Case, Maltbie, & Ely, for defendants, appellees:

There has never been any watercourse from the plaintiffs' to the defendants' lot, nor any defined limit within which water ran from one lot to the other. The water was "strictly surface water," and its accumulation has never been permanent. A party may obstruct or change the direction and flow of surface water by preventing it from coming within the limits of his land, or by erecting barriers or changing the level of the soil so as to turn it off in a new course after it has come within his boundaries.

Gannon v. Hargadon, 10 Allen, 109; *Flagg v. Worcester*, 13 Gray, 601; *Luther v. Winnissimmet Co.* 9 Cush. 174; *Murphy v. Kelley*, 68 Me. 531; *Eutrich v. Richter*, 37 Wis. 226.

The erection, by a conterminous proprietor, of structures or improvements which cause water to accumulate from natural causes on adjacent land, will not render him liable.

Dickinson v. Worcester, 7 Allen, 22; *Goodall v. Tuttle*, 29 N. Y. 487; *Barkley v. Wilcox*, 86 N. Y. 140; *Swett v. Cutts*, 50 N. H. 439.

There is no such thing known to the law as a right to any flow of water *jure natura*. The owner of land may withhold the water falling on his property from passing in its natural course on to that of his neighbor, and in the same manner may prevent the water falling on the land of the latter coming on his own.

Bowlsby v. Speer, 31 N. J. L. 352; *Lessard v. Stream*, 62 Wis. 112; *Benthall v. Seifert*, 77 Ind. 302; *Chatfield v. Wilson*, 28 Vt. 49.

The owner of the higher land cannot compel the owner of the lower land to receive it.

Grant v. Allen, 41 Conn. 160.

The adoption of the doctrine of the civil law would prevent improvement, restrict grading of lots, the erection of curves, walks, and division fences, even in cities the most thickly inhabited, and compel each landowner to use his land as his adjoining proprietor tells him to. The Court of Appeals in New York, after a long discussion of the common and civil law rule, adopted the common-law rule in deference to the advance of civilization.

Barkley v. Wilcox, 86 N. Y. 148.

The case of *Adams v. Walker*, 84 Conn. 406, is not in point; for the difference is material between turning water off from one's land on to another's land, and preventing water coming from another's land on to your own. This distinction is recognized in *Barkley v. Wilcox*, *supra*.

The plaintiffs can claim nothing from the fact that the defendants built two or three more feet of fence than they agreed to. All that appears is that the defendants built the fence from the street back to the plaintiff's fence, and in so doing built two or three feet more of the fence than they agreed to; but it does not appear that at the time they erected the fence they had any thought of the surface water at all; still less does it appear that they built this additional fence to obstruct its flow. They were within their rights in building a proper and suitable fence on the divisional line between them and the plaintiffs, and if by so doing they obstructed the flow of surface water, they are not liable for the possible damages, and the plaintiffs have no right of action against them.

Inasmuch as it appears that "the plaintiffs might also, without unreasonable expense, have laid a tile drain alongside the divisional fence on their own land to the street, and thus rid their land of said water and escape said danger," they cannot, by their own negligence, charge defendants with damages resulting.

Pardee, J., delivered the opinion of the court:

This is a complaint for obstructing the passage of surface water flowing upon the defendants' land, whereby it was set back upon the land of the plaintiffs. Judgment was rendered for the defendants, and the plaintiffs have appealed. The following are the reasons of appeal assigned:

1. That the court erred in ruling, as a matter of law, upon the facts found, that there was *damnum absque injuria*, and that therefore the plaintiffs were not entitled to recover damages.

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2. The court—having found that the course of the surface water, coming from the lands south of the plaintiffs, and flowing across their land, was thence upon the defendants' land; and that the defendants constructed their fence two or three feet beyond the point of division, and upon the plaintiffs' line; and that the agreed place of dividing said divisional fence was at or very near the place where the greater quantity of water was accustomed to flow from the plaintiffs' to the defendants' land, and the defendants' divisional fence constituted the substantial obstruction to its flow; and that except for the erection of said fence by the defendants the damage to the plaintiffs would not have occurred; and that material damage was done to and in the house of the plaintiffs by said divisional fence stopping the water—erred in ruling that, as a matter of law, the plaintiffs were not entitled to damages.

The parties are severally owners of adjoining village lots, with a house upon each. Except for the intervention of man, surface water would run from the plaintiffs' lot upon that of the defendants. They made an agreement as to the portion of division fence to be built and maintained by each. The defendants built a tight board fence two or three feet longer than the agreement required from them, for the purpose of closing an opening left by the plaintiffs. The agreed place of division of the fence was at or near the place where the greatest part of the surface water flowed, and the defendants' fence prevented the usual flow and ponded the water on the plaintiffs' land to their material damage.

The general common-law rule in reference to surface water is that stated in Gould on Waters, § 267, as follows: "The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface, or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated, with reference to that of adjoining owners, that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface or flowing on to it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities or in other directions than they were accustomed to flow."

This rule was accepted as the law by this court in *Grant v. Allen*, 41 Conn. 156; the court there saying that "the right of the owner of land to determine the manner in which he will use it, or the mode in which he will enjoy it, the same being lawful, is too high in character to be affected by considerations growing out of the retention, diversion, or repulsion of mere surface water, the result of falling rain or melting snow."

Under that rule it is the right of the defendants to erect, for the entire depth of their lot, a structure which will be a perfect barrier to surface water. Of course that which they may do perfectly and permanently, they may do imperfectly and temporarily; and the plaintiffs must accept the consequences. And this rule is neither suspended nor modified in the present

case by the agreement as to the portion of fence to be constructed by each. That agreement was not intended, and is not by either party to be interpreted, as a permanent quitclaim by the other of the right to improve his property to the fullest extent.

There is no error in the judgment complained of.

In this opinion the other Judges concurred.

Lucy S. BRIGHAM

John L. ROSS.

1. The construction which the parties themselves have put upon a deed containing a right or privilege, by their practical acts thereunder, is the proper one.
2. So, where a deed of land executed in 1807 gave, among other things, to the grantees, their heirs, and assigns, the right, privilege, and benefit of opening a ditch on the upper end of grantors' own lands, to carry water from a river to the premises of grantees, for the purpose of running mills or waterworks erected, or that might be erected, on grantee's premises, and also the privilege of opening a proper ditch for drawing the water from said premises to the river at the lower end of grantors' lands; and the grantees thereupon entered into the right as conveyed to them, and they and those holding under them have, from 1807 to the present time, used the entire fall of water, from the upper to the lower end of the tract, for running their mill,—the right of the grantees and their assigns to use the entire fall of water is shown to have been the intention and understanding of the original parties, by this long, practical construction of the deed.

(Windham—Filed November 17, 1887.)

APPEAL by defendant from a judgment of the Superior Court of Windham County in favor of plaintiff in an action to recover for damages occasioned by defendant's wrongful acts in violation of a right under a provision of deed to plaintiff's grantors. *Affirmed.*

Plaintiff is the owner of a mill privilege which was conveyed to her by Elisha Morey in 1874, the said premises having formerly belonged to her husband, Lewis Brigham, deceased, and brings an action to recover \$2,000 damages, claiming that defendant wrongfully raised his dam, which is situated about half a mile below plaintiff's mill, to such a height that the water set back into and upon the land of plaintiff and into the canal or ditch leading from the plaintiff's waterwheel, which injured the movement of said wheel.

The Superior Court of Windham County, having fully heard the parties, found the issue for the plaintiff, and assessed the damages at \$35, and finds that the value of the right of water in question in this suit is more than \$50; from which judgment defendant appeals.

Other facts are sufficiently stated in the opinion.

Messrs. A. P. Hyde and John L. Hunter. for defendant, appellant:

The water-power to which the riparian owner is entitled consists in the fall of the stream when in its natural state, as it passes through his land or along the boundary of it; or, in other words, it consists of the difference of level between the surface where the stream first touches his land, and the surface where it leaves it.

Ang. Watercourses, § 95, and cases cited. See also *Id.* § 344; *M'Calmont v. Whitaker*, 3 Rawle, 84.

The ditch which the plaintiffs' grantors were authorized to open below their land was in no other way defined or described in the deed than that it was to be "a sufficient and proper ditch to drain the water from the above premises."

"Where the language of a deed is doubtful in the description of the land conveyed, parol evidence of the practical interpretation, by the acts of the parties, is admissible to remove the doubt."

1 Greenl. Ev. § 298. See also *Hull v. Fuller*, 4 Vt. 199, 202.

In the case of *Smith v. Agawam Canal Co.* 2 Allen, 355, the court, in describing the right of riparian proprietors above or below an existing mill, uses the following language, p. 357: "They may still construct and maintain dams across the stream at any point, either above or below his mill, for the purpose of raising a head of water to propel, operate, and work mills of their own, erected on the adjoining land, provided that their arrangements are so made that they will not unreasonably withhold and detain the water above, nor throw it back from below, so as to affect, impede, delay, or obstruct the movement and operation of the wheels and machinery of his previously-existing mill (*Thurber v. Martin*, 2 Gray, 394); and in all such cases the material question arises as to the state of the water to which these general rules are applicable; to which there can be no other answer than that they refer to the stream when the water is flowing in at its ordinary height, not when it is substantially exhausted by the severity of a drought, or swollen into a flood by long-continued rains or the sudden melting of snow."

Mr. John M. Hall, for plaintiff, appellee:

It is a maxim of the highest antiquity in the law that all deeds should be construed favorably and as near the apparent intention of the parties as possible, consistent with the rules of law.

Cruise, Dig. tit. 32, chap. 23, § 2.

This court has repeatedly said that deeds are to receive a construction so as to effectuate, if possible, the intent of the parties (*Magill v. Hinsdale*, 6 Conn. 469; *Wright v. Pond*, 10 Conn. 261; *Bryan v. Bradley*, 16 Conn. 496); and that, to ascertain the import of a deed, the court will look at its terms in connection with the situation of the parties and the object they had in view.

Griswold v. Allen, 22 Conn. 98; *Strong v. Benedict*, 5 Conn. 220.

Easements are also created by grant or deed. Under the Statute of Frauds no interest in land can be conveyed, except by deed; and at common law incorporeal rights which lay in grant.

and not in livery, could only be transferred by deed.

2 Washb. Real Prop. § 552.

There is therefore no rule applicable to the creation or transfer of other interests in land, which does not apply to easements.

No particular words are necessary for such a grant. Any words which clearly show an intention to give an easement which is by law grantable are sufficient.

Rowbotham v. Wilson, 8 H. L. Cas. 362.

Does an intention appear to confer a right to affect the land of the grantor? Is the right one which is capable of being made the subject of a grant as an easement? If these two questions are answered in the affirmative, an easement has been created.

Gale, Easem. 37.

But not only the express terms of deed, but the location of the mill site, indicate the purpose the parties to the grant had in view. This has been the usual way of locating mill sites of this kind everywhere.

See *Nuttall v. Bracewell*, L. R. 2 Exch. 1.

"The acts of the parties, contemporaneous with the grant, giving a practical construction of it, shall be deemed to be a just exposition of the intent of the parties."

Jeanison v. Walker, 11 Gray, 416; *Stone v. Clark*, 1 Met. 378, and cases cited.

Generally speaking, any interference with a right, however small, creates a cause of action.

Cliford v. Hoare, L. R. 9 C. P. 372; 9 Eng. Rep. 449.

In regard to this special class of cases, it has repeatedly been held that an injury to the race-way is an injury to the mill.

Ang. Watercourses, p. 218, note 3, § 153 a; *Butz v. Ihrie*, 1 Rawle, 218; *Wetmore v. White*, 2 Cal. Cas. 87; *Rackley v. Sprague*, 17 Me. 281; *New Ipswich Woolen Factory v. Batchelder*, 3 N. H. 190; *Perrin v. Garfield*, 37 Vt. 304; *Whitney v. Eames*, 11 Met. 519.

"It matters not how much the owner of land upon a stream has actually used the water, or whether he has used it all, his right to the use of it remains unaffected during any period of time. A mere nonuser of his right raises no presumption against him."

Williams, J., in *Sampson v. Hoddinott*, 1 C. B. N. S. 608; *Buddington v. Bradley*, 10 Conn. 218; *Johnson v. Jordan*, 2 Met. 239; *King v. Tiffany*, 9 Conn. 166, 167; *Atlanta Mills v. Mason*, 120 Mass. 251.

Nor need the plaintiff show any injury if the right is invaded.

Washb. Easem. p. 136, § 30, and cases cited; *Wood, Nuis.* pp. 824, 825.

Such an injury as in case at bar is clearly actionable.

Wood, Nuis. p. 461, and cases cited.

Park, Ch. J., delivered the opinion of the court:

This case depends upon the construction to be given to the deed to the plaintiff's grantors of June 1, 1807. That deed conveyed a tract of land by particular description to the grantees, their heirs and assigns, and then proceeded as follows: "And also the right, privilege, and benefit of opening a ditch on our land in the most convenient place, 12 feet wide, with

1 Conn.

proper and convenient room to throw the earth, to convey the water from the Willimantic River to the aforesaid premises, for the purpose of carrying a gristmill, sawmill, and any other waterworks that may be erected on the premises; and also the like liberty is hereby given to said grantees to open a sufficient and proper ditch to drain the water from the above premises to the said river,—said ditch to be made in the most convenient place, doing the least damage."

The case finds that the plaintiff is the owner of all the right conveyed by the deed; that, when the deed was given, the grantors owned a tract of land bounded westerly for about three fourths of a mile on Willimantic River; that from the upper to the lower line of this tract there was a fall of about 14 feet and 4 inches in the river; that the grantees went into possession of the premises conveyed by the deed, built a mill upon them, and used all the fall of the river in the running of the mill, drawing the water from it at the upper end of the tract and returning it at the lower end; and that, from the time the deed was given to the present time, all the fall has been so used by the original grantees and those holding under them.

We think the construction which the parties themselves have put upon the deed for this long period, under which the plaintiff and his grantors have claimed and used the entire fall from the upper to the lower end of the tract, is the proper one.

The deed contains no reservation of the fall, no limitation of the right conveyed, but, on the contrary, uses language adapted to a conveyance of the entire fall on the grantors' land. The grantees had the right to take the water of the river to their mill from the upper line of the grantors' land, as they did, and return it to the river at the lower extremity of their land; for by the terms of the deed they were required to consult only their own convenience in the matter.

Besides this, the entire fall of the river on the grantors' land was only 14 feet and some inches,—scarcely enough for one mill privilege. Obviously, if only a part of the fall was conveyed, there would be almost a certainty of loss. There could have been, therefore, no motive on the part of the grantees to purchase anything less than the entire fall, but a strong motive to the contrary. That such must have been their intention is therefore not only probable, but the practical construction of the deed given to it at the time shows that both parties then so understood it.

There is no error in the judgment appealed from.

In this opinion the other Judges concurred.

A. S. H. DAVIES *et al.*

v.

J. M. DAVIES *et al.*

1. Where, under a provision of a will, a legatee was to receive the interest and income of certain property during his life, and upon his death the property was to

be distributed or go to his "personal representatives who would be entitled to his personal estate according to law," these words of description were not intended to describe parties who might represent said legatee in an official capacity as executors or administrators, or those who might be his devisees or legatees, but was intended to describe his next of kin, who would be entitled to his personal estate by right of consanguinity; that is, by natural right—by relationship—by being next of kin.

2. The original testator having provided for the ultimate disposal of the gift, the legatee had no power of appointment, and the property would not pass to the wife of legatee under said legatee's will.

(New Haven—Filed September, 1887.)

SUIT for the construction of the will of John M. Davies, deceased, brought in the Superior Court for New Haven County, and there reserved for the consideration and advice of this court.

The clause of the will to be construed is set out in the opinion.

Mr. C. H. Farnam, for plaintiffs.

Mr. John S. Beach, for defendant Grace W. Davies, cited—

2 Redf. Wills, 80; Theobald, Wills, 260; Conn. Gen. Stat. 378, § 8; 2 N. Y. Rev. Stat. p. 159, § 79.

Mr. C. R. Ingersoll, for the other defendants, cited—

2 Jarm. Wills, 111; 2 Redf. Wills, 78, 80; *Palin v. Hills*, 1 Mylne & K. 470; *Baines v. Ottey*, Id. 465; *Bridge v. Abbot*, 3 Bro. C. C. 224; *Cotton v. Cotton*, 2 Beav. 67; *Booth v. Vicars*, 1 Coll. 6; *Robinson v. Smith*, 6 Sim. 47; *Walter v. Makin*, Id. 148; *Smith v. Palmer*, 7 Hare, 225; *King v. Cleveland*, 4 De G. & J. 487; *Re Grylls's Trusts*, L. R. 6 Eq. 589; *Briggs v. Upton*, L. R. 7 Ch. 376; *Drake v. Pell*, 3 Edw. Ch. 270; *Watson v. Bonney*, 2 Sandf. 405, 417; *Tillman v. Davis*, 95 N. Y. 17; *Brokaw v. Hudson*, 27 N. J. Eq. 185.

Park, Ch. J., delivered the opinion of the court:

The ninth article of the will of the late John M. Davies is as follows: "It is my will, and I hereby direct, that four fifths of the share of any and every of my sons shall be paid to him as soon as it can be conveniently done after my decease; and, as to the remaining one fifth, it is my will, and I hereby direct, that the same be invested in bonds and mortgages, or, if it shall be thought best by my executrix and executors, in real estate, and kept invested for his use during his life, and that the interest and income therefrom shall be paid to him during his life, and that on his death the same shall be distributed or go to his personal representatives who would be entitled to his personal estate according to law."

The testator left three sons surviving him at the time of his death, who were all of age when the will was made. The share of each in his estate was \$166,660, of which the one fifth in question in this case is \$33,333.

One of the sons, Cornelius C. Davies, has since died, leaving a will, and a widow, Grace Welch Davies, one of the defendants, but no issue. By the will he gave all his property, both real and personal, to his widow, and constituted her the executrix of his will.

The executors of the will of John M. Davies present to this court the following questions for our advice:

1. Who are the personal representatives of Cornelius C. Davies intended by the testator in the ninth article of his will?

2. To whom is it the duty of the plaintiffs to deliver the estate now in their hands, under the trust of said ninth article?—to the defendants who are the heirs at law of said John M. Davies and the next of kin of said Cornelius C. Davies; or to the defendant Grace Welch Davies, who is the executrix and sole devisee and legatee under the will of said Cornelius; or to the defendant Grace W. Davies as the widow, and the other defendants as the legal representatives, of said Cornelius, in proportions according to the Statutes of Distributions of this State, relating to intestate estate?

The ultimate gift of the property in question was made to the "personal representatives" of Cornelius C. Davies, "who would be entitled to his personal estate according to law." We think this description was not intended to describe parties who might represent Cornelius in an official capacity as executors or administrators; neither was it intended for those who might be his devisees or legatees; but was intended to designate his next of kin, who would be entitled to his personal estate by right of consanguinity.

We think it clear that the testator never intended by this description that those should enjoy his bounty who might happen to be Cornelius's executors or administrators, to the exclusion of his children, should he leave any surviving him. The improbability of such a gift to those who might not only be strangers to the blood of the testator, but strangers to him personally,—strangers who might come within the description by the accident of appointment by Cornelius as executors of his will, or by the probate court as administrators of his estate,—would be so great that it would require unequivocal language to establish it. As said the Lord Chancellor in *Palin v. Hills*, 1 Mylne & K. 470: "If, by personal or legal representative, or executors or administrators, we suppose the testator to mean those whom the legatee might appoint executors, or to whom the Ecclesiastical Court might give administration, we presume a great improbability; namely, that he should leave it to the choice of another, or the accidents of grant of administration, to determine in what channel his bounty should flow."

Such a gift would have put it in the power of Cornelius to make a disposition of the property, in effect, to whomsoever he would; for he could select whatever party or parties he might feel disposed, to be his executor or executors, and he might make the selection in order that others might have the property, to the exclusion of his children.

All this he might do when no power of appointment has been given to him directly in the will; and no such power has been given unless intentionally given to the indirect manner sug-

gested. This seems preposterous; and especially so when we consider that the testator granted the power of appointment, in the sixth and tenth articles of his will, to his widow in one case, and to his daughters in the other; and the grants are made in clear and direct terms. The conclusion is irresistible that, if the testator had intended that the sons should have this power, the grant would have been made in equally explicit and direct language.

Again, the cases are numerous, both in England and in this country, where the words "personal or legal representatives," when used by a testator to describe the objects of his bounty, have been construed to mean natural representatives, and not legal representatives,—representatives in the sense of next of kin, and not representatives in an official or fiduciary capacity.

In the old and leading cases of *Bridge v. Abbot*, 3 Bro. C. C. 224, and *Cotton v. Cotton*, 2 Beav. 67, the gift was to certain devisees, and, in case of the death of either, then to his or her "legal representatives." And in the latter case one of the devisees had died leaving a will. But the Master of the Rolls held that the next of kin in both cases were entitled to take as the representatives intended by the testator. In *Baines v. Otley*, 1 Mylne & K. 465, the trust was for M. K. for life, with remainder as she should appoint; and, in default of appointment in trust, to transfer and assign the personal estate to and among such person or persons as would be the personal representatives of M. K. These words of distribution were held sufficient to show that the executors were not intended, but that persons who could take beneficially must be the parties intended. In *Robinson v. Smith*, 6 Sim. 47, the trust was for the life of a daughter, and, after her decease, to pay the trust moneys to such persons as she should by will appoint, and, in default of appointment, to her "personal representatives." The next of kin were regarded as the persons intended. To the same effect is *Walter v. Makin*, 6 Sim. 148. In *Smith v. Palmer*, 7 Har. 225, and *King v. Cleveland*, 4 De G. & J. 477, a direction for a distribution among "legal representatives" was held to mean the next of kin. In *Re Grylle's Trusts*, L. R. 6 Eq. 589, a legacy was given in trust for a married daughter for life, with power of appointment, and, in default of appointment, to transfer the same to such persons as would be her personal representatives in case she had died sole and unmarried. The vice-chancellor said: "It is a most improbable thing that the testator meant his daughter's executor or administrator to take beneficially." The next of kin took the property. In *Briggs v. Upton*, L. R. 7 Ch. 876, the marriage settlement was in trust for the life of the wife, with power of appointment; "and, in default of such direction or appointment, then upon trust to pay or transfer the trust moneys unto the legal representatives of the said J. B. in a due course of administration." It was urged that these words, "in due course of administration," indicated the executors as the legal representatives; but the Lord Chancellor said: "I do not think that to be the natural meaning of the words. The natural meaning of the words would be that the trust

tees were to pay it over to those who, in a due course of administration, beneficially represented him; and that, of course, would bring in the statute with reference to the administration of intestate estates."

In this country the English cases giving to "representatives" the significance of "next of kin" have been generally followed. 2 Redf. Wills, 78. Such has been particularly the case in the State of New York, where the will in question was executed, and in reference to whose laws, presumably, it was made.

The case of *Drake v. Pell*, 3 Edw. Ch. 270, is a leading one in that State. The bequest was of personal property in trust for the benefit of nine children of the testator, with this provision: "And in case any of my said children shall die after me under the age of twenty-one years, and leaving a child or children him or her surviving, then the share, portion, or interest of the child so dying shall go to the heirs, devisees, or legal representatives of the child so dying." One of the sons died a minor and intestate, leaving a widow and two children; and the question was whether the son's administrator took as his legal representative, or his children as his next of kin. In deciding the question the court says: "And with respect to the words 'legal representatives,' if the property transmitted be personal estate, the persons designated by and answering to this description are those who by the Statute of Distributions are known as the next of kin, and not the executors or administrators of the deceased child. The testator doubtless meant those who should take beneficially to themselves as owners, and not in a mere official or representative capacity in the right of a deceased child." The two grandchildren of the testator were declared to be the parties described to take under the will, and the mother of the children to be entitled to no interest in the property.

The case of *Tillman v. Davis*, 95 N. Y. 17, fully and clearly shows that the law of New York excludes the widow and husband from the class of "next of kin" in personal property, and from "heirs" in real estate. In that case the testatrix gave property to her executors in trust for the use of her husband during life, and then directed its division into a number of shares, each of which she gave to a beneficiary; and then the will provided that "the heirs of any or either of the foregoing persons who may die before my husband, to take the share which the person or persons so dying would have taken if living." One of the persons died in the lifetime of the husband, leaving a widow, to whom by his will he gave all his property. The court held that the widow took nothing by her husband's devise to her, but that his heirs took by substitution under the original will. It was also held that the word "heirs" was to be construed as next of kin, which did not include the widow.

The word "representatives" has also been regarded as meaning next of kin in *Brokaw v. Hudson*, 27 N. J. Eq. 185. In this case the gift was made to the testator's sister "or to her representatives." The court says: "In a gift of personal property, where the substitutes of the primary legatee are described by the word 'representatives,' those will take who have the

right to represent the primary legatee as next of kin under the Statute of Distributions, and not his executors or administrators."

But we think, aside from the adjudged cases on the subject, that the language of the description of the parties who are to take the remainder of the property in question clearly excludes both the executors and administrators of Cornelius C. Davies, and his legatee and widow. The language is: "Shall be distributed and go to the personal representatives of Cornelius C. Davies, who would be entitled to his personal estate according to law." The last words, we think, make it clear that the testator meant by personal representatives those who would be entitled to the personal estate of Cornelius by right of consanguinity; that is, who would be entitled by natural right—by relationship—by being next of kin.

But it is said that the title to the one-fifth share of Cornelius C. Davies was vested in him as much as the title to the four fifths, and consequently that he had the right to dispose of it by will, as he did, to his wife.

But John M. Davies, the original testator, disposed of the title to the one fifth to the next of kin of Cornelius, as we have seen; how, then, could Cornelius convey it to another party? He had no power of appointment. He had only the interest and income of the one fifth. This is as clear as language could make it. The testator manifestly intended to put so much of the share of Cornelius beyond the reach of his creditors in case financial disaster should befall him. There could have been no other object in view in regard to the one fifth. The testator said, in effect, in his will: Come what may, so much shall be saved from the wreck of Cornelius's estate, for his support, and for the benefit of his next of kin.

We therefore, in answer to the questions propounded by the executors for our advice, say that the personal representatives of Cornelius C. Davies are his next of kin; and that the property in question should be delivered to the defendants who are the heirs at law of John M. Davies and the next of kin of Cornelius C. Davies.

In this opinion **Pardee** and **Loomis JJ.**, concurred.

Carpenter, J., dissenting:

The testator disposed of the residue of his property as follows: "Seventh. It is my will, and I hereby direct, that all the rest, residue, and remainder of my estate, real and personal, and effects whatsoever, shall be divided in equal portions among my children who shall survive me, and the children of such of them as shall die leaving children, if any, so that each of my children who survive me shall have an equal portion of my estate if all shall survive me, or if any shall have died before my decease without leaving a child or children; and so that, if any of my children shall have died before my decease leaving a child or children, the child or children of each and every one who shall have died before my decease shall take the share which the father or mother would have taken under this my will, if such father or mother had survived me."

Clearly the leading thought and intent in this section is that his children shall share his property equally. There is no intimation of a

contrary intention. He is careful to provide that the issue of each child dying before his own decease shall take the share which the parent would have taken if living. He then divides the property among his children "in equal portions;" and then, to emphasize the intent, he repeats: "So that each of my children who survive me shall have an equal portion of my estate."

It will be observed that the gift to each and every one of his children is in precisely the same language. There is no distinction. If one takes a fee, all take a fee, so far as this section is concerned. That will be admitted. The court cannot construe the same language as meaning one thing in respect to one child, and something different in respect to another. If, therefore, such a construction is to prevail, it must be on account of some other portion of the will which requires it.

The ninth section is as follows: "It is my will, and I hereby direct, that four fifths of the share of any and every of my sons shall be paid to him as soon as it can be conveniently done after my decease; and, as to the remaining one fifth, it is my will, and I hereby direct, that the same be invested in bonds and mortgages, or, if it shall be thought best by my executrix and executors, in real estate, and kept invested for his use during his life, and that the interest and income therefrom shall be paid to him during his life, and that on his death the same shall be distributed or go to his personal representatives who would be entitled to his personal estate according to law."

The tenth section makes a similar provision for the shares of the daughters, except that the proportions are reversed,—one fifth being payable presently to each daughter, and four fifths invested for her use during life; and, at her decease, and not before, "the said four fifths of her share shall go to her child or children, if she shall leave any surviving her, share and share alike if more than one, and so that the children of any deceased child shall receive the share that the parent would have been entitled to if living; and if not,—that is, if she shall leave no child nor descendant,—shall be distributed as her personal estate according to law, or as she shall by her will direct and appoint." And in case any one of his daughters should die after his own decease, and before the payment to her of said one fifth or before said four fifths shall have been invested for her as directed, then the direction is that "so much of such one fifth or increase as shall not have been actually paid to her, or so much of the amount herein directed to be invested as shall not have been actually invested for her use, shall go and be distributed as the personal estate of such daughter, as in case of intestacy, according to the provisions of the statutes of the State of New York regulating the distribution of the personal estates of intestates, to the absolute exclusion of any right, claim, or interest therein, or in any part thereof, of any husband, as her administrator or otherwise."

It will be found that the portion given to each daughter in the seventh section is spoken of as "her share" in his estate no less than seven times in the tenth section. She has the beneficial use of the whole share during her life; the power of disposing of it by will is ex-

freely given her; and, in case she makes no will, it is to be disposed of as her personal estate.

Under such a will I think it will be admitted that each daughter, in effect, takes a fee in the whole portion given to her by the seventh section.

I fail to discover enough in the difference between the ninth and tenth sections to convince me that the testator intended to deal less favorably with the sons than with the daughters. That difference may be accounted for mainly, not entirely, by his extreme anxiety that each daughter, when married, should take her share in her sole and separate estate, and have the power of disposing of it to the "absolute exclusion" of any right in the husband. In case she fails to dispose of it, the provision that it shall be distributed as her personal estate is significant; he thereby recognizes, not only that the property vests in the daughter, but also that it is hers, and not her husband's.

No part of the will indicates any want of confidence in the sons. Two of them are made executors, and in the twelfth section the testator speaks as follows: "It is my desire that my three sons should carry on business together in copartnership,—believing that they are well constituted with the blessing of God to make a strong and prosperous firm,—and in connection with my present partner and friend, Mr. Gopali; and that they should continue the name of the old firm of John M. Davies & Co."

The suggestion that he intended to place one fifth of each son's share beyond the hazards of business is hardly in harmony with other parts of the will. It may be so, but he has not said so; and no such reason for withholding payment of the one fifth is apparent, either on the face of the will or in the attending circumstances. Besides, if it had been his intention to give but a life estate to his sons in any portion of his property, we should expect to find, in a will so intelligently drawn as this is, that intention clearly expressed. We should not expect to find it only by implication, and a rather weak implication at that. Moreover, that construction partially defeats the leading intention of the will, by effecting an ultimate unequal distribution of the property.

But the ninth section, aside from the argument drawn from the tenth, may be fairly construed as I contend it should be. Its object is not to devise or bequeath property, but to fix a time for the payment of legacies already given. Hence the testator speaks of "the share of any and every of my sons." Four fifths of that share is payable at his decease; and on the death of the legatee the other fifth is not in terms given to his personal representatives, but "shall be distributed or go to" them. They are to take, not as purchasers, for that would make the ninth section to some extent repugnant to the seventh. That would limit a remainder upon a fee. That is allowable in a will, the remainder taking effect as an executory devise, when such an intention is clearly expressed. If doubtful, and the language will admit of another rational construction, the latter should be preferred as the true one.

Sometimes the gift of a remainder after a fee will be regarded as repugnant and void. There is not necessarily any repugnancy here, and I

contend that the will should not be so construed as to make one; neither should it be so construed as to reduce an estate previously given in fee to a life estate, unless such an intention is clear; and I think no such intention appears in this case.

There is no gift or devise in this section except by implication; and such implication need not be resorted to in order to discover the testator's intention, as that intention is reasonably clear without it. Bearing in mind that the testator is simply providing for the payment of a portion of a legacy previously given, at the death of the legatee, there is no difficulty in perceiving that by personal representatives he meant those who should represent or succeed the son in the ownership of the property. That construction avoids repugnancy, does not reduce a fee to a life estate, and gives effect to the testator's intention.

I am aware that there are decisions in England and in this country which hold that a gift to personal representatives is a gift to the next of kin. I have no occasion to controvert this rule; but, like all other arbitrary rules, it should be sparingly used, and never when it tends to defeat the intention of the testator. But, as I construe this will, the rule has no application to this case, as here is no gift to personal representatives, but a time is named when a portion of a gift previously given is payable; and, as that time is after the death of the legatee, the testator naturally speaks of those who succeed to his rights in property, wholly personal as personal representatives.

In this opinion **Granger, J.**, concurred.

Dwight M. CONNELL

v.

George J. RICHMOND.

1. Where land is let "on shares," after the crops are harvested, and before a division is made, each party is the owner of an undivided moiety of the same, and is a tenant in common with the other, unless the contract contains some special provision taking the case out of the general rule.
2. And where such a contract provided that the lessee should manage the farm for the best interests of both parties concerned, and should pay to the lessor, at times therein specified, one half of the amount of all sales from the farm, the provision did not take the case out of the general rule, and the parties are tenants in common; and the lessee could not maintain an action for the alleged unlawful act of the lessor in taking for his own use, without the consent of the lessee, not more than one half of the crop of oats raised on the farm.

(New London—Filed May, 1887.)

A PPEAL by plaintiff from a judgment of the Court of Common Pleas for New London County in favor of defendant in an action for unlawful conversion and carrying away of plaintiff's oats by defendant. *Affirmed.*

The portions of the contract material to the issues, and the facts, appear in the opinion.

Mr. Roderick M. Douglass, for plaintiff, appellant:

This action must stand or fall upon the construction of this contract; indeed, its construction is the only important question in the case.

See 55 Am. Dec. 187.

The intentions of men must be ascertained by their words and actions; and these must be understood in the ordinary acceptation.

1 Swift, Dig. p. 226, § 5.

The construction must be favorable, and as near the apparent intent of the parties as is consistent with law.

Shep. Touch. 83; 11 Vt. 583; 8 Ham. 325; 2 Shep. 238; 8 Conn. 32; 4 Conn. 10.

The construction must be reasonable, and according to an indifferent and equal understanding; and the words are to be understood according to the subject of them.

1 Swift, Dig. p. 227.

Words are not the principal things in a contract, but the intent and design of the parties.

1 Swift, Dig. p. 228, § 8; Shep. Touch. 84.

Words may be transposed to give effect to an intent, where that is evident.

1 Swift, Dig. p. 228.

The construction shall be made upon the whole contract, and not upon separate parts.

Singleton v. Carroll, 22 Am. Dec. 95; *Stewart v. Preston*, 44 Am. Dec. 621; *Watson v. Blaine*, 14 Am. Dec. 669; *Chapman v. Glassell*, 48 Am. Dec. 41; *Foster v. Pettibone*, 57 Am. Dec. 580; Shep. Touch. 84; 16 Johns. 172; 9 Pick. 422; 18 Pick. 167; 1 Swift, Dig. 228.

Where the words are doubtful, the first thing to be inquired into is the intent of the parties.

5 Conn. 210; 1 Swift, Dig. 230.

The circumstances attending a transaction may be called in, to explain the nature of the dealings between the parties, where they are ambiguous.

1 Swift, Dig. 231; 5 Conn. 210; 2 Conn. 195; 4 Dal. 345.

Intention of the parties must govern in the construction of a contract, if it can be collected from the instrument and the circumstances, and is not repugnant to some settled principle of law.

Tindall v. Conover, 40 Am. Dec. 220; *Roberts v. Beatty*, 21 Am. Dec. 410; *Kendall v. Russell*, 30 Am. Dec. 696.

Obscure parts may be explained by the parts which are clear.

Watson v. Blaine, 14 Am. Dec. 669. See also *Atwood v. Cobb*, 26 Am. Dec. 637.

In construing contracts, the situation of the parties and the subject of their transactions should be considered.

Wilson v. Troupe, 14 Am. Dec. 458.

The court can make no exposition against the express terms of written contracts.

Pendegast v. Meserve, 53 Am. Dec. 234.

Whatever may be fairly implied from terms or language of an instrument is in judgment of law contained in it.

Hutchinson v. Lord, 60 Am. Dec. 881.

Plaintiff and defendant were not tenants in common. Tenants in common are such as hold by several and distinct titles, but by unity of possession.

2 Bl. Com. 191; 1 Swift, Dig. 107.

Where personal property is owned by several persons in common, all the owners are equally entitled to the possession of it; and where one of them is in the actual possession, he has a right to maintain that possession against the others.

Southworth v. Smith, 27 Conn. 355.

If the plaintiff and defendant were tenants in common, then the plaintiff could have no legal right to sell any produce from the farm without the consent of the defendant.

Oviatt v. Sage, 7 Conn. 95.

If, upon the construction of this contract, the defendant was entitled to a share of the produce raised by the plaintiff on the farm, he must be held to have it as rent "in kind" for the use and occupation thereof by the plaintiff.

Deaver v. Rice, 34 Am. Dec. 388.

The question as to whether or not the parties are landlord and tenant, or merely owner and cropper; and whether they are tenants in common of the crops before division, or whether one or the other is the exclusive owner,—must be determined by ascertaining the intentions of the parties as expressed in the language they have used.

Atwood v. Ruckman, 21 Ill. 200; *Dixon v. Nicolls*, 39 Ill. 372; *Walls v. Preston*, 25 Cal. 59; *Johnson v. Hoffman*, 53 Mo. 504; *Werner v. Abbey*, 112 Mass. 355; *Chandler v. Thurston*, 10 Pick. 205; *Walker v. Fitts*, 24 Pick. 191; *Delaney v. Root*, 99 Mass. 546; *Cornell v. Dean*, 105 Mass. 435.

If, in a contract for the cultivation of lands on shares, there are clear words importing a present demise, or that the occupier is to have the exclusive possession of the land, or that he is to pay or deliver to the owner a portion of the crops as rent, the relation between them is that of landlord and tenant.

Sargent v. Courier, 66 Ill. 245; *Front v. Hardin*, 56 Ind. 135; *Townsend v. Isenberger*, 45 Iowa, 670; *Hoskins v. Rhodes*, 1 Gill & J. 286; *Symonds v. Hall*, 37 Me. 354; *Woodruff v. Adams*, 35 Am. Dec. 122; *Walls v. Preston*; *Dixon v. Nicolls*; *Deaver v. Rice*, and *Werner v. Abbey*, *supra*; *Darling v. Kelly*, 113 Mass. 29; *Watson v. Bryan*, 64 N. C. 764; *Harrison v. Ricks*, 71 N. C. 7. See also *Taylor, Land. & T.* § 24, and note.

If the owner enters and takes possession of the crops he is liable in trespass or trover.

Blake v. Coats, 3 Greene (Iowa), 548; *Werner v. Abbey*, and *Hoskins v. Rhodes*, *supra*.

The plaintiff's claim is supported by the opinion of the late Chief Justice Seymour in *Somers v. Joyce*, 40 Conn. 593.

It is obvious that the contract may be so drawn as to be a mere lease, or, on the other hand, may be so drawn as to be a mere hiring of the labor of the occupant. Each case must stand upon the terms used.

See *Taylor v. Bradley*, 39 N. Y. 139, and cases there cited.

Messrs. S. S. Thresher and Brown & Perkins, for defendant, appellee:

The 1st and 2d requests being manifestly partly incorrect, the court was not bound to dissect them to ascertain if any part of them was correct, but might wholly disregard them.

Marlborough v. Sisson, 23 Conn. 54.

The parties were, under the contract, tenants in common of the crops; and as such tenants in

common could not maintain suit against each other.

Moulton v. Robinson, 27 N. H. 553; *Ladd v. Robinson*, Id. 557; *Daniels v. Brown*, 84 N. H. 458; *Hatch v. Hart*, 40 N. H. 98; *Carr v. Dodge*, Id. 403; *Brown v. Lincoln*, 47 N. H. 469; *Oviatt v. Sage*, 7 Conn. 99; *Southworth v. Smith*, 27 Conn. 859, 860; *Taylor v. Bradley*, 39 N. Y. 129; 1 Swift, Dig. p. 91; *Somers v. Joyce*, 40 Conn. 592; *Hurd v. Darling*, 14 Vt. 214.

The word "profits" is often used as a synonym of the word "increase," and this undoubtedly is the sense in which it was used in this instrument.

Webster, Dict. *Increase*, note 2; Putnam, Dict. of Synonyms, *Increase*; King James's Transl. of Bible; Shakespeare; and any standard English author.

Park, Ch. J., delivered the opinion of the court:

This case depends upon the construction to be given to the contract between the parties as to the occupancy by the plaintiff of a farm of the defendant. The important portion of the contract is as follows:

"This agreement, made this 3d day of April, 1886, between George J. Richmond of the first part, and Dwight M. Connell of the second part, witnesseth that the said Richmond, in consideration, etc., doth covenant and agree to and with the said Connell, to let to him on shares that part of the farm (describing it). The said Connell agrees not to sell any hay, corn, or fodder of any kind, from the farm; to manage it for the best interests of both parties concerned; and to pay to said Richmond on the first day of June, 1886, and every two months thereafter, up to the expiration of the year, one half of the amount of all sales from the farm. And, for security to the said Richmond for the fulfillment of this agreement, and the payment to him in full of one half of all profits from the farm, crops, stock, hogs, and poultry, I, the said Connell, hereby pledge my stock, consisting of one horse, six cows, three calves, and two hogs."

The plaintiff went into possession of the farm under this agreement, and, among other crops, raised a quantity of oats, a portion of which, not exceeding one half, the defendant took and appropriated to his own use without the plaintiff's consent. It is for this act of the defendant that the plaintiff brings this suit, claiming it to be illegal.

The court below ruled that the agreement constituted the parties tenants in common of the crops, and that consequently the plaintiff could not recover. The correctness of this ruling is the question we have to consider.

The agreement commences with the statement that the defendant agrees with the plaintiff to let to him a certain part of a farm "on shares." "Letting land on shares" is a phrase well understood among farmers. It means that both parties shall share equally in the products of the land, to compensate the one for his labor and the other for the use of his land. In such cases, after the crops are harvested, and before a division is made, each party is the owner of an undivided moiety of the same, and is a tenant in common with the other, unless

less the contract contains some special provision taking the case out of the general rule. There is no such provision in the present case. It is true that, by the terms of the contract, the plaintiff was "to pay the defendant on the 1st day of June, and every two months thereafter, up to the expiration of the year, one half the amount of all sales from the farm." But this provision imposes no obligation on the plaintiff to make such sales, except so far as he was obliged to act "for the best interest of both parties," and that interest might not in his judgment require or allow such sales. A large quantity of the products might therefore remain unsold at the expiration of the year, and clearly the parties would be tenants in common of these products.

The view we have taken of the contract virtually disposes of the other questions made in the case, and renders it unnecessary to consider them.

There is no error in the judgment appealed from.

In this opinion the other Judges concurred.

George J. RICHMOND

v.

Dwight M. CONNELL.

1. Where a contract to let land "on shares" (the lessee to manage the farm for the best interests of both the parties concerned) contains a provision that the lessee shall pay to the lessor, at stated times therein specified, "one half the amount of all sales from the farm" and "one half of all profits from crops, stock, pigs, and poultry," the term "one half" means of all the products of the farm, and not simply of the net profits.
2. The fact that under such contract the parties are tenants in common of the crops until sold does not affect the right of lessor to sue for and recover his share of money received by the lessee for such portions of the crops as were sold.

(New London—Filed May, 1887.)

APPEAL by defendant from a judgment of the Court of Common Pleas for New London County in favor of plaintiff in an action for damages for breach of contract. *Affirmed.*

The questions raised appear from the opinion. The contract between the parties is fully stated in the opinion of the judge in the preceding case of *Connell v. Richmond*.

Mr. Roderick M. Douglass, for defendant, appellant:

If plaintiff and defendant are tenants in common, or partners under said contract, this action cannot be maintained by plaintiff.

Somers v. Joyce, 40 Conn. 594; Gen. Stat. Rev. 1885, p. 467, § 4; *Lacom v. Davenport*, 10 Conn. 841.

Plaintiff could not recover against defendant in any action unless he (defendant) had realized profits from said farm, crops, stock, hogs, and poultry.

Plaintiff declared upon the contract; it was a material part of said contract that "the defendant should pay to the plaintiff one half of all profits from sales from the farm, crops, stock, hogs, and poultry."

1 Chitty, Pl. pp. 218, 214.

The contract declared on in this case is indivisible. It is one entire contract.

1 Swift, Dig. pp. 709, 714; 1 Chitty, Pl. pp. 304, 305.

The burden of proof was upon plaintiff to prove that defendant had realized "profits from sales from the farm, crops, stock, hogs, and poultry."

1 Greenl. Ev. p. 86, § 74; *Powers v. Russell*, 18 Pick. 69, 76; *Burnham v. Allen*, 1 Grav. 496, 499; *Crowninshield v. Crowninshield*, 2 Gray, 524, 529; *Central Bridge Corp. v. Butler*, Id. 182.

Upon the legal construction of this contract, defendant is only liable to the plaintiff for one half of the profits accruing from said farm, crops, stock, hogs, and poultry, and only upon an action of account brought according to law.

1 Swift, Dig. p. 592; 1 Story, Eq. Jurisp. p. 492, § 466; *Leach v. Beattie*, 33 Vt. 195; *Darden v. Cooper*, 7 Jones, L. (N. C.) 210.

Messrs. S. S. Thresher and Brown & Perkins, for plaintiff, appellee:

Defendant's second and third request are clearly intended to go together, and we shall so consider them. To put these requests into other language, for the better understanding of them, they would read as follows: "And second, though the court should find that defendant had realized profits from the sales from said farm, still, plaintiff could not recover what might be found due to him on that account, in this form of action; but, to recover his share of such profits, he would be compelled to institute an action of account against defendant for an accounting of all sales and profits arising from sales from said farm, under said contract."

This in substance, though not in form, is a motion in arrest of judgment for a defective declaration.

If the declaration is defective, it is only in matter of form, and could be taken advantage of only by demurrer.

1 Swift, Dig. *776.

The complaint was brought upon the written contract, which was set out in full; it claimed that, and pointed out specifically how, defendant was indebted to plaintiff under the contract; it alleged a demand of the defendant and a refusal of payment by him.

The defendant pleaded the general issue, and set up a counterclaim. He thus waived all objection to the form of the action.

1 Swift, Dig. *778; *Healey v. New Haven*, 49 Conn. 394.

But the form of action was the proper one.

Assumpsit will lie for a breach of all simple contracts, whether verbal or written, express or implied.

1 Swift, Dig. p. 588; 1 Chitty, Pl. 112.

Park, Ch. J., delivered the opinion of the court:

This case grows out of the contract which we have considered in the last preceding case

of *Connell v. Richmond*. We there held that the contract constituted the parties tenants in common of the crops raised on the farm leased by the present plaintiff on shares to the present defendant. By that contract Connell agreed to pay Richmond on the 1st day of June of that year, and, every two months thereafter to the end of the year, "one half the amount of all sales from the farm." And by a later clause of the contract he bound himself to pay to Richmond "one half of all profits from the farm, crops, stock, hogs, and poultry." The suit is based upon these provisions of the contract.

The defendant claims that the expression, "one half of all profits from the farm," means net profits,—profits after deducting all expenses of production. The court below held otherwise, and the defendant claims that the court erred in this ruling.

Such a claim seems to be entirely against reason where land is leased upon shares; that is, where one party furnishes the labor, and the other the land.

The labor, which is the cost of production, is the very thing which the tenant was to furnish. The manifest meaning of the contract is that the defendant was to account to the plaintiff for one half of all the products of the farm.

By the terms of the contract the defendant agreed to account to the plaintiff, at stated times during the year, for one half of all moneys received from the sale of products. The fact that they were tenants in common of the crops until sold could not affect the right of the plaintiff to sue for and recover money received by the defendant for such portions of the crops as were sold.

And there is nothing in the claim that an action of account only would lie. When any portion of the crops was sold, the defendant at once held to the use of the plaintiff one half of all the money received from such sale, which could have been recovered in an action of assumpsit at common law, and under our Practice Act in an ordinary suit for the recovery of money.

There is no error in the judgment appealed from.

In this opinion the other Judges concurred.

Elizabeth M. KNOWLES

c.

William B. CRAMPTON.

1. The offer in evidence of a section of the human body, to show that there are no ribs in the place described by plaintiff (in an action to recover for personal injuries), being of doubtful utility and offensive in its nature, and not in itself evidence, the trial court might well exercise its discretion in rejecting it; and matters of discretion are not reviewable by the appellate court.
2. No admission or declaration by the father is admissible against the plaintiff (his daughter), in an action by the daughter against a third person for personal injuries.

3. That part of a letter written by the father of the plaintiff, acting by her authority, which states the facts,—as it is absolute, and not conditional,—may be offered in evidence on the trial; but the part of the letter relating to the amount of damages which would be accepted for the purpose of effecting a settlement without suit is clearly inadmissible. If the unobjectionable part and the inadmissible part are not divisible, the objectionable part would exclude the whole.
4. The party offering the letter must limit his offer to the part to which he is entitled, and not offer the entire letter, and, if he does not so limit the offer, the court is not bound to discriminate for him, and will properly exclude the whole.
5. When teams are passing along the public highway in the same direction, the rear team may pass on either side of the advanced team, provided there is ample room; and if, in attempting to pass, damage occurs without fault on the part of the advanced team, the party attempting to pass, and causing the damage, is liable for the consequences; and this rule is equally applicable whether the forward team is in motion or is for the moment standing still.
6. In dangerous situations, ordinary care means great care; the greater the danger, the greater the care required; and the want of the degree of care required may amount to culpable negligence.
7. The rule of law is, that when both parties, by their mutual neglect to use proper precaution, have contributed to the injury, and when it would not have occurred but through the combined negligence of both, no damages can be recovered.

(New Haven—Filed October 19, 1887.)

APPEAL by defendant from a judgment of the Court of Common Pleas for New Haven County in favor of plaintiff in an action for damages for personal injuries. *Affirmed.*

Upon the trial it was admitted that the parties to the suit were living in the town of Madison, in this State; and that on the 25th day of July, 1886, they had been to church and Sunday school; and that the accident occurred upon the public highway as they were returning from church, about 1 o'clock in the afternoon. The Knowles team, in which the plaintiff and her brother, Herbert Knowles, were riding, started from the church first, and was soon followed by the Crampton team, in which William B. Crampton, the defendant, Carrie Crampton, Catherine J. Pickett, and Thomas Pickett were riding. Herbert Knowles was driving the Knowles team, and Thomas Pickett the Crampton team. Near the church the road bends to the west at a point called Todd's Corner. As the Crampton team turned the corner, the Knowles team was about eleven rods in

advance, and slacked up almost to a standstill, to ask a young girl to ride. As the Crampton team approached near, the Knowles team started forward again, the horse walking, and had proceeded about two rods when it stopped to allow another young lady to get in and ride. As the Knowles wagon stopped, William B. Crampton, the defendant, told Thomas Pickett, his driver, to turn out and go past. Pickett turned to the left, and, in attempting to pass, the wheels of the Crampton wagon struck the wheels of the Knowles wagon, which was tipped up toward the left, and the plaintiff and Herbert and the seat of the wagon came to the ground at the same time. The plaintiff was assisted into her wagon by the defendant, and she rode home sitting in the wagon, without support, and on the way stopped to take in the same young lady, and carried her a portion of the distance. The plaintiff was eighteen years old, and not under the average size.

As to the injury sustained, the plaintiff claimed and offered evidence to prove that she was thrown from the wagon by reason of the carelessness and gross negligence of the defendant; that in falling she struck upon the ground, somewhat in the rear of the Knowles wagon, where she lay until assisted to her feet and into the Knowles wagon by the defendant; that when she reached home she had to be lifted out of the wagon, and helped into the house, and could not go alone; that she was severely injured by the fall, one rib being broken and two other ribs severely injured; that for a long time thereafter she suffered much pain; and that she was obliged to employ physicians; and that her system received a shock by reason of the fall, which rendered her incapable of doing any work, and confined her to her bed a large part of the time, both day and night.

In support of these claims the plaintiff introduced the testimony of physicians as to the precise location and character of her injuries, and testified herself to the same points. To disprove this testimony the defendant introduced a surgeon, who testified that he examined the plaintiff a short time after the accident, and could find no appearance of broken ribs; and that the portion of the ribs described by the physicians called by the plaintiff was not bone, but cartilage, which is pliable, and which it is almost impossible to break in a person of the plaintiff's age.

The defendant, to sustain the testimony of the surgeon, and to discredit the testimony of the physicians for the plaintiff, offered in evidence a section of a human body, which he claimed would show the character and relative position of the bone and cartilage constituting the human ribs, and the manner in which the bone and cartilage are joined together and joined to the breast-bone; which the surgeon testified that he had cut from the body of a woman about the size and age of the plaintiff. To this exhibit the plaintiff objected, the court sustained the objection, and the defendant excepted.

The defendant also offered in evidence a letter written to him by one of the counsel for the plaintiff. (This letter is given in the opinion.) To its introduction the plaintiff objected on the ground that it was an offer to com-

promise, and therefore was inadmissible in evidence. The court sustained the objection, and the defendant excepted.

The defendant offered to call Henry D. Knowles and the plaintiff, to show that they had authorized the writing of the letter, but the plaintiff objected on the ground that, even if the plaintiff did authorize the writing, it was still an offer of compromise, and therefore inadmissible. The court sustained the objection, and the defendant excepted.

The jury returned a verdict for the plaintiff for \$500 damages, and the defendant appealed to this court.

The charge of the court is sufficiently stated in the opinion.

Mr. C. K. Bush, with **Messrs. H. G. Newton** and **Charles Kleiner**, for defendant, appellant:

An admission of a fact is not to be excluded because it is made with a view to a compromise, or connected with an offer of compromise.

Fuller v. Hampton, 5 Conn. 428; *Hartford Bridge Co. v. Granger*, 4 Conn. 148; 1 Greenl. Ev. § 192; Steph. Dig. Ev. 3d Am. ed. art. 20, note 2, and authorities cited.

That a charge not called for by the evidence is error, see—

Wilcox v. Chicago, M. & St. P. R. R. Co. 24 Minn. 269; *State v. Riculfi*, 85 La. Ann. 770; *Ward v. McCue*, 17 Rep. 91; *Willis v. Oregon, R. & Nav. Co.* 11 Oreg. 257; *Smith v. Evans*, 13 Neb. 316.

Where the language of the court, in connection with the facts, may have misled the jury, it is ground for reversal.

Bisking v. Third Nat. Bank, 93 Pa. 79; *Manuf. Co. v. Shirley*, 17 Rep. 371.

An instruction upon a point not in issue, though sound in itself, must not be given.

Wilcox v. Chicago, M. & St. P. R. R. Co. 24 Minn. 269.

The court should refuse to charge an abstract legal proposition which has no bearing upon the case on trial.

State v. Riculfi, 85 La. Ann. 770; *Ward v. McCue*, 17 Rep. 91.

Negligence is itself an absence of ordinary care, and, without such an absence of care on the part of the defendant, the plaintiff could not in any event recover.

Birge v. Gardiner, 19 Conn. 511; *Shearm. & Redf. Neg. § 25*; 4 Wait, Act. & Def. 658; *Murphy v. Deane*, 101 Mass. 466.

Where contradictory instructions are given, a new trial will be granted.

Knowlton v. Fritz, 5 Bradw. 221; *Aguirre v. Alexander*, 58 Cal. 26; *Brown v. McAllister*, 89 Cal. 576; *Quinn v. Donovan*, 85 Ill. 194.

We claim that the statute relating to treble damages is only intended to apply to definite, ascertainable damage, and not to cases like the present, where the amount of damages is not covered by any fixed rule.

1 Suth. Dam. p. 826.

Different degrees of care and negligence are not generally recognized by the courts.

Whart. Neg. § 384.

Burden is always upon plaintiff to show that the injury is in no degree attributable to any want of care on his part.

Murphy v. Deane, 101 Mass. 466; *Monongah-*

la City v. Fischer, 1 Pa. (L. ed.) 499; 2 Cent. Rep. 79, 111 Pa. 9.

It was not disputed that plaintiff's team stopped in the traveled track. Defendant had a clear, undisputable right to turn out and drive past. If, while doing so, plaintiff's wagon backed against him, it is clear matter of law that he was not liable.

Le Baron v. Joslin, 41 Mich. 313; *Joslin v. Le Baron*, 44 Mich. 160; *Strouse v. Whittlesey*, 41 Conn. 560.

To refuse a new trial on the ground that no injustice has been done, it must clearly appear that such is the case.

Skidmore v. Clark, 47 Conn. 20.

Messrs. J. H. Whiting and **J. McKean**, for plaintiff, appellee:

The only proper evidence would be that of expert witnesses; and that the defendant had, as fully as he wished.

Jacobs v. Davis, 34 Md. 204; *Commonwealth v. Wilson*, 1 Gray, 337.

Dr. Lewis could have been asked as to whether or not his opinion was based upon actual measurement, but could not introduce the party measured, or any part of her, as an exhibit.

Commonwealth v. Sturtivant, 117 Mass. 123; *Commonwealth v. Brown*, 121 Mass. 69.

The letter was clearly inadmissible, and would have been so if written by the plaintiff herself.

Stranahan v. East Haddam, 11 Conn. 507; *Home Ins. Co. v. Baltimore Warehouse Co.* 93 U. S. 527 (23 L. ed. 868); *White v. Old Dominion Steamship Co.* 102 N. Y. 660.

Mr. McKean was authorized merely to make the offer for Mr. Knowles. The statements are those of the attorney, and, as such, inadmissible as against the plaintiff.

Greenl. Ev. § 186; *Murray v. Chase*, 134 Mass. 92; *Guy v. Bates*, 99 Mass. 268; *Haney v. Donnelly*, 12 Gray, 361.

Even though certain sentences removed from their context "may not be strictly correct, yet, taking the whole charge together, it is extremely improbable that the jury was misled."

City Bank's App. 1 Conn. (L. ed.) 285, 3 New Eng. Rep. 549, 54 Conn. 269; *Murley v. Roche*, 130 Mass. 830.

The language claimed by the defendant is his third reason of appeal to be erroneous is no stronger than that used in many well-considered cases.

Avegro v. Hart, 25 La. Ann. 235; *Poster v. Goddard*, 40 Me. 64; *State v. Morris*, 47 Conn. 179; *Frech v. Philadelphia, W. & B. R. R.* 39 Md. 574; *Lewis v. Baltimore & O. R. R. Co.* 38 Md. 588; *Austin v. New Jersey S. B. Co.* 43 N. Y. 75; *Davies v. Mann*, 10 Mees. & W. 545; *Radley v. London & N. W. R. R. Co. L. R. 1 App. Cas. 754*; *Isbell v. New York & N. H. R. R. Co.* 37 Conn. 898; *Nolan v. New York, N. H. & H. R. R. Co.* 1 Conn. (L. ed.) 112, 1 New Eng. Rep. 826, 58 Conn. 461.

An erroneous charge entirely inapplicable to the case cannot be ground for a new trial.

If the charge in accordance with plaintiff's second request is error, it is one which seems prevalent throughout New England.

Brooks v. Hart, 14 N. H. 307; *Poster v. Goddard*, 40 Me. 64; *Goodwin v. Avery*, 26 Conn.

585; *Lovejoy v. Dolan*, 10 Cush. 495; *Bigelow v. Read*, 51 Me. 325.

The plaintiff's ninth request, which is not objected to, shows what was meant by plaintiff's fourth and fifth requests. The only natural meaning—the only significance consistent with the whole charge—is that no extraordinary care was required of the plaintiff.

Beers v. Housatonic R. R. Co. 19 Conn. 566; *Daley v. Norwich & W. R. R. Co.* 26 Conn. 591; *Brennan v. Fair Haven & W. R. R.* 45 Conn. 284; *Steele v. Burkhart*, 104 Mass. 59; *Patrick v. Pote*, 117 Mass. 297; *Griggs v. Fleckenstein*, 14 Minn. 81-93; *Wyandotte v. White*, 13 Kan. 191; *Western Union Tel. Co. v. Eyster*, 2 Col. 141-150; *Nolan v. New York, N. H. & H. R. R. Co.* 1 Conn. (L. ed.) 112, 1 New Eng. Rep. 826, 53 Conn. 461.

There was no error in charging in accordance with the plaintiff's tenth request.

Baldwin v. Greenwoods Turnp. Co. 40 Conn. 283.

The defendant's first request was clearly improper. If given it would have entitled the plaintiff to new trial.

Baltimore & O. R. R. Co. v. Boteler, 38 Md. 568; *Beers v. Housatonic R. R. Co.* 19 Conn. 566; *Baldwin v. Greenwoods Turnp. Co.* *supra*. The charge given errs in favor of the defendant, in not requiring the negligent handling to be that of the plaintiff or someone for whose acts she was responsible.

Robinson v. N. Y. Cent. & H. R. R. R. Co. 66 N. Y. 11; *Daley v. Norwich & W. R. R. Co.* 26 Conn. 591; *Webster v. Hudson R. R. R. Co.* 38 N. Y. 260.

"In actions for personal injuries the law does not attempt to fix any precise rules for the admeasurement of damages, but from necessity of the case leaves their assessment to the good sense and unbiased judgment of the jury."

Aldrich v. Palmer, 24 Cal. 513; *Wheaton v. North Beach & M. R. R. Co.* 36 Cal. 590; *Illinois C. R. R. Co. v. Barron*, 72 U. S. 5 Wall. 90 (18 L. ed. 591); *Allison v. Chandler*, 11 Mich. 542; *Fulsome v. Concord*, 46 Vt. 185; *Masters v. Warren*, 27 Conn. 300; *Hattin v. Chapman*, 46 Conn. 607; *Etchberry v. Levielle*, 2 Hilt. 40; *Bateman v. Goodyear*, 12 Conn. 575; *Walker v. Erie R. Co.* 63 Barb. 280.

The charge in regard to treble damages was for the benefit of the defendant.

Brewster v. Link, 28 Mo. 147; *Loddell v. New Bedford*, 1 Mass. 153; *Swift v. Applebone*, 23 Mich. 252; *Bateman v. Goodyear*, 12 Conn. 575.

Carpenter, J., delivered the opinion of the court:

The plaintiff claimed, and offered evidence in support of her claim, that two or three of her ribs were broken. The physicians who testified in her behalf located the ribs. The defendant denied the claim, and further contended that at the place described there were no ribs. To support his claim on this point, he offered in evidence a section of a human body. To this evidence the plaintiff objected, and the court excluded it.

We see no necessity for evidence of this character. It was not in itself evidence, although it might serve to illustrate, and might perhaps assist the jury somewhat in understanding, the expert testimony. But for that

purpose it was hardly needed, as that testimony was reasonably intelligible in itself. But if not, the jury could easily have been made to comprehend it by other means. The exhibit being of doubtful utility, and offensive in its nature, we think the court might well exercise its discretion. In matters of discretion the action of the trial court is not subject to review in this court.

The second reason of appeal is the rejection by the court of a letter, offered by the defendant, written to him by the attorney of the plaintiff, stating the claim, naming a sum which would be accepted, and requesting a settlement. The letter purports to present a claim of the father of the plaintiff "for the loss of services, nursing, and doctor's bill, etc., necessary for his daughter," and contains no intimation of a claim in behalf of the daughter for personal injuries. Of course no admission or declaration by the father is admissible against the plaintiff. But the defendant offered to prove that the letter was authorized by the plaintiff, and so was in fact her letter. This too was rejected.

The rejection of the letter and the accompanying evidence cannot be wholly vindicated on the ground that it was an offer to compromise an existing controversy. The material part of the letter is as follows: "Mr. Henry D. Knowles has put a claim which he has against you, into my hands for settlement. He claims that, while his children were peacefully driving home from Sunday school last Sunday, your carriage ran into his, throwing the children out, and fracturing one of his daughter's ribs, and otherwise injuring her so badly that she is now under the doctor's care, and liable to be so for some time to come. He authorizes me to say that, while he does not consider \$50 a fair compensation for the loss of service, nursing, and doctor's bill etc., necessary for his daughter, yet, to avoid any further difficulty, he will be willing to accept that sum as full compensation."

That part of the letter which states the facts is absolute, not conditional. It is not expressly stated to be without prejudice, and nothing in it justifies the inference that it is a concession for the mere purpose of a compromise. That part, aside from the remaining portion, would have been admissible if the defendant had chosen to offer it. But it is otherwise with that part relating to the amount of damages. There is a concession, and it is clearly stated to be for the purpose of effecting a settlement without suit. That is clearly inadmissible. The whole letter was offered in evidence—that part as well as the other. If it was not divisible, the objectionable part would seem to exclude the whole. If divisible, the defendant should have offered only that part which he was entitled to, as that might have been received and the other excluded. Instead of limiting his offer to the admissible part, and stating the purpose for which he offered it, he insisted upon his right to have the whole, not stating the object for which he wanted it; leaving it open to the inference that it was the objectionable part that he wanted, and that solely for the purpose of affecting the amount of damages. The court was not bound to discriminate for him, but properly excluded the whole.

The court charged the jury as follows: "When teams are passing along the public highway in the same direction, the rear team may pass on either side of the advance team, provided there is ample room; and, if in attempting to pass, damage occurs without fault on the part of the advance team, the party attempting to pass, and causing the damage, is liable for the consequences." The third reason of appeal alleges that this charge was erroneous: first, on the ground that it was not applicable to the case; and, second, that it imposed upon the defendant a liability, without negligence on his part. The rules which govern attempts to drive by others going in the same direction are equally applicable whether the forward team is in motion or is for the moment standing still; so that the first objection fails. The second is equally groundless; for the jury were fully charged on the subject of negligence, and were distinctly told that negligence was essential to the defendant's liability.

The court charged the jury that "contributory negligence, to be a defense, must have contributed to produce the injury, and even then the defendant must have been in the exercise of ordinary care." This is excepted to. As an abstract proposition, divorced from the facts of the case, and the context, it may be erroneous. Taken in connection with the respective claims of the parties, it is not difficult to discover the meaning of the court. The supposed negligence of the plaintiff consisted in stopping just ahead of the defendant, and it was claimed that the defendant was negligent in driving by. The court doubtless intended to say that the defendant must use such care as men of ordinary prudence would use under the circumstances. In view of the plaintiff's situation, admitting that she was there negligently, and that the defendant knew it, he was certainly required to use reasonable care not to injure her. In dangerous situations ordinary care means great care; the greater the danger the greater the care required; and the want of the degree of care required may amount to culpable negligence. In a crowded city a man may negligently leave the sidewalk and walk in that part of the street devoted to the use of carriages; but that will not justify the driver of a carriage in wantonly driving against him. In such cases there is manifestly a limit to the defense of contributory negligence; and that limitation the court had in mind. It is not necessary, however, to vindicate the charge wholly on that ground; for, taken in connection with what precedes and what follows the sentence quoted, we think the jury were not misled. The jury had just been told that the plaintiff must prove, not only negligence by the defendant, but also "that the injury was not caused in whole or in part by his own negligence." And immediately after they were told that, if the plaintiff "was carelessly and negligently run into by the defendant, and injured, without any act on her part contributing to the injury, your verdict will be for the plaintiff." And again: "The law is so that when both parties, by their mutual neglect to use proper precaution, have contributed to the injury, and when it would not have occurred but through the combined negligence of both, no damages can be recovered."

There are in all nineteen reasons of appeal,

the others of which present several questions of minor importance. None of them however, although alluded to, are strenuously insisted on. We deem it unnecessary to consider them in detail. It is sufficient to say that in none of them do we find any reason for granting a new trial.

There is no error in the judgment complained of, and a new trial is not granted.

In this opinion the other Judges concurred.

George H. BEECHER *et ur.*

v.

Garwood M. BALDWIN *et al.*

1. In actions on the covenant against incumbrances, the plaintiff will recover actual damages sustained. If the plaintiff is evicted, causing a total failure of consideration, he will recover the value of the land at the time of eviction, provided he has paid the purchase money. If the purchase money has been partially paid, he will recover the amount paid, with interest, not exceeding the value of the land. The consideration having been paid, if the purchaser remove the incumbrance, he will recover the amount paid, not exceeding the value of the land. If the purchaser pays nothing towards the removal of the incumbrance, and is not evicted, his recovery is limited to nominal damages. In applying these general rules, care will be taken in each case to do no injustice to either party.
2. Where, by the original contract, the plaintiff purchased, and the defendant sold, mortgaged premises as though they were free from incumbrance, the contract providing that the purchase money should be paid, and the incumbrance removed, when the deed should be given; but, the plaintiff being unable to pay the purchase money in full, a change was made, in the form of the transaction only,—a change wholly for the benefit of the plaintiff,—the purchase money to be used for the double purpose of extinguishing the mortgage on the land and the plaintiff's debt for purchase money to the defendant; but, the land depreciating in value, and the plaintiff refusing to complete the payments, the property was sold under a foreclosure,—the plaintiff could recover, in an action on the covenant against incumbrances, at most but nominal damages. But where the defendants plead a set-off of the notes given for the purchase money, which exceed the value of the property at the time of eviction, this set-off is a full answer to the plaintiff's demand; for, as these claims arose in the same transaction, and are so connected that one is the consideration for the other, there can be no difficulty in allowing the one to be used in reduction of the other; and the Statute of Limi-

tations has no application to the notes for the purchase money as a set-off or recoupment.

3. As, by the real contract between the parties, in equity at least, the **eviction** was the necessary consequence of plaintiff's failure to pay the purchase money, and whatever loss she sustained resulted, not from the breach of the covenants, but from the depreciation in value of the estate purchased, she can have **no recovery** either on the covenants against incumbrances or on the covenant of warranty.

(New Haven—Filed December 28, 1887.)

CASE reserved. Judgment for defendants advised

Action upon the covenants contained in a warranty deed from the defendants to the plaintiff E. Louise Beecher, brought to the Superior Court for New Haven County.

The facts are stated in the opinion.

Messrs. Clark, Swan, & Rogers, and Messrs. Doolittle & Bennett, for plaintiffs:

The plaintiff is entitled to a judgment upon either of the covenants in controversy, at her election.

Sterling v. Peet, 14 Conn. 255.

Upon the covenant of warranty, the plaintiff's measure of damages is the value of the land at the date of eviction.

Sterling v. Peet, 14 Conn. 245.

The plaintiff is entitled to recover, as damages for the breach of the covenant against incumbrances, the purchase money which she has paid, with interest thereon.

Kelsey v. Remer, 43 Conn. 129. See 3 Washb. Real Prop. 5th ed. 580; *Jenkins v. Hopkins*, 8 Pick. 346; *Chapel v. Bull*, 17 Mass. 213. See also *Blanchard v. Ellis*, 1 Gray, 195; *Wilson v. Wilson*, 25 N. H. 229, 285; *Patterson v. Stewart*, 6 Watts & S. 527; *Dimmick v. Lockwood*, 10 Wend. 142; *Lloyd v. Quinby*, 5 Ohio St. 265; *King v. Kerr*, 5 Ohio 155; *Stewart v. Drake*, 9 N. J. L. 139; *Waldo v. Long*, 7 Johns. 173.

The right of action on the covenants cannot be asserted or controverted by the introduction of parol testimony showing the covenantee's knowledge of an outstanding incumbrance, or altering or varying the express covenant contained in the deed.

Hubbard v. Norton, 10 Conn. 422; *Townsend v. Weld*, 8 Mass. 146; *Harlow v. Thomas*, 15 Pick. 66; *Spurr v. Andreu*, 6 Allen, 420; *Earle v. De Witt*, Id. 520; *Howe v. Walker*, 4 Gray, 318; *Johnson v. Walter*, 60 Iowa, 315.

"It is true the grantee, while the prior mortgage remained only an incumbrance, might have discharged it if he had possessed the pecuniary ability, and thus saved himself from eviction; but then so might the grantor: the grantee—whether able or willing, or not—was in no way bound to do it, and had a right to expect that the grantor would do it; while he (the grantor) was bound to do it,—bound by the obligation of his express covenants."

Lloyd v. Quinby, 5 Ohio, 235. See also, to the same point, *Miller v. Halsey*, 14 N. J. L. 48; *Stewart v. Drake*, 9 N. J. L. 143; *Burk v. Clements*, 16 Ind. 182.

The interference of equity to restrain the collection of the purchase money should be refused when the purchaser's knowledge and the state of facts continue to be the same as they were at the date of the conveyance, unless the vendor's nonresidence or insolvency is shown.

Rawle, Cov. Tit. 683, 688; *Youngman v. Linn*, 53 Pa. 418; *Murphy v. Richardson*, 28 Pa. 293; *Lighty v. Shorb*, 3 Pen. & W. 447; *Woodruff v. Bunce*, 9 Paige, 443; *Wimberg v. Schweegeman*, 97 Ind. 530; *Allen v. Thornton*, 51 Ga. 595; *Refeld v. Woodfolk*, 63 U. S. 22 How. 318 (16 L. ed. 856); *Horbach v. Gray*, 8 Watts, 497; *Wilson v. Cochran*, 46 Pa. 230; *S. C.* 48 Pa. 107. See also *Wailes v. Cooper*, 24 Miss. 208, 282.

A mere general inability to pay debts does not constitute insolvency.

Rogers v. Thomas, 20 Conn. 62; *Millard v. Webster*, 1 Conn. (L. ed.) 278, 3 New Eng. Rep. 542, 54 Conn. 415.

The covenants in the mortgage back from the plaintiff to the defendants, of the premises conveyed by the warranty deed of March 11, 1873, do not operate to preclude the maintenance of an action on the covenants of the absolute deed, either by way of estoppel or rebutter, or to prevent circuity of action.

Hubbard v. Norton, 10 Conn. 422; *Smith v. Cannell*, 32 Me. 125; *Brown v. Staples*, 28 Me. 497; *Haynes v. Stevens*, 11 N. H. 28; *Sumner v. Barnard*, 12 Met. 461.

The defendants, in the absence of any evidence of the plaintiff's insolvency, have no greater rights in equity upon these notes than the law gives them.

Courts of equity must adjust the rights of parties, according to the conditions which the Statute of Limitations imposes.

Ang. Lim. 21-26; *Farnam v. Brooks*, 9 Pick. 242; *Phalen v. Clark*, 19 Conn. 421; *Badger v. Badger*, 69 U. S. 2 Wall. 94 (17 L. ed. 838). See also *Pendleton v. Taylor*, 77 Va. 580; *Walker v. Smith*, 8 Yerg. 241.

The rule is fully established that the Statute of Limitations operates against a demand equally, whether it be sued upon or brought in by way of set-off.

Alsop v. Nichols, 9 Conn. 357, 365; *Tyler v. Boyce*, 135 Mass. 560; *Turnbull v. Strohecker*, 4 McCord, 210; *Nolin v. Blackwell*, 31 N. J. 170; *Harwell v. Steel*, 17 Ala. 372.

Messrs. Ingersoll & Stoddard, for defendants:

It is a well-settled rule, in all cases of this class, that the court will strive to give to the plaintiffs such actual damages as the plaintiffs have suffered by reason of the broken covenant in the deed.

Sedg. Dam. pp. 585, 174; *Wheeler v. Sohler*, 8 Cush. 219; *Rickert v. Snyder*, 9 Wend. 416; *Hartford & S. O. Co. v. Miller*, 41 Conn. 180; *Willson v. Willson*, 25 N. H. 229; *Loomis v. Bedel*, 11 N. H. 74; *Rawle, Cov. Tit.* 4th ed. p. 234, note 1; *Byrnes v. Rich*, 5 Gray, 518.

If we admit that the agreement and understanding between the parties would not be a bar to this action, still we claim that, at the time Mrs. Beecher refused to pay her notes, and until the foreclosure and eviction of the plaintiffs, or until the plaintiffs paid said mortgage to Yale College (which they never did),

the plaintiffs could recover only nominal damages.

Davis v. Lyman, 6 Conn. 249.

The rule of damages is the amount paid to remove the incumbrance; and if nothing was paid (as in the case at bar), the plaintiff can only recover nominal damages.

Mitchell v. Hazne, 4 Conn. 512; Sedg. Dam. p. 189; Rawle, Cov. Tit. 4th ed. p. 288; *Kelsey v. Remer*, 43 Conn. 129.

The rule of damages in Connecticut, under the fourth count, is the value of the land at the time of eviction.

Sterling v. Peet, 14 Conn. 254.

As plaintiffs refused to perform their part of the agreement, they are not entitled to recover.

Reid v. Sycks, 27 Ohio St. 285; *Pitman v. Conner*, 27 Ind. 387; *Fitzer v. Fitzer*, 29 Ind. 468; *Blood v. Wilkins*, 43 Iowa, 567; 2 Suth. Dam. p. 290.

The defendants are entitled to recoup their claim on the plaintiffs' notes (*Avery v. Brown*, 31 Conn. 398); nor, under such circumstances, can the plaintiffs avail themselves of the Statute of Limitations.

"Not only does the bringing of an action stop the operation of the statute as to a proper matter of set-off, but it also seems that it revives a claim which is actually barred out, which is the proper subject of recoupment in the action as damages growing out of the same transaction."

Wood, Lim. Act. p. 602, and cases there cited.

Phalen v. Clark, 19 Conn. 421.

Under the facts in this case, the plaintiff ought to be treated as a grantee without ever having paid the purchase money, and, therefore, not entitled to recover.

Harper v. Jeffries, 5 Whart. 26; *Carver v. Lauthain*, 38 Ind. 538; *Wyman v. Ballard*, 12 Mass. 304; *Hardy v. Nelson*, 27 Me. 530; *Zent v. Picken*, 54 Iowa, 535; *Reid v. Sycks*, 27 Ohio St. 285; *West v. West*, 76 N. C. 45; *Moak v. Johnson*, 1 Hill, 100; *Kelly v. Dutch Church*, 2 Hill, 105; *Baldwin v. Munn*, 2 Wend. 405; *Kinney v. Watts*, 14 Wend. 83; *Duvoll v. Wilson*, 9 Barb. 487; *Mellon's Appeal*, 32 Pa. 121; *Copeland v. Copeland*, 30 Me. 446; *Pitman v. Conner*, 27 Ind. 387; *Sumner v. Barnard*, 12 Met. 459; Rawle, Cov. Tit. 4th ed. p. 288, and cases there cited; 2 Suth. Dam. p. 290.

Plaintiffs gave defendants their mortgage deed, with covenant of title, under the same conditions and incumbrances that the defendants' deed was given; and the plaintiffs are liable to the defendants by virtue of said covenant.

Lockwood v. Sturdevant, 6 Conn. 373; *Hubbard v. Norton*, 10 Conn. 423.

The plaintiffs are estopped by their acts and declarations from claiming damages in this action.

Brown v. Wheeler, 17 Conn. 354; *Kinney v. Farnsworth*, Id. 355; *Dyer v. Cady*, 20 Conn. 563; *Smith v. Lewis*, 24 Conn. 624.

The case of *Smith v. Lewis*, *supra*, has many circumstances similar to the case at bar.

Preston v. Mann, 25 Conn. 118; *Smith v. Smith*, 30 Conn. 111; *Ives v. North Canaan*, 38 Conn. 402; *Parker v. Crittenden*, 37 Conn. 148.

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Carpenter, J., delivered the opinion of the court:

The facts of this case, stripped of immaterial matters, may be briefly stated: The defendants were the owners of some real estate which was heavily mortgaged to Yale College. They sold a portion of it, subject to the mortgage, to the plaintiff, for \$12,500. It was understood that the mortgage was to be removed from that portion sold to the plaintiff, so that she was to have a clean title. The transaction, however, took another form. In March, 1873, the plaintiff paid \$2,500 of the purchase money, received a warranty deed of the premises containing the usual covenants, and mortgaged the same premises to the defendants to secure the balance of the purchase money. It was arranged between the college and the defendants that the purchase money, when paid, was to be applied in part payment of the incumbrance; and that the college was to quitclaim its interest in the premises to the plaintiff. The plaintiff knew of the incumbrance at the time, and of the arrangement by which it was to be extinguished. She failed to pay the balance of the purchase money; consequently the incumbrance was not removed, and she did not acquire a complete title.

Yale College, at the instance of one of the defendants, foreclosed its mortgage, the foreclosure taking effect early in May, 1878, and evicted the plaintiff. The property at that time was worth but \$6,500, being several thousand dollars less than the unpaid portion of the purchase money. The plaintiff declined to pay her notes, stating that she "should be obliged to give up the land and lose what she had paid."

In February, 1885, this suit was brought. The complaint is in four counts. A demurrer was filed, which was sustained as to the first and second counts, and overruled as to the third and fourth. The answer to the third and fourth counts denied the material allegations. The defendants also pleaded a set-off and filed a cross-complaint. The third count is on the covenant against incumbrances, and the fourth is on the covenant of warranty.

The plaintiff claims that she is entitled to a judgment on either count at her election; the defendants claim that she is entitled to recover on neither.

In actions on the covenant against incumbrances, the court will endeavor to give to the plaintiff the actual damage sustained by the breach of the covenant.

If the plaintiff is evicted, and there is thereby a total failure of consideration, he will recover the value of the land at the time of the eviction, provided he has paid the purchase money. If the purchase money has been partially paid, he will recover the amount paid, with interest, not exceeding, however, the value of the land. The consideration having been paid, if the purchaser removes the incumbrance, the rule of damages is the amount paid for that purpose, not exceeding the value of the land. If the purchaser pays nothing towards the removal of the incumbrance, and is not evicted, he will recover only nominal damages.

These are the general rules; in applying them, however, care will be taken in each case to do no injustice to either party.

The leading principle is to give effect to the real intention of the parties. Both parties intend that the title shall vest in the purchaser. If the value increases, he has the benefit of it; if it decreases, he bears the loss. To secure to him the one, and subject him to the other, the rule has been adopted to limit the damages by the value of the land at the time of the eviction. Thus it will sometimes happen that he will recover more than the consideration paid, and sometimes less. To give the seller the benefit of an increased value, or to require him to bear the loss of a depreciation, would be a perversion of the fundamental principle on which the rule rests.

In the present case, if the plaintiff recovers, on the third count, the consideration paid by her, she loses nothing by the transaction, although the premises depreciated in value nearly one half. Yet the whole loss falls upon the defendants. That cannot be as the parties intended it. On the other hand, suppose the property had increased in value 50 per cent or more. The plaintiff then could have paid her notes and had the benefit of the enhanced value. We know of no method by which the defendants could legally have deprived her of that privilege. If now it is so that she can, with the aid of the court, compel the defendants to bear the loss, there must be some defect either in the law or in its administration.

If the plaintiff had paid the consideration, the incumbrance would have been removed, and she would have had a clean title according to her contract. That is precisely what the parties intended. It was not contemplated that the incumbrance would be removed in any other manner or by any other means. If she had paid, and the defendants had removed, the incumbrance, her loss doubtless would have been greater than it now is; and yet in this action she could have recovered only nominal damages. In that case it would have been very clear that her damage resulted, not from the breach of the covenant, but from the depreciation in the value of real estate.

By the original contract the plaintiff purchased, and the defendants sold, the premises, as though they were free from incumbrance. The contract provided that the purchase money should be paid, and the incumbrance removed, when the deed should be given. But, the plaintiff being unable to pay the purchase money, a change was made, in the form of the transaction only,—a change wholly for her benefit. In substance it was still a sale of the land,—the whole title,—and not merely an equity of redemption. The purchase money was to be used for the double purpose of extinguishing the mortgage to Yale College and the plaintiff's mortgage to the defendants. It was wholly her fault that it was not so used. It resulted from her failure to perform her agreement. She deliberately violated her contract, and now seeks to take advantage of her own wrong to the prejudice of the defendants. Having wronged them once, she now virtually insists that she has thereby acquired a right to inflict upon them a further wrong.

Suppose the transaction had been in form what it really was in substance—a sale of an unincumbered piece of land for \$12,500. The purchaser paid \$2,500 and gave her note for

\$10,000, secured by a mortgage of the same premises. After three or four years the property so far depreciated in value that it was worth much less than the mortgage on it; so much less that it was more advantageous for the purchaser to forfeit the amount already paid than to pay the balance. Now, let us further suppose that the purchaser, in this state of things, makes a claim on the seller for the amount of the purchase money actually paid, with interest, would a court of justice seriously entertain such a preposterous claim? And yet that is virtually the claim presented and strenuously urged in this case. The only difference is that in this case the form of the transaction gives the plaintiff a naked right of action; but it rests on the purest technics, being entirely destitute of merit. The plaintiff, therefore, is entitled to recover at most but nominal damages.

But the plaintiff is not entitled to recover even nominal damages. The defendants plead a set-off of the notes given for the purchase money, amounting to about \$10,000. One thing may be noticed in this connection with respect to these notes. They are either valid, subsisting notes, or they are not. If not, they are not collectible, and would not ordinarily be the subject of a set-off. If valid, or if for the purposes of this case they are to be treated as valid, they may be set off. It is unnecessary to consider to what extent they are collectible by the defendants; for the plaintiff, in claiming to recover substantial damages, proceeds upon the theory that she may require the defendants to make their deed good. If she may, she thereby becomes obligated to pay her notes. As the set-off assumes the validity of the notes, the defendants thereby impliedly admit their liability on their covenants. In discussing the matter of set-off, we shall assume the liability of both parties—the defendants on their covenants, and the plaintiff on her notes.

As the plaintiff in no event can recover to exceed \$6,500 and interest, and the notes amount to a much larger sum than that, the set-off is an answer to the plaintiff's demand, unless the notes are barred by the Statute of Limitations.

The statute provides for a set-off of mutual debts. Mutual debts growing out of the same subject-matter have been set off aside from the statute, especially in equity. The statute allows all such debts to be set off at law, and extends the equitable principle to independent debts, or debts growing out of different transactions. A set-off under the statute was refused by this court in *Atsop v. Nichols*, 9 Conn. 357, where the debt claimed to be set off was barred by the Statute of Limitations.

By statute the defendant may recover a balance if his claim is greater than the plaintiff's; but no recovery can be had if the debt is barred.

In *Avery v. Brown*, 31 Conn. 398, the court makes a clear distinction between independent debts and debts growing out of the same transaction. The former, if mutual, are proper subjects of set-off under the statute. The latter may be applied in reduction of the plaintiff's demand, without the aid of the statute. In this case there would be difficulty in applying the statute, and allowing the defendant to re-

cover a balance; but, as these claims arose in the same transaction, and are so connected that one is the consideration for the other, there can be no difficulty in allowing the one to be used in reduction of the other.

In *Avery v. Brown*, *supra*, on page 401, this court said: "The policy of the law is always to prevent unnecessary litigation; and where, in a pending suit, entire justice can be done to both of the parties before the court, by the ascertainment and set-off of their mutual claims against each other, without a violation of any of the settled rules or forms of law, such set-off ought always to be made." The court also quotes approvingly from *Parsons on Contracts*, as follows: "A defendant may deduct from the plaintiff's claim all just demands or claims owned by him in the very same transaction, or even in other, but closely-connected, transactions."

Applying the unpaid portion of the purchase money in reduction of the plaintiff's demand is but an application of the principle that, if the grantee fails to pay the purchase money,—the real consideration for the deed,—he is not entitled to recover in an action on the covenants in the deed; certainly no more than nominal damages. To such a claim, when offered, in common speech, as a set-off, but, more accurately speaking, by way of recoupment, the Statute of Limitations has no application.

"Not only does the bringing of an action stop the operation of the statute as to a proper matter of set-off, but it also seems that it revives a claim which is actually barred out, which is the proper subject of recoupment in the action as damages growing out of the same transaction." *Wood*, *Lim. Act.* p. 602.

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"Where there are cross-demands between parties, which accrued nearly at the same time, both of which would be barred by the statute, and the plaintiff has saved the statute by suing out process, but the defendant has not, the defendant may nevertheless set off his demand." *Ang. Lim.* § 75.

It seems clear, therefore, that, if substantial damages are recoverable, the notes, as a set-off or recoupment, are a complete defense; and they are equally a defense if only nominal damages are recoverable. Each party broke the contract, and each party is technically liable to the other. One demand may well offset the other, so that neither can recover.

Under the covenant of warranty the plaintiff claims that she is entitled to recover the value of the land at the time of the eviction. That would be the extent of her recovery if she had paid the purchase money. That being unpaid, it would seem that she would be entitled to recover much less. But, however that may be, even if we concede her claim as made, the set-off answers it fully.

The reasons given against a recovery on the third count are equally applicable to the fourth. The difficulty with the plaintiff's whole case is that, by the real contract between the parties, in equity at least, the eviction was the necessary consequence of her failure to pay the purchase money; and that whatever loss she sustained resulted, not from the breach of the covenants, but from the depreciation in the value of the estate purchased.

The Superior Court is advised to render judgment for the defendants.

In this opinion the other Judges concurred.

1 CONX.

MASSACHUSETTS.
SUPREME JUDICIAL COURT.

Thomas TURNER

v.

FITCHBURG R. R. CO., *Appl.*

Pub. Stat. chap. 112, §§ 195, 198, imposing a penalty on any person "knowingly without right" walking or standing on any railroad track, applies only to such acts when done without consent of the company; but they are acts which may be permitted by the railroad corporation. The right to maintain a private crossing is one which the railroad might grant, and to which it could give consent. The acts done in assertion of such right, or in virtue of such an alleged consent, are not to be treated as originally wrongful, when they have been continued over twenty years, and when the party affected thereby has acquiesced for that length of time. It does not, however, follow that, if one has acquired a private way over a railroad, it is not one which he is compelled to exercise subject to the superior right of the railroad corporation to run its trains as it may determine to be proper for the general business of its road.

(Franklin—Filed January 4, 1888.)

ON agreed facts. Judgment for plaintiff. Appeal by defendant. *Affirmed.*

The agreed statement of facts were substantially as follows:

The tracts of land described in plaintiff's declaration, and the tract of land between the same, owned by the defendant, over which said right of way is claimed, were owned by one Rodney Hunt, of said Orange, and was one continuous tract of land. In 1849 the said Hunt, by deed of warranty, conveyed to the Vermont & Massachusetts Railroad Company the tract of land now lying between plaintiff's two tracts of land, over which said right of way is claimed. The defendant is now rightfully in possession of said land, through conveyance from said Vermont & Massachusetts Railroad Company, and the same has been occupied and used as a railroad continuously since 1849. In 1874 the plaintiff became possessed of the two tracts of land described in his declaration, by a deed of warranty from one Patrick H. McCushing, the said McCushing holding title under one Howe, to whom said Hunt had granted said tracts, the possession of the said Hunt, Howe, McCushing, and Turner being continuous and without interruption. All of the defendant's acts declared on occurred between 1880 and 1886, and were done upon its said described tract of land in the construction and maintenance of its railroad, which it was authorized by the law to construct and maintain.

It is further agreed that the second described tract of land is bounded continuously on the north by land of the defendant as set forth in the declaration, and bounded continuously on

the south by Miller's River, so called, a stream of water varying in width from 100 to 150 feet; and that there is no approach to said tract either from the east or west, excepting over the land and tract of defendant. That there is no bridge or other means of getting over said river, and that the only access had by the plaintiff to and from said described tract of land is over the land of defendant. The plaintiff does not own any land south of said river, which is separated from the nearest public highway, south, by a tract of land about one half mile wide, mostly covered with an unbroken forest. That the plaintiff and his grantors have used said right of way openly, adversely, and uninterruptedly for more than twenty years prior to the acts of the defendant declared on.

If the plaintiff is entitled to damages, it is agreed that they may be assessed at \$25.

Judgment was entered in the court below for plaintiff, and defendant appealed.

Mr. George A. Torrey, for defendant:

Where a railroad cuts off a portion of land from the remaining land of the proprietor, and no agreement is made regarding a passway, and none is ordered by the county commissioners, the whole value of the land so cut off is included in the estimate of damages for the land taken by the railroad company for its right of way.

Presbry v. Old Colony & N. R. Co. 103 Mass. 1; *Tucker v. Massachusetts Cent. R. R. Co.* 118 Mass. 546; *Old Colony R. R. Co. v. Miller*, 125 Mass. 1; *Peoria, A. & D. R. R. Co. v. Sawyer*, 71 Ill. 361; *Wyandotte, K. C. & N. R. Co. v. Waldo*, 70 Mo. 629; *Reisner v. Atchison Union Depot & R. R. Co.* 27 Kan. 382; *Sheldon v. Minneapolis & St. L. R. Co.* 29 Minn. 318; *Parks v. Wisconsin Cent. R. Co.* 33 Wis. 418; *Hartshorn v. Burlington, C. R. & N. R. Co.* 52 Iowa, 618; *St. Louis, A. & T. R. R. Co. v. Anderson*, 39 Ark. 167.

Where a parcel of land is sold for a specific purpose, and conveyed without reservation, the law will not imply, in favor of the vendor, a right of way of necessity over or through such land, inconsistent with the object of the purchase.

Secley v. Bishop, 19 Conn. 128.

No right of way can be acquired by prescription over the land and location of a railroad company, while in use for railroad purposes.

Worcester v. Western R. R. Corp. 4 Met. 564.

Land dedicated to one public use cannot be taken for another public use without an Act of the Legislature.

Lake Shore & M. S. R. Co. v. N. Y. Cent. & St. L. R. Co. 8 Fed. Rep. 858; *Housatonic R. R. Co. v. Lee & H. R. R. Co.* 118 Mass. 391; *Worcester & Nashua R. R. Co. v. Railroad Comrs.* 118 Mass. 561; *Boston & M. R. R. Co. v. Lovell & L. R. R. Co.* 124 Mass. 368; *Central City H. R. Co. v. Fort Clark H. R. Co.* 81 Ill. 523; *Eastern R. R. Co. v. Boston & M. R. R. Co.* 111 Mass. 125.

To gain a prescriptive right to the use and enjoyment of an easement by a long continuance of the same, it must have been done with a knowledge and acquiescence of him who was seized of an estate of inheritance as the owner of the servient estate.

Washb. Easem. p. 111; *Daniel v. North*, 11 East, 872.

If defendant is a tenant of the original owner, the use of the way since the origin of said tenancy does not affect the right of the reversioner; and, inasmuch as it does not affect the right of the reversioner, it does not operate to create any prescriptive right against defendant.

Washb. Easem. p. 110; *Bright v. Walker*, 1 Comp. M. & R. 211.

Plaintiff, in order to have acquired a right of the location of the railroad, must have continuously violated the provisions of Pub. Stat. chap. 112, §§ 195-198. It is a well-settled principle of law that the direct violation of a public statute gives no rights to the violator.

Brookline v. Mackintosh, 138 Mass. 225; *Gay v. Boston & A. R. R. Co.* 1 Mass. (L. ed.) 468, 2 New Eng. Rep. 240, 141 Mass. 409.

When acts which are not *mala in se* are made *mala prohibita* from public policy, it is not necessary, in order to secure a conviction for their violation, to prove a *scienter*, nor is it any excuse that the defendant committed the offense under a claim of right.

Commonwealth v. Raymond, 97 Mass. 569; *Hourigan v. Nouell*, 110 Mass. 470; *Commonwealth v. Wentworth*, 118 Mass. 441; *Commonwealth v. Uhrig*, 188 Mass. 492.

The cases in this Commonwealth which have considered similar questions to the one now before the court are *Fisher v. New York & N. E. R. R. Co.* 135 Mass. 107, and *Gay v. Boston & A. R. R. Co. supra*.

Plaintiff has not shown that the railroad company has unlawfully interfered with the same. The railroad company has a perfect right to use the whole location for railroad purposes and for constructing the necessary tracks, buildings, and other structures thereon.

Boston G. L. Co. v. Old Colony & N. R. Co. 14 Allen, 444.

Messrs. Perkins & Lyman, for plaintiff: The agreed facts show all the elements of a prescriptive title.

Pub. Stat. chap. 122, § 12; *Blake v. Everett*, 1 Allen, 248.

The user of a grantee may be tacked to that of his grantor.

Leonard v. Leonard, 7 Allen, 277.

If defendant relies upon a defense of permissive use or license, it is incumbent upon it to prove affirmatively that the use of the easement was under some license or indulgence inconsistent with the plaintiff's claim of right (*Smith v. Miller*, 11 Gray, 145), and to rebut the presumption of a nonappearing grant (*Barnes v. Haynes*, 13 Gray, 188).

The only statute touching this subject of right of way is the Statute of 1861, chap. 112, § 100, re-enacted in Pub. Stat. chap. 112, § 215; but it was held in *Fisher v. New York & N. E. R. R. Co.* 135 Mass. 107, that this statute did not apply to a private way.

Since 1841 the county commissioners have had power, when land is taken for a railroad, to establish and order ways to be laid out across it for the benefit of the owner whose land is taken.

See Stat. 1841, chap. 125, §§ 1, 8; Gen. Stat. chap. 68, § 40; Pub. Stat. chap. 112, § 113.

The public may acquire a prescriptive right to a highway across a railroad location.

Fitchburg R. R. Co. v. Page, 131 Mass. 391;

Boston & A. R. R. Co. v. Boston, 140 Mass. 87; *Commonwealth v. Boston, B. & G. R. R. Co.* 135 Mass. 550.

A public right of way is certainly more of an obstruction than a private right of way.

Such crossings as are reasonably required may be provided by agreement, i. e. grant of the parties.

Boston G. L. Co. v. Old Colony & N. R. Co. 14 Allen, 444.

The Legislature has thought it necessary to pass a statute, to prevent the acquisition of rights by prescription in railroad locations.

Pub. Stat. chap. 112, § 215.

A right of way across a railroad location may be acquired by reservation (*Eames v. Worcester & N. R. R. Co.* 105 Mass. 198), and it will hardly be denied that such a way cannot be created by grant. That a railroad corporation may, to the extent of its interest in the owner of the land, grant a private way over its road, is unquestionably the law.

Gay v. Boston & A. R. R. Co. 1 Mass. (L. ed.) 468, 2 New Eng. Rep. 240, 141 Mass. 407.

There is no legal inconsistency in the existence of the prescriptive right of way over a railroad location, for prescription is founded on the supposition of a grant. Whatever may be granted may be prescribed for.

Washb. Easem. * 97.

Twenty years of appropriate use is sufficient to establish a public way across a railroad, or the grant of a private way.

Gay v. Boston & A. R. R. Co.; and *Fisher v. New York & N. E. R. R. Co. supra*; *Smith v. New York & N. E. R. R. Co.* 1 Mass. (L. ed.) 555, 2 New Eng. Rep. 412, 142 Mass. 21; *Wright v. Boston & A. R. R. Co.* 1 Mass. (L. ed.) 698, 2 New Eng. Rep. 725, 142 Mass. 296; *Deerfield v. Connecticut River R. R. Co.* 2 Mass. (L. ed.) 379, 4 New Eng. Rep. 189, 144 Mass. 325, 326; *Housatonic R. R. Co. v. Waterbury*, 28 Conn. 101; *Kansas Central R. Co. v. Allen*, 22 Kan. 285.

Jackson v. Rutland & B. R. R. Co. 25 Vt. 150, is in conflict with the decisions of numerous other courts.

See *Blake v. Rich*, 24 N. H. 282; Washb. Easem. 159, 214; *Lance's App.* 55 Pa. 16; *Erans v. Haefner*, 29 Mo. 141; *Alabama & F. R. R. Co. v. Burkett*, 42 Ala. 88; 1 Redf. R. R. 247; *Re New York & H. R. R. Co. v. Kip*, 46 N. Y. 546; *Washington Cemetery v. Prospect Park & C. I. R. R. Co.* 68 N. Y. 591.

No good reason seems to exist why the same rule should not apply where the fee is held by the railroad company. The defendant owned the fee in *Gay v. Boston & A. R. R. Co.* 1 Mass. (L. ed.) 468, 2 New Eng. Rep. 240, 141 Mass. 407.

See *Housatonic R. R. Co. v. Waterbury, supra*.

The easement acquired is practically a fee, and no difference in the assessment of damages is made because of the reversionary right. The easement is only technically such; for the corporation acquires the right to the land, "permanent in its nature, and practically exclusive."

Bemis v. Springfield, 122 Mass. 110, 118.

A right to cross a railroad is not inconsistent with the purpose of maintaining a railroad.

Housatonic R. R. Co. v. Waterbury, supra.

It is strictly a way of necessity to plaintiff, and not merely of great convenience.

Washb. Easem. p. 48, and cases cited in note; 3 Kent, Com. 422; *Leonard v. Leonard*, 2 Allen, 543; *Brigham v. Smith*, 4 Gray, 297.

The rule that deeds are to be construed as meaning what the language employed in them imports is well established; but there is an exception in the construction of deeds in the case of ways of necessity, where, by fiction of law, there is implied a deed or grant, to meet a special emergency on the grounds of public policy, as it has been said, in order that no land should be left inaccessible for purposes of cultivation.

Cardrey v. Willis, 7 Allen, 364; *Randall v. McLaughlin*, 10 Allen, 866; *Buss v. Dyer*, 123 Mass. 287, 291; *Leonard v. Leonard*, 2 Allen, 543.

The landowner has the right to cross the track, or to go under it, at reasonable times, and in such a manner as not to interfere with the operations of the railroad, when a necessity therefor exists, to get to and from the other portions of his farm, his crops, and for usual farming purposes.

2 Wood, R. R. 771.

The statement in *Presbrey v. Old Colony & N. R. Co.* 103 Mass. 1, that the landowner has no right to cross the railroad to get to and from his estate, must be applied strictly to the facts of that particular case. The court merely affirmed the ruling of the sheriff, which was that the petitioner, "having an opportunity to reach the highway without crossing the railroad, had no right so to cross."

The rule of construction—*expressio unius exclusio alterius*—shows that if the deed was intended, in effect, to deprive the owner of the right of access to the south tract of land, the land conveyed to the company would have been bounded by the river.

If there is any evidence which would warrant the finding, it must stand.

Forsyth v. Hooper, 11 Allen, 419; *Smith v. Collins*, 115 Mass. 888.

The finding is not to be set aside because, on the same evidence, the court might have been justified in finding otherwise. The burden is on the defendant to show that the finding was unmistakably wrong.

Reed v. Reed, 114 Mass. 872.

Devens, J., delivered the opinion of the court:

The plaintiff, and those under whom he claims, have used a right of way "openly, adversely, and uninterruptedly," across the road of defendant, for more than twenty years prior to the acts of defendant declared on.

The most important question which the parties have presented is whether a private right of way by prescription could be acquired, by an individual, over the location of a railroad, under the statutes as they now exist. That such a right of way may be acquired by reservation, by grant, or by agreement of parties, is well established. *Boston G. L. Co. v. Old Colony & N. R. Co.* 14 Allen, 444; *Gay v. Boston & A. R. Co.* 1 Mass. (L. ed.) 468, 2 New Eng. Rep. 240, 144 Mass. 407.

If such a right might be thus acquired, there would be nothing inconsistent in holding that

it might be acquired by prescription, and that twenty years' adverse user would be evidence of a grant thereof. In *Fisher v. New York & N. E. R. R. Co.* 185 Mass. 107, it was held that Stat. 1861, chap. 100 (Pub. Stat. chap. 112, § 215), which in substance provides that no length of possession or occupancy of land of a railroad corporation by an abutter shall create a right in such land to the abutter, would not prevent him from acquiring a right to a private way across the railroad by a twenty years' user thereof.

That which the defendant urges as the strongest argument against the plaintiffs having acquired a prescriptive right to cross the railroad track is that, in order to have done so, he and his grantors must have continuously violated Pub. Stat. chap. 11, §§ 195, 198; and that such violations could confer no rights on the violator. Section 195, imposing a penalty on any person "knowingly without right" walking or standing on any railroad track, is first found in Stat. 1853, chap. 414, § 4. Since that time it has been decided that, in the case of a public way, a right might be acquired by prescription, although the effect of this section of the statute was not discussed. *Fitchburg R. R. Co. v. Page*, 181 Mass. 391. There are intimations also, since the Statute of 1853, that a private way may be thus acquired. *Gay v. Boston & A. R. Co.* 1 Mass. (L. ed.) 468, 2 New Eng. Rep. 240, 141 Mass. 407; *Wright v. Boston & A. R. Co.* 1 Mass. (L. ed.) 683, 2 New Eng. Rep. 725, 142 Mass. 296; *Deerfield v. Connecticut River R. R. Co.* 2 Mass. (L. ed.) 379, 4 New Eng. Rep. 189, 144 Mass. 325.

The defendant also relies on Pub. Stat. chap. 112, § 198, making it penal to ride or drive a horse, without consent of a railroad corporation, on its road. Its contention as to both sections (195, 198) is that rights cannot be acquired by prescription against another, or his property, by acts done in violation of the absolute prohibition of a public statute; that such acts, where expressly prohibited, are illegal in their inception and continuance, and cannot become lawful as against individual members of the public, however long they may have been exercised. It is urged that, "when the statute forbids anything to be done, the right to do it is not to be granted or acquired." This contention, apparently drawn from the case of *Brookline v. Mackintosh*, 123 Mass. 225, is there applied to a claim of a prescriptive right to defile a stream of water by pouring into it deleterious substances contrary to law, which right it was not in the power of any one to grant. Such an act, for public reasons, is expressly prohibited to all. The argument has no proper application where the act done is or is not lawful according as it may have been done by right, or with the consent of the party claiming to have been injured; or as it may have been done against right, or without such consent. The acts forbidden by §§ 195, 198, are so only when done without consent, but they could be permitted by the railroad corporation. The right to maintain a private crossing is also one which the railroad might grant, and to which it could give consent. The acts done in assertion of such a right, or by virtue of such an alleged consent, are not to be treated as originally wrongful, when they have been con-

tinued over twenty years, and when the party affected thereby has acquiesced for that length of time.

The defendant further urges that it is impossible to gain a right of way over a railroad in actual operation, as the laws of the railroad would be subject to the easement of the plaintiff, who might make use of it at his own pleasure. The case does not require us to define the exact limits of the right which the plaintiff has acquired. But it does not follow that, even if he has an easement, it is not one which he is compelled to exercise subject to the superior right of the railroad corporation to run its trains as it may determine to be proper for the general business of its road. There certainly may be an easement which will permit a way to be used only at particular times or seasons, or for particular purposes. As there may be, by grant, a right to cross a railroad when the trains of the corporation are not passing, so such an one may be acquired.

It is said that the railroad has, under Stat. 1874, chap. 401, a right to take lands for railroad purposes; that "lands" includes rights of way; and that, if plaintiffs' rights are interfered with, his remedy is by application to the county commissioners. This statute gives to the railroad company a right to relocate its railroad, and, for that purpose, upon proper proceedings, to take other lands than those then occupied by it; but the case affords no evidence that such proceedings were had, nor does it appear that the agreed statement of facts was intended to bring any such question before us.

It must be assumed that the defendant had knowledge of the acts of the plaintiff, as they were open and adverse, although such knowledge is not stated, in terms, in the statement of facts. The statement also fails to show precisely what the acts of the defendant were, although it refers to them as those declared on. These are, as alleged in the declaration to have been, the erection of a fence across the way used by plaintiff, filling and placing upon it stones, ties, gravel, and iron rails, so as to render it impassable as a horseway, and practically so as a footway. The statement finds that the acts done by defendant were done "in the construction and maintenance of its railroad which it was authorized by law to construct and maintain." If the meaning of this is that the acts done by defendant were done as a part of the necessary repair of its road, and were appropriate for that purpose; and that interference with plaintiff's way was necessarily incidental to such repair,—there would be strong ground to argue that the plaintiff had, and could acquire, no right which interfered with this, and that such a right of the defendant was necessarily superior to any which plaintiff could have acquired. But an examination of the whole facts, taken in connection with the arguments submitted, lead us to the conclusion that the obstacle to the plaintiff's way was a permanent one; that its purpose was simply to deprive the plaintiff of the use of the way; and that it was in no other sense an act done in the maintenance of its road by the defendant.

We have not found it necessary to consider whether the plaintiff was entitled to a way by necessity.

Judgment affirmed.

James C. EDDY *et al.*, Exrs.,

v.

Walter S. ADAMS, Admr.

1. Pub. Stat. chap. 197, § 12, is simply a general statement of the rule for the running of the Statute of Limitations in the ordinary case, where the same person remains administrator for two years. The general rule is more specifically stated in Pub. Stat. chap. 136, § 9; and neither section is inconsistent with or qualifies the express provisions in chap. 136, § 17, for cases where the administrator of the maker of a promissory note who has died before the statute has run, and before suit, resigns within the two years, and an administrator *de bonis non* is appointed. These provisions apply in terms, and allow an action within two years from the defendant's giving bond. While the special Statute of Limitations overrides the general statute, it was not intended to bar an action by the lapse of time during which it provides that the administrator shall not be held to answer to a suit. Pub. Stat. chap. 136, § 1, applies to an administrator *de bonis non* as well as to others, and is a bar to an action prematurely commenced.

2. Where it does not appear that the estate had been exhausted in paying preferred claims, and there was evidence that there were funds of the estate not included in the inventory or account, and several of the sums paid out were not preferred claims, the action is not barred by Pub. Stat. chap. 136, § 5.

(Bristol—Filed January 4, 1888.)

ON defendant's exceptions. *Overruled.* The court found for the plaintiff, and defendant alleged exceptions. The facts are stated in the opinion.

Messrs. John C. Coombs and John V. Beal, for defendant:

This action is barred by Pub. Stat. chap. 136, § 5.

All the evidence in this case tends to show that the entire estate was exhausted in the payment of preferred claims, which fact is, under the statute, in and of itself, a substantive bar to the suit. The only answer to be suggested to it here is that the fact should appear at the settlement of the account in the probate court, in reply to which the defendant submits that the suggestion is in its nature technical, and ignores the meritorious fact. There is no reason why the fact should not be shown at any time.

Fuller v. Connelly, 1 Mass. (L. ed.) 623, 2 New Eng. Rep. 600, 142 Mass. 227.

Under the amendment of the Practice Act of 1883, chap. 223, § 14, equitable defenses are open in legal actions.

The action is barred by Pub. Stat. chap. 197, §§ 1 and 12.

The plaintiffs' testator did not die until after the time when the defendant could be sued on this claim.

The right of plaintiffs to sue on claims, not

otherwise affected, for two years after their appointment, does not extend the period of defendant's liability.

Hill v. Mixer, 5 Allen, 27; *Aiken v. Morse*, 104 Mass. 277.

The defendant has urged, as a consequence of plaintiffs' construction of Pub. Stat. chap. 197, § 12, that it might suspend the operation of the general statutes of limitations by and against the estates of decedents, indefinitely. It is true that such consequence has been held to be no objection to a true construction.

Gallup v. Gallup, 11 Met. 445.

But defendant relies upon the language of Chief Justice Shaw, in the same case, for the answer that an unexpected consequence to plaintiffs, or disappointment to their expectations, is no ground for varying the clear meaning of the Act.

The plaintiffs' testator died, during his lifetime, have a period during which he could have brought this action within the extension given by chap. 197, § 12, and without any objection under chap. 186, §§ 1, 9, 17, to wit, all day on April 7, 1886.

Paul v. Stone, 112 Mass. 27.

Messrs. Morton & Jennings, for plaintiffs:

The estate had not been fully administered. In order to avail himself of the defense of *plene administravit*, an administrator must show, upon a settlement of his account, that he has exhausted the whole of the estate.

Pub. Stat. chap. 186, § 5; *Cushing v. Field*, 9 Met. 180.

The action was seasonably brought. The cause of action accrued to the plaintiffs' testator May 28, 1879, and, if both parties had survived, would have been barred by the provisions of Pub. Stat. chap. 197, § 1, on or after May 28, 1885.

From April 7, 1884, to April 6, 1885, the whole period of the administration of Boynton, the first administrator, and from April 6, 1885, to April 6, 1886, the first year of the defendant's administration, the plaintiff could maintain no action upon his claim; his remedy was wholly suspended.

Pub. Stat. chap. 197, §§ 1, 9, 17.

If then the two years, during which the right of the testator to bring suit on the note was suspended, be deducted from the entire time which had elapsed from the time the cause of action accrued until the bringing of this suit, the six years had not expired when the suit was begun, and the action is not barred by the general statute.

Hoyt v. Shields, 3 Port. (Ala.) 247; *Planters Bank v. Bank of Alexandria*, 10 Gill & J. 846; *Jordan v. Jordan*, Dudley (Ga.), 182; *Little v. Price*, 1 Md. Ch. 182; *Moore v. Crockett*, 10 Humph. 365; *Hutsonpiller v. Storer*, 12 Gratt. (Va.) 579; *Mattingly v. Boyd*, 61 U. S. 20 How. 128 (15 L. ed. 845); *Warlaw v. Buzzard*, 15 Rich. (S. C.) 158; *Doughty v. Doughty*, 10 N. J. Eq. 347; *Montgomery v. Hernandez*, 25 U. S. 12 Wheat. 128 (6 L. ed. 575); *Hanger v. Abbott*, 73 U. S. 6 Wall. 532 (18 L. ed. 939).

In *Colleston v. Hasley*, 6 Gray, 519, and *Stoddard v. Doane*, 7 Gray, 386, while the court holds that insolvency proceedings do not suspend the operation of the Statute of Limitations, because they in no way prevent the bringing of

suit against the debtor, the fair inference from the language of the court is that the statute would have ceased to run if the insolvency proceedings had barred the right of action while they were pending.

Hill v. Phillips, 14 R. I. 93.

If the action was not barred prior to the termination of the previous administration of Boynton, or if the testator, who died April 19, 1886, was entitled to bring this action on or after April 6, 1886, then the action is not barred by the statutes of limitation relative to suits by and against executors and administrators.

Pub. Stat. chap. 186, § 17; Pub. Stat. chap. 197, § 12.

The two years given by chap. 197, § 12, for actions against executors and administrators, mean two years during one of which a creditor could have commenced his action; they do not mean two years during neither of which such action could have been commenced.

Gallup v. Gallup, 11 Met. 447.

Holmes, J., delivered the opinion of the court:

1. This is a suit on a promissory note made by the defendant's intestate May 25, 1878, payable to the plaintiff's testator in one year, which therefore would have been barred by the Statute of Limitations after May 25, 1885, if the maker and payee had both lived so long. The maker died, however, on March 31, 1884, and one Boynton was appointed his administrator, and gave bond on April 7, 1884. If Boynton had remained administrator, the note would have been barred after April 7, 1886. Pub. Stat. chap. 197, § 12; chap. 186, § 9. But Boynton resigned, and the defendant was appointed administrator *de bonis non* on April 6, 1885. The writ in this suit is dated April 5, 1887.

The defendant contends that Boynton's resignation makes no difference in the running of the special Statute of Limitations in favor of executors and administrators; that the language of Pub. Stat. chap. 97, § 12, allows the action to be brought only within two years after "the grant" of letters of administration; and that the word "the" can only refer to the original grant, and thus that the time within which this action could be brought ended April 7, 1886. But we think it perfectly clear that this section is simply a general statement of the rule for the ordinary case, where the same person remains administrator for two years; that the general rule is more specifically stated in Pub. Stat. chap. 186, § 9; and that neither section is inconsistent with, or qualifies, the express provisions for cases like the present in chap. 186, § 17, which apply in terms, and allow an action within two years from the defendant's giving bond. The special Statute of Limitations overrides the general statute, and sometimes abridges, and sometimes extends, the period of liability. But it cannot have been intended to bar an action by the lapse of the time during which it provides that the administrator shall not be held to answer to a suit. Pub. Stat. chap. 186, § 1, applies to administrators *de bonis non* as well as to others, and is a bar to an action prematurely commenced. Therefore, on the defendant's contention, the plaintiffs had only one day—April 7, 1886—on which they

could have sued, within the two years from Boynton's giving bond, and by a little contrivance could have been prevented from suing at all.

2. It does not appear that the estate had been exhausted in paying preferred claims, so that the action is barred by Pub. Stat. chap. 186, § 5. The exceptions state that there was evidence that there were funds of the estate in the hands of Boynton's agent, which were not included in his inventory or account; and several of the claims paid do not appear to have been preferred claims. See also *Cushing v. Field*, 9 Met. 180.

Exceptions overruled.

Clinton P. VOSE

r.

ESSEX COUNTY.

1. The order of the superior court, fixing, under Pub. Stat. chap. 220, § 27, the salaries of officers, assistants, and employees of jails and houses of correction, is not for any definite period in the future, and does not deprive the commissioners of the power to establish a different salary after the year for which the salary is fixed has expired, if a change in the circumstances or the officer seems to require it.
2. Where the superior court, in 1879, upon petition of the sheriff, fixed the salary of the steward and engineer at the jail and house of correction in Lawrence at \$900, and the person who then held the office resigned in 1880, and the plaintiff was appointed in his place, and the commissioners fixed his salary at \$800,—after such salary had been paid as fixed, the plaintiff had no claim against the county.

(Essex—Filed January 5, 1888.)

ON defendant's exceptions. *Sustained.*

This is an action of contract brought by the plaintiff to recover a balance of salary claimed to be due him for services rendered to the county, as steward and engineer at the jail and house of correction at Lawrence in said county. Judgment for plaintiff, and defendant alleged exceptions.

Further facts appear from the opinion.

Messrs. D. & C. & C. G. Saunders, for defendant:

The plaintiff is an officer employed at the jail and house of correction in Lawrence as steward and engineer.

The county commissioners have authority in the first instance to establish the salary of such an officer.

Pub. Stat. chap. 220, § 26.

If the sheriff deems the salary so fixed to be inadequate, he may present a petition to the superior court next to be holden in the county; and the court, after notice to the chairman of the county commissioners and a hearing, shall fix the salary and pass upon such further order in the premises as law and justice require.

Pub. Stat. chap. 220, § 27.

The county commissioners are the persons charged by law with the oversight and management of the property of the county; to them is entrusted very largely the matter of furnishing supplies to the jails and houses of correction, and they alone have the power to fix the compensation of all the officers employed therein, save the limited jurisdiction given the superior court to increase such salaries. They organize once a year by choosing a chairman at the first meeting in each year after the annual election.

Pub. Stat. chap. 22, § 18.

After such organization they become in fact a new board, and are not bound by the action of their predecessors in office, unless the county has become lawfully bound by contracts which the commissioners had a right to make in its behalf.

In the absence of action by the court, they surely must have the right of fixing salaries at least once a year.

Such a power frequently to change the salaries of public officers is in accordance with our general system of government, both State and municipal.

Commonwealth v. Bacon, 6 Serg. & R. 332; *Barker v. Pittsburgh*, 4 Pa. 49.

Mr. E. T. Burley, for plaintiff:

The question raised by the bill of exceptions is whether the county commissioners of Essex County had power to change the salary fixed by the superior court. The duty of the county commissioners, as stated in Gen. Stat. chap. 178, § 22, was to establish fixed salaries. Under the next section, the superior court on appeal could revise the county commissioners' finding, and fix the salary.

The phraseology used indicates that, like other salaries in the Commonwealth, these salaries for established duties were compensations having some regard to permanency.

There are only two views possible: that the order of the superior court only binds that particular board of county commissioners, or that it is binding until modified by the superior court itself. And it is submitted that the latter is the more reasonable view.

Morton, Ch. J., delivered the opinion of the court:

Under our system of managing the prisons of the State, the sheriff has charge of the jails and—except in the county of Suffolk—of the house of correction in his county, and is to keep them by himself or by his deputy as jailer or master. The jailer or master appoints all subordinate officers or assistants, but the responsibility of determining their compensation is placed upon the county commissioners. The statute provides that "the commissioners shall establish fixed salaries for all officers, assistants, and employees of jails and houses of correction, which shall be in full compensation for all their services." Pub. Stat. chap. 220, § 26. Section 27 provides that, "if the sheriff, master, keeper, or jailer deems any such salary inadequate, he may present his petition, showing the facts, to the superior court next to be holden for the county; and the court, after notice to the chairman of the county commissioners, and a hearing, shall fix the salary, and pass such further order in the premises as law and justice require."

The provision that the commissioners shall establish the salaries implies that they shall have the power to change them from time to time as the public interests seem to require. If the commissioners establish a salary, and the superior court, upon petition of the sheriff, increases it, we do not think that this takes away the power of the commissioners to establish a different salary in the future, if a change in the circumstances or the officer seems to require it. The order of the court fixing the salary is not for any definite period in the future. It is based upon the facts existing at the time it is passed. The statute contains no provision that the commissioners shall or may apply to the court for a reconsideration or revision of the order. It is not intended that the court shall exercise a continuing supervision over the officers or their salaries; that responsibility rests upon the county commissioners. This seems to be the purpose of the statute. If, therefore, after the superior court has fixed the salary of an officer or employee, and after the year for which the salary is fixed has expired, the commissioners are of the opinion that a change in the circumstances and conditions has occurred which makes it just, in the interest of the public, that a different salary should be established, we are of opinion that they have the power to fix the salary at a lower sum, subject to the revision of the superior court, upon the petition of the sheriff or jailer, if he is dissatisfied with the new salary as fixed. In the case at bar, in 1879 the superior court, upon the petition of the sheriff, fixed the salary of the steward and engineer at the jail and house of correction in Lawrence at \$900; the person who then held the office resigned, and in 1880 the plaintiff was appointed in his place, and the commissioners fixed his salary at \$800. For the reasons stated above, we think they had the right to do this. It follows that, as the plaintiff has been paid his salary as fixed by the commissioners, he has no claim against the defendant.

Exceptions sustained.

Mary E. STANTON

v.

City of SALEM.*

In an action under Pub. Stat. chap. 52, § 18, for personal injuries by falling on ice, about two inches thick, on a sidewalk of a highway, where there was no evidence as to how it was formed or how long it had existed, or that any officer of the city knew of it, or by reasonable diligence could have acquired such knowledge, the court properly directed a verdict for the defendant.

(Essex—Filed January 4, 1888.)

ON plaintiff's exceptions. *Overruled.*

This was an action of tort to recover for personal injuries to the plaintiff by falling on the ice on the sidewalk on Winter Street in the

*As to liability of municipalities for injuries resulting from ice and snow on sidewalks, see *Chase v. Cleveland* (Ohio), 6 West. Rep. 817, and note, p. 82.

defendant city, which street was a public highway which the defendant was bound to keep in repair.

At the close of the plaintiff's case the defendant asked the court to rule that the action could not be maintained. The court ruled as requested, and ordered a verdict for the defendant; and plaintiff alleged exceptions.

Further facts appear from the opinion.

Mr. D. W. Quill, for plaintiff:

It was a question for the jury whether the ice was a defect for which defendant would be liable, or whether plaintiff was in the exercise of due care at the time of the injury.

Bigelow v. Rutland, 4 Cush. 247.

It is the duty of a judge to submit to the jury the question of due care of the plaintiff, if there is any evidence to justify a finding, although in his opinion its preponderance should be against the plaintiff.

Measel v. Lynn & B. R. R. Co. 8 Allen, 284; *Fox v. Sackett*, 10 Allen, 585; *Williams v. Grealy*, 112 Mass. 79; *Reed v. Deerfield*, 8 Allen, 522; *Gaynor v. Old Colony & N. R. Co.* 100 Mass. 208; *Linnehan v. Sampson*, 126 Mass. 506; *Hall v. Lowell*, 10 Cush. 260; *Burt v. Boston*, 122 Mass. 223.

Ice or snow suffered to remain upon a sidewalk in such an uneven and rounded form that a person cannot walk over it, using due care, without danger of falling down, may be found by the jury, in an action against the town to be a defect for which the defendant is liable.

Luther v. Worcester, 97 Mass. 268; *Stone v. Hubbardston*, 100 Mass. 49; *Morse v. Boston*, 109 Mass. 446; *McAuley v. Boston*, 113 Mass. 508; *Pinkham v. Topsfield*, 104 Mass. 78; *Williams v. Lawrence*, 118 Mass. 506; *Street v. Holyoke*, 105 Mass. 82.

In *Olson v. Worcester*, 142 Mass. 536, the court says: "By the existing statutes, a town or city is liable for an injury caused by a defect in a way, if the injury might have been prevented by reasonable care and diligence on the part of the town or city, and if the town or city had reasonable notice of the defect, or might have had notice thereof by the exercise of proper care and diligence on its part. * * * If there are known causes in operation, likely to produce a defect in the way, the diligence required is greater than might be sufficient under other conditions."

Pub. Stat. chap. 52, § 18.

In the case at bar it appears, from the testimony of the plaintiff and her witnesses, that the ice on which she fell was old ice, and must have been on the sidewalk for a considerable length of time before the time of the injury.

Post v. Boston, 141 Mass. 189; *Blake v. Lowell*, 148 Mass. 296.

In *Billings v. Worcester*, 102 Mass. 829, the court says: "The fault for which the town is chargeable consists in permitting the defect to remain, not in causing it to exist."

It is not enough for the exemption of the town that it has exercised reasonable care, or even the utmost diligence, to make its ways safe, if they are in fact not so.

See *Fitzgerald v. Woburn*, 109 Mass. 204.

Mr. F. L. Evans, for defendant:

1. The plaintiff must show that at the time she was injured she was a traveler upon the highway within the meaning of the statute.

She might have been walking upon the sidewalk, and still not have been a traveler within the meaning of the statute.

Blodgett v. Boston, 8 Allen, 287; *Tighe v. Lowell*, 119 Mass. 472; *Stinson v. Gardiner*, 42 Me. 248; *Hardy v. Keene*, 52 N. H. 370; *Harper v. Milwaukee*, 30 Wis. 365; *Hunt v. Salem*, 121 Mass. 294; *McCarthy v. Portland*, 67 Me. 167.

There is no testimony that the plaintiff, when injured, was in the exercise of due care.

Wilson v. Charlestown, 8 Allen, 187.

Upon the facts stated, there was no defect for which the city would be liable.

Street v. Holyoke, 105 Mass. 82; *Raymond v. Lowell*, 6 Cush. 538; *Stanton v. Springfield*, 12 Allen, 570; *Nason v. Boston*, 14 Allen, 508; *Gilbert v. Roxbury*, 100 Mass. 185.

If, upon the testimony, the jury might have found that the cause of the plaintiff's fall was a defect in the sidewalk, then the burden was upon the plaintiff to show that the defendant had reasonable notice of such defect, or might have had notice thereof by the exercise of proper care and diligence.

Reed v. Northfield, 13 Pick. 94; *Hove v. Lowell*, 101 Mass. 99; *Whitehead v. Lowell*, 124 Mass. 281; *Donaldson v. Boston*, 16 Gray, 508; *Hanscom v. Boston*, 141 Mass. 245.

Morton, Ch. J., delivered the opinion of the court:

In an action brought under Pub. Stat. chap. 52, § 18, the burden is upon the plaintiff to show, not only a defect in a highway, but also that the defect was one which the proper officers either had knowledge of, or, by the exercise of reasonable care and diligence, might have had knowledge of, in time to have remedied it, or to have prevented the injury complained of. *Hanscom v. Boston*, 141 Mass. 242, and cases cited.

In the case at bar the plaintiff was injured by stepping upon ice about two inches thick, which had formed upon the sidewalk. If we assume this to have been a defect, there is no evidence in the case as to how it was formed, or how long it had existed. No witness saw it before the accident, and there was no evidence to show either that any officer of the city knew of it, or could by reasonable diligence have known of it before the injury to the plaintiff. She failed to meet the burden of proving her case, and the court rightly directed a verdict for the defendant.

Exceptions overruled.

COMMONWEALTH of Massachusetts.

v.

Patrick CARROLL.

1. **Complaint** may be made by anyone competent to make oath to it.
2. An **offense** charged to have been committed in a **locality** within the **jurisdiction** of the court is well pleaded.
3. Objection to complaint for **form** cannot be raised in the superior court for the **first time**.
4. **Throwing a missile at a car**, whether in use or not, is a violation of Pub. Stat. chap. 112, § 206.

5. Acts of the Legislature incorporating **railroad companies** and providing for their **consolidation** are, in connection with agreement of consolidation and assent of the railroad commissioners, **competent proof of existence of new company**.

6. Description of a **car**, as bearing a **certain name and marks**, coupled with **identification** that cars so marked belonged to the company whose name they bore, was competent to prove **ownership**.

7. Refusal to instruct jury in **definition** of the word "**stone**" is not error.

(Middlesex—Filed January 2, 1888.)

ON defendant's exceptions. *Overruled.*

Complaint to the Third District Court of Eastern Middlesex, charging that Patrick H. Carroll on the 20th day of February, 1887, at Cambridge, willfully did throw a certain missile, to wit, a stone, at a certain street railway car of the property of the Cambridge Railroad Company, a corporation duly established by law, against the peace, etc. Before the impaneling of the jury in the superior court, the defendant filed a motion to quash the complaint, for the following reasons: 1. There is therein no legal offense duly, formally, and substantially set forth. 2. Because the complaint is not made by any competent and proper person or authority. 3. Because there is no averment, and nothing to show, that the alleged offense was within the jurisdiction of the lower court. 4. Because there is no proper and fit description of the railway car. 5. There is no proper and sufficient description of the place where the said car was, or in what street it was, or that it was in any public place whatever. The court overruled the motion, and the defendant excepted.

The testimony tended to show that on Sunday, February 20, 1887, between 4 and 5 p. m. a certain horsecar was passing in and along Webster Avenue, at the junction of Windsor Street, in Cambridge, and that a stone was thrown from the sidewalk, towards the car, by someone, the stone hitting the car, unless possibly by a rebound. The government offered three witnesses, who testified that the defendant was the person who threw it. The defendant testified that he did not throw a stone, and presented five witnesses, who were with him, and who swore that he threw nothing. No stone or other missile was produced at the trial, and neither of the government witnesses undertook to describe the thing alleged to have been thrown, otherwise than as a stone, and about the size of a goose egg, and dark. The government offered in evidence the Acts of incorporation,—Acts 1853, chap. 883; also Acts 1872, chap. 17; also Acts 1883, chap. 37; and also Acts 1886, chap. 229.

The government also offered in evidence an alleged agreement of consolidation between the two roads named in the last Act (the Charles River Street Railway and the Cambridge Railway Company), dated in September, 1886, and having at the bottom the assent of the railroad commissioners. The government produced no further evidence of the incorporation of the Cambridge Railroad Company. The govern-

ment asked one of the witnesses, "What, if anything, was painted on the car?" The defendant objected to the question, but the court admitted it, and the witness answered that "the Cambridge Railroad Company" was painted on the car, and also "No. 13." The superintendent of the road testified that the car numbered 13, with the words painted on the outside "Cambridge Railroad Company," was the property of the Cambridge Railroad Company. At the close of the testimony the defendant requested the court to rule:

1. The burden is upon the government to prove that the Cambridge Railroad Company was, at the time of the alleged offense, a duly incorporated company, and that that was its correct name; that this car belonged to that corporation, and was then and there its property, and in its possession, custody, control, and use.

2. There has been no competent legal evidence offered of the organization and existence of this alleged corporation.

3. The certificate of the secretary of state is indispensable.

4. Under this complaint the burden is upon the government to prove, beyond reasonable doubt, the alleged missile was a stone. It is not enough to show it a hard, compact body, of any form or size.

5. A stone is a concretion of some species of earth, as lime, silex, clay, and the like, usually in combination with some species of air or gas, with sulphur, or with a metallic substance.

The court declined to instruct the jury as asked, except as follows: That the government must prove beyond a reasonable doubt all the facts alleged in the complaint as alleged, except that the date was not material; that it was a stone, and not another missile; that the defendant did wilfully throw it at a certain railway car; that the car was the property of the Cambridge Railroad Company; that that company was a corporation duly established by law.

The jury returned a verdict of guilty, and the defendant alleged exceptions.

Mr. George W. Searle, for defendant:

The motion to quash should have been sustained. The complaint is not made by any policeman or any other official, and there is no statement by which the court could know that the complainant had any right or authority to institute the prosecution. There is nothing in the complaint to show that the locality of the alleged offense was within the jurisdiction of the Third District Court of Eastern Middlesex. There is no offense whatever set forth substantially and precisely. The motion was made for the first time in the upper court; but this is an objection, not of mere form, but of substance.

There is nothing whatever from which it can be inferred that the car was in use, and running or standing upon any railway or railroad track. "At a certain street railway car" does not import anything of that kind, and is perfectly consistent with the car being in the storehouse, shed, or yard of a manufacturer of cars; or in the yard, barn, or other place of storage of a horse railway car, when not in use.

Chapter 112, by its title, tenor, and entire provisions, refers to a car in use upon a track, 2 MASS.

and in use upon a railroad or railway, in the ordinary course of its business.

See §§ 1, 2, 9-14.

Chapter 212, § 206, is manifestly intended to refer to a car on a track, and in active use as a traveling car, either for passengers or freight, or both.

The question put to witness: "What, if anything, was painted on the car?" was objectionable and incompetent for any purpose, and let him in to say that "Cambridge Horse Railway Company" was painted on it, and also "No. 13;" and this last in turn allowed the superintendent to say that the car with such painting belonged to the Cambridge Railroad Company. All this was an act done, and painting put on and allowed to be on, by the action of a third person, without any co-operation, or concurrence, or consent of the defendant, and could not be used as evidence against him for any purpose, against his objection.

There was no competent evidence whatever as to the incorporation, the charter, or the existence of the alleged Cambridge Railroad Company, a corporation, etc.

The court should have given the definition of a stone as asked, or else have given some other definition.

Mr. Andrew J. Waterman, *Atty. Gen.*, for the Commonwealth:

The rulings of the court were correct.

The complaint is under Pub. Stat. chap. 112, § 206.

The offense is within the jurisdiction of the district court.

Stat. 1882, chap. 233, § 1.

The motion to quash was not seasonably made.

Pub. Stat. chap. 214, § 25; *Commonwealth v. Goulding*, 135 Mass. 552; *Commonwealth v. Hard*, 121 Mass. 56.

There was a sufficient proof respecting ownership of property.

See chap. 214, § 14; Pub. Stat. chap. 169, §§ 67, 68.

The instruction respecting the missile was correct. Even if the clause, "to wit, a stone," may not be disregarded under *Commonwealth v. Dextra*, 1 Mass. (L. ed.) 796, 3 New Eng. Rep. 132, 143 Mass. 28, there was no substantial variance between the complaint and proof. The missile was in the nature of a stone for the purpose to which it was put.

See *Commonwealth v. Auberton*, 133 Mass. 404.

Holmes, J., delivered the opinion of the court:

1. The motion to quash was rightly overruled. Anyone may make a complaint who is competent to make oath to it.

The offense is alleged to have been committed at Cambridge, and therefore it is shown to be within the jurisdiction of the court. Stat. 1882, chap. 233. In the opinion of a majority of the court, Pub. Stat. chap. 12, § 206, must be construed to punish throwing a missile at a car, whether in use or not, and therefore it was unnecessary to allege that the car was in use at the time. It was also unnecessary to describe the car more particularly; and if there had been any defect in this respect, or in respect of the place, it would have been a defect of form.

which could not be objected to for the first time in the superior court. Pub. Stat. chap. 214, § 25.

2. The evidence of the existence of the corporation was competent. *Commonwealth v. Bakeman*, 105 Mass. 53, 60; Pub. Stat. chap. 169, §§ 68, 69. The certificate of the secretary of state provided for in Pub. Stat. chap. 106, §§ 21, 22, is for corporations established under that chapter or taking advantage of its provisions. It was also competent to prove the ownership of the car by the testimony of one witness, describing its particular marks, coupled with that of another, that the car bearing those marks belonged to the company. Moreover, possession was enough. Pub. Stat. chap. 214, § 14.

3. The instructions requested were given in substance, so far as correct and material. The word "stone" did not need definition.

Exceptions overruled.

UNITED SOCIETY OF SHAKERS

v.

Frank A. BROOKS.

1. An oral contract purporting to be a present sale of growing wood and timber, with a privilege of entering upon the land to remove it, is not within the Statute of Frauds. It is a sale of chattels, which changes the ownership as fast as the trees are severed from the real estate.
2. Where the language of a written contract under seal—which was not signed in the presence of two witnesses, or acknowledged or recorded, as required by the law of the State where the property was situated, to make a conveyance of an interest in land good against others than the grantor and his heirs,—was, "agrees to sell" and "agrees to buy,"—not sells and buys,—and four years were given in which to perform the agreement "to purchase" as well as the agreement "to take, cut, and remove" the timber; and the instrument in all its parts seems to look to future action and future results rather than to a present change of title,—the property to be transferred having no existence in the form in which it was referred to in the contract, being called bark, lumber, and timber, and being required first to be put into that form, and then measured and paid for at certain prices by the cord and by the thousand,—it is not an executed contract of sale, but executory, and, so long as the timber and bark remained standing, no property in it passed under the contract; and, in an action to recover damages for the defendant's failure to cut and remove the timber and bark, the value of the wood and timber left uncut upon the land should not be included in the damages awarded.

ON defendant's exceptions. *Sustained.*

This was an action brought on a contract to recover damages for the defendant's failure to cut and remove certain timber and bark, as specified in a certain contract between the parties.

Prior to the hearing by this court, the cause was referred to Justin Dewey, Esq., as auditor, who, after hearing the parties, reported his findings to the court.

At the hearing before this court upon the questions raised and presented by said report, the court ruled that the plaintiff was entitled to recover, upon said findings, the larger sum found and reported by the auditor, and gave judgment for said larger sum; and defendant alleged exceptions.

The facts appear from the opinion.

Mr. A. Potter, for defendant:

The land being situated in the State of Vermont, the validity and effect of contracts concerning its alienation are governed by its laws.

Ripley v. Cross, 111 Mass. 41.

Hence the contract in this case did not operate to convey a present interest in the standing timber, for want of execution according to the laws of Vermont.

Vt. Rev. L. chap. 97, § 1927; *Cady v. Sanford*, 58 Vt. 682; *Day v. Adams*, 42 Vt. 519.

It could take effect only as an executory contract for the sale of standing timber, for a breach of which the measure of damages would be the difference between the contract price and the value of the timber at the time of the breach.

Cady v. Sanford, *supra*; *Danforth v. Walker*, 37 Vt. 289; *Old Colony R. R. Corp. v. Evans*, 6 Gray, 25.

Messrs. E. M. Wood and A. J. Waterman, for plaintiff:

By the laws of this Commonwealth this agreement is binding.

Busford v. Pearson, 7 Allen, 506, 507; *Boat v. Burt*, 118 Mass. 523; *Dix v. Marcy*, 116 Mass. 416.

The agreement was made in this Commonwealth. Both plaintiff and defendant were residents of this Commonwealth. The place of performance was in this Commonwealth. The land alone was in Vermont.

Busford v. Pearson, *supra*.

Plaintiff submits that this agreement absolutely conveyed to the defendant all the hemlock bark, and hemlock and spruce timber, on said lot, together with the right to enter, cut, and remove the same.

Clap v. Draper, 4 Mass. 266; *White v. Foster*, 102 Mass. 875.

Plaintiff could not treat this agreement under seal as a mere license.

Clap v. Draper, *supra*.

Growing timber constitutes a part of the realty, is a parcel of the estate, and may be separated from the rest, by express reservation or grant, so as to form itself a distinct inheritance.

White v. Foster and *Clap v. Draper*, *supra*; *Putnam v. Tuttle*, 10 Gray, 48.

This deed would be good in equity; and the defendant could compel plaintiff to execute a deed should he so desire.

Day v. Adams, 42 Vt. 510.

As between the parties, this deed would be good even by the laws of Vermont.

Vt. Rev. Stat. chap. 63, § 7; *Vermont M. & Q. Co. v. Windham Co. Bank*, 44 Vt. 489.

Knowlton, J., delivered the opinion of the court:

We are to determine in this case whether the writing declared on passed a title to the defendant in the trees growing upon the land, or whether it was an executory agreement for the sale of chattels, to take effect after they should appear in the form of timber, lumber, and bark.

An oral contract purporting to be a present sale of growing wood and timber, with a privilege of entering upon the land to remove it, is held not to be within the Statute of Frauds, but a sale of chattels, which changes the ownership as fast as the trees are severed from the real estate under the license granted to the purchaser. *Claffin v. Carpenter*, 4 Met. 583; *Giles v. Simonds*, 15 Gray, 441; *Drake v. Wells*, 11 Allen, 141.

If a contract for the sale of growing wood and timber is in the form required for a conveyance of real property, it becomes a question of construction, upon the language of the whole instrument, whether it was intended to immediately pass a title to an interest in land, or whether, by its terms, it is executory. *White v. Foster*, 102 Mass. 375.

In the case at bar the property was in Vermont, and the parties entered into a contract under seal, which was not signed in the presence of two witnesses, or acknowledged, or recorded, as was required by the law of that State to make a conveyance of an interest in land good against others than the grantor and his heirs. By the first language of stipulation in the instrument, the plaintiff agreed to sell, and the defendant agreed to buy, "all the hemlock bark, and the hemlock and spruce timber, now standing," etc. In the next sentence the defendant agreed "to purchase, take, cut, and remove" the timber and bark, "within four years" from the date of the agreement. Then followed provisions as to the quantity to be cut in each year, the prices to be paid per cord for the bark, and per thousand for the hemlock lumber and for the spruce timber, and the times for payments. Measurements were to be made by the plaintiff, or its agents, at places specified in the contract, with notice to the defendant in all cases, to enable him to be present at them. Other details for proceeding in execution of the contract were inserted, with a stipulation in these words: "It is also further agreed that all spruce and hemlock trees which are down, or which may hereafter fall, which will make fair merchantable lumber, shall be cut, removed, measured, and paid for by said Brooks."

The language of the writing was "agrees to sell" and "agrees to buy,"—not sells and buys. In the second sentence, four years were given in which to perform the agreement "to purchase," as well as the agreement "to take, cut, and remove" the timber. The instrument, in all its parts, seemed to look to future action and future results rather than to a present change of title. The property to be transferred had no existence in the form in which it was re-

ferred to in the contract. It was called bark, lumber, and timber, and was to be first put into that form, and then, measured and paid for, at certain prices, by the cord and by the thousand.

The general rule as to sales of personal property is, "that where any operation, as surveying, weighing, measuring, counting, or the like, remains to be performed, in order to ascertain the price, or the quantity, or the parcel to be delivered, the contract is incomplete, and the property does not pass." *Mason v. Thompson*, 18 Pick. 305.

Interpreting this instrument in the light of all its provisions, we find it to have been, not an executed contract of sale, but executory. It follows that, so long as the timber and bark remained standing, no property in it passed under the contract, and that the value of the wood and timber left uncut upon the lot should not have been included in the damages awarded to the plaintiff at the trial. Upon the facts then presented, the plaintiff should have been permitted to recover, as damages for the non-fulfillment of the defendant's contract, \$300 and interest from the date of the writ.

Exceptions sustained.

Michael O'DONNELL, *Petitioner*,

v.

Town of CLINTON.

1. To lead a person reasonably to suppose that you assent to an oral arrangement is to assent to it, wholly irrespective of fraud. Assent, in the sense of the law, is a matter of overt acts, not of inward unanimity in motive, design, or the interpretation of words.
2. Where the road commissioners knew of the inability of the petitioner to read, and presented to him a receipt prepared by them, acknowledging full payment of all claims for damages caused by taking land for a townway, including damages to the petitioner's house, paying him at the time \$200; and the petitioner, on accepting the money and setting his mark to the receipt, stated that he took it for the land alone, and that he signed the receipt for the land alone, understanding that to be its tenor; and the commissioners expressed no dissent, but, through their spokesman, said that "that would be all right;" and, as soon as the petitioner understood that the commissioners regarded the payment as a full settlement, he repudiated the transaction, giving them a notice addressed to the town, and left the money in the hands of the town treasurer,—an instruction in a petition for the assessment of damages, that it was not necessary that there should have been any intent to defraud the petitioner, but that it was necessary to show some conduct which was calculated to mislead him, and did mislead

him, was sufficiently favorable for the defendant.

3. Assuming that the commissioners had no right to offer the sum for less than all the damages, that did not make it impossible for them to do so in fact, and would not make a payment which purported to be made and accepted for land alone a payment for land and buildings. The defendant, when it claims the benefit of an arrangement made through the commissioners, takes it with all its defects.

4. Placing the money where the town could take it at any time, and notifying it of that fact, was an exercise of the petitioner's right to repudiate the transaction, and was doing all that he was called upon to do, to entitle him to file his petition for an assessment of damages. The oral evidence shows that the contract was never executed, or was voidable for fraud. In a case where the rights of a bona fide purchaser for value are involved, other considerations would come in, which have no application to this case.

5. An exception cannot be taken by the defendant to the evidence of other conversations with the road commissioners, individually, where such evidence is in reply to testimony put in by the defendant on the same matter.

(Worcester—Filed January 4, 1888.)

ON defendant's exceptions. *Overruled.*

Verdict for the petitioner, and defendant alleged exceptions.

The facts appear from the opinion.

Messrs. John W. Corcoran, Herbert Parker, and Walter R. Dame, for defendant:

Road commissioners, when exercising their duties and powers in laying out and altering townways, awarding damages therefor, and constructing the same, are public functionaries, and not town officers. They can therefore only exercise the powers expressly given them by statute, and can bind their town only when acting within the limits of the authority thus given.

Brimmer v. Boston, 102 Mass. 19; *Kean v. Stetson*, 5 Pick. 492; *Harrington v. Harrington*, 1 Met. 404; *Higginson v. Nahant*, 11 Allen, 530.

No townway laid out by road commissioners can be established, unless such laying out, with the boundaries and measurement thereof, has been duly reported to the town, and unless such report has been filed in the office of the town clerk seven days, at least, before the meeting at which action is had thereon.

Pub. Stat. chap. 49, § 71.

If, in such laying out, damage is sustained by any person in his property, he shall receive such compensation as the road commissioners may determine, to be assessed and awarded as in the laying out of highways; and "the commissioners shall estimate the amount, and in their return state the share of each separately."

Id. §§ 6, 8, 14.

In making such estimate "regard shall be had to all the damage done to the party, whether

by taking his property, or by injuring it in any manner."

Id. §§ 14, 16.

The assessment of damages is therefore part of the laying out of the road commissioners and of their notice to the town, and embraced in their acceptance and confirmation.

Russell v. New Bedford, 5 Gray, 34.

The legal presumption is that the petitioner, Michael, knew the law, and therefore knew that the award made by the road commissioners must have been an award for all damages that he might suffer from the laying out aforesaid.

Neuman v. Sylvester, 42 Ind. 106; *Murray v. Carothers*, 1 Met. (Ky.) 71.

All representations upon this point by the road commissioners must have been representations of law rather than of fact, and no contract can be avoided for fraudulent representations as to law.

Rice v. Wright Mfg. Co. 2 Cush. 86; *Starr v. Bennett*, 5 Hill, 303; *Fish v. Cleland*, 33 Ill. 238; *Smither v. Calvert*, 44 Ind. 242; *Rashdall v. Ford*, L. R. 2 Eq. 750.

Nor can he set aside his settlement with the town because of the nonperformance of a promise which he knew was beyond the power of the promisor to perform, and which he knew, moreover, was illegal.

The promises alleged to have been made to the petitioner, Michael, were collateral to the main contract, and therefore formed a supplementary undertaking.

Such promises and representation, if they had any force or effect, could only have had such force or effect as the promises or representations of the makers themselves, and not of the town, both for the reasons given and because the evidence as reported shows they were personal undertakings,—if they were more than mere expressions of opinion,—and the makers could only be held liable in tort.

Nickerson v. Dyer, 105 Mass. 320; *Ayre's Case*, 25 Beav. 513; *Donahoe v. Emery*, 9 Met. 66.

The petitioner, to avoid his release on the ground that he was induced to make it by the misrepresentations of the defendant, must show that such misrepresentations were intentional.

Page v. Bent, 2 Met. 371; *Hartford L. S. Ins. Co. v. Matthews*, 102 Mass. 226; *Brown v. Castles*, 11 Cush. 349, and cases cited.

The scienter is material and vital in order to avoid the release.

Hartford L. S. Ins. Co. v. Matthews, *supra*; *Brown v. Castles*, 11 Cush. 349, and cases cited; *King v. Eagle Mills*, 10 Allen, 548; *Pearson v. Howe*, 1 Allen, 207; *Grinnold v. Sabin*, 51 N. H. 167; *Stitt v. Little*, 63 N. Y. 467; *Green v. Nixon*, 23 Beav. 535.

Where each party is possessed of the same information, or has an equal opportunity to ascertain the truth, it cannot be said one willfully withheld anything from, and thereby deceived, the other.

Brown v. Leach, 107 Mass. 364; *Brown v. Castles*, 11 Cush. 349, and cases cited; *Hobbs v. Parker*, 31 Me. 143.

The false statements must have related distinctly and directly to the release itself, and have affected its very essence and substance, being the material inducement or motive to the act of the other party, by which he was actually misled to his injury.

Taylor v. Fleet, 1 Barb. 471; *Byard v. Holmes*, 34 N. J. L. 296; *Denne v. Light*, 8 De G. M. & G. 774.

If the petitioner, Michael, signed said release without reading it, or if, being unable to read, without taking the trouble to inform himself of its contents, he cannot avoid its legal effects and consequences.

Hartford L. S. Ins. Co. v. Matthews, *supra*; *Grace v. Adams*, 100 Mass. 507.

Where a party enters into a written contract, in the absence of fraud, he is conclusively presumed to understand the terms and legal effect of it, and to consent to them.

Grace v. Adams, *supra*; *Androscooggin Bank v. Kimball*, 10 Cush. 373.

Moreover, the petitioner, Michael, could not, under the evidence aforesaid, maintain his petition until he had returned, or offered to return, the money he had received from the town.

Brown v. Hartford F. Ins. Co. 117 Mass. 479; *Estabrook v. Sweet*, 116 Mass. 303; *Coolidge v. Brigham*, 1 Met. 547.

In this case the petitioner, Michael, does not allege that he expected the award was given as a gratuity, but as part payment of the damage; and hence, before he can recover, he must place the town in the position it was before the taking of the money, or at least offer to do so.

Brown v. Hartford F. Ins. Co. *supra*.

This case is thus distinctly different from the case (*Muller v. Old Colony R. R. Co.* 127 Mass. 87) where the plaintiff took the money as a gratuity.

To constitute a valid tender, it must be made to the creditor, or to some one authorized to receive it in his behalf.

King v. Finch, 60 Ind. 420; *Kirton v. Braithwaite*, 1 Mees. & W. 310.

A tender to the road commissioners is not such a return of the money. They are not financial agents of the town, and have no authority to receive or accept money for the town.

The charge to the jury that, "in the present case, it is not necessary that there should have been any intention to cheat or defraud the petitioner, but it is necessary to show that there was some act, declaration, or conduct which was calculated to mislead the petitioner, and which did so mislead him," was wrong in that it did not make the intention an essential part of the representations.

Hartford L. S. Ins. Co. v. Matthews, 102 Mass. 226; *Brown v. Castles*, 11 Cush. 343, and cases cited; *Green v. Nizon*, 23 Beav. 535; *Griswold v. Sabin*, 51 N. H. 167.

Again, the court erred in not ruling that the fraudulent representations must have related to the contents of the release, or have been such as to make the petitioner, Michael, believe that the paper he was signing was not a release.

Byard v. Holmes, 34 N. J. L. 296; *Taylor v. Fleet*, 1 Barb. 471; *Frenzel v. Miller*, 37 Ind. 3.

Messrs. A. Norcross, H. C. Hartwell, and C. F. Baker, for plaintiff:

The instructions were sufficiently favorable to the defendant, and were in accordance with well-settled rules of law.

Stuart v. Sears, 119 Mass. 143; *Riggs v. Hawley*, 116 Mass. 596; *Prescott v. Wright*, 4 Gray, 2 Mass.

461; *Hoitt v. Holcomb*, 23 N. H. 535; *Larrabee v. Sewall*, 66 Me. 376; *Licemore v. Peru*, 55 Me. 469; *Hall v. Holden*, 116 Mass. 172.

In an action of deceit, actual intention to defraud would be necessary; but in this action, if it is proved that erroneous or false statements were made to the petitioner, by which he was misled, he was entitled to rescind the settlement made by him with the road commissioners, and appeal from their award.

Stuart v. Sears, *supra*; *Union Bank v. U. S. Bank*, 3 Mass. 74.

It was only necessary for the petitioner, in rescinding his settlement with the defendant, to restore, or offer to restore, what he had received from it.

Kimball v. Cunningham, 4 Mass. 502; *Cook v. Gilman*, 34 N. H. 556.

The defendant asked the court to rule that no sufficient tender to the town was shown by petitioner's offer to return the money to the road commissioners. This request was rightly refused.

No objection is made that the petitioner's offer to return the money was not seasonably made; the only objection being that it was not made to the right person or persons. Who would be the right person or persons the defendant does not state.

The town can only act through its officers. The petitioner was obliged to tender or offer it to some officer. He went to the officers who had paid him the money, and through whom the settlement was made. They were the proper officers; they had the powers in all "matters concerning the streets, ways, * * * and were subject to the duties, liabilities, and penalties of selectmen."

Pub. Stat. chap. 27, § 75.

The evidence was both competent and sufficient to prove that the petitioner was misled by the road commissioners into accepting the award and signing the receipt. While it is true that the town had no right to make an agreement with the petitioner to repair his house, and this promise of the road commissioners was *ultra vires*, yet the defendant cannot, in this action, avail itself of this unlawful act of its agents. The question raised is, Was the petitioner misled by these agents of the town into signing the receipt? and to prove this, it is competent to prove their declarations and conduct.

Hall v. Holden, *supra*.

Holmes, J., delivered the opinion of the court:

This is a petition for the assessment of damages caused by taking land for a townway, including damage to the petitioner's house. Pub. Stat. chap. 49, §§ 79, 105.

The petitioner, before filing his petition, had accepted \$200 awarded by the road commissioners, and had set his mark to a receipt prepared by them, acknowledging full payment of all claims. The defendant asked a ruling that this settlement was a bar, which was refused, and the defendant excepted.

The petitioner's evidence tended to show that he could not read, and that the road commissioners knew of his inability; that at the time of accepting the \$200 he stated that he took it

for the land alone, and also stated that he signed the receipt for the land alone, understanding that to be its tenor; that the road commissioners expressed no dissent, but, through their spokesman, McGown, said that "that would be all right;" and that, as soon as the petitioner understood that the commissioners regarded the payment as a full settlement, he repudiated the transaction, tendered the money back to them, giving them a notice addressed to the town, and left the money, with the notice, in the hands of the town treasurer, although no sufficient tender was made to the latter.

The court instructed the jury that it was not necessary that there should have been any intent to defraud the petitioner, but that it was necessary to show some conduct which was calculated to mislead him, and did mislead him. In the connection in which the instruction was given, it must be taken to mean that the petitioner must have been misled as to the terms of the receipt, and as to what the money was paid for. Thus construed, and having reference to the petitioner's evidence, it was sufficiently favorable for the defendant; and the defendant's request for a ruling was rightly refused.

If the petitioner was ignorant of the contents of the instrument prepared by the defendant, and was known to be so by the defendant's agents; and if he expressly declared, in good faith, that he set his mark to it as a receipt for the damage to his land alone; and the defendant's agents thereupon accepted the instrument in silence, or with words importing an assent to that declaration,—such conduct would be a representation that the instrument was what it was signed for. *Tramby v. Ricard*, 130 Mass. 259, 261; *Hall v. Holden*, 116 Mass. 172, 176. And a representation of what is known to be false may be none the less a fraud that it is made without any corrupt motive or intent. *Stone v. Denny*, 4 Met. 151, 161; *Fisher v. Mellen*, 108 Mass. 503; *Litchfield v. Hutchinson*, 117 Mass. 195; *Polhill v. Walton*, 3 Barn. & Ad. 114; *Quick v. Milligan*, 6 West. Rep. 888, 108 Ind. 419, 422.

It is unnecessary to go further, and to consider whether or not the ultimate reason why the party cannot be held in the case supposed is that the overt acts of setting his mark to the instrument, and delivering it, which, standing alone, would have been an execution of it, were qualified by another overt act, which changed their character, as between the parties, and prevented the mark and the delivery from having that effect, or expressing an intent corresponding with the written words. In the old books it is said that a deed which is misread to an illiterate man, although by his friend and without fraud, does not bind him. *Thoroughgood's Case*, 2 Rep. 9; *Com. Dig. Faint*, bk. 2; *Foster v. Mackinnon*, L. R. 4 C. P. 704, 711; *Schuykill County v. Copley*, 67 Pa. 886, 889. And the proper mode of pleading the facts was *non est factum*, because, as was said, "the matter proves that it never was his deed" (*Plowd.* 66; *Y. B. 30 Edw. III.* 81, 82, 44 Ass. pl. 80, fol. 292; *S. C.* 44 Edw. III. 23, pl. 28; 9 Hen. V. 15, pl. 2; 9 Hen. VI. 59, pl. 8; *Kellw.* 70, b, pl. 6; *Pigot's Case*, 11 Rep. 26, b, 27, b; 2 Rolle, Abr. 28; 1 Gilb. Ev. 6th ed. 144; *Mullen v. Old Colony R. R.* 127 Mass. 86, 90; *White v. Graves*, 829

107 Mass. 325, 328; *Somes v. Brewer*, 2 Pick. 184, 204), whereas an ordinary case of fraud or duress could not be pleaded in this way, because the delivery was not void (*Plowd.* 66; 1 Chitty, Pl. 7th ed. 511. See *Fairbanks v. Snow*, 5 New Eng. Rep. 160, 145 Mass. 153). But we put our decision solely on the ground of fraud, and express no opinion with regard to the suggestions last thrown out.

In either view, the oral evidence is not offered for the purpose of varying the written instrument, or of adding an oral promise to it, which it may be assumed could not be done (*Brown v. Cambridge*, 8 Allen, 474; *James v. Bligh*, 11 Allen, 4), but for the purpose of showing that it was never executed, or was voidable for fraud. We may add, by way of caution, that, in the case of a *bona fide* purchaser for value, other considerations come in, which have no place here. See *White v. Duggan*, 140 Mass. 18, 20; *Williams v. Stoll*, 79 Ind. 80; *Chapman v. Row*, 56 N. Y. 137.

Leaving the receipt on one side, if the conduct of the defendant's agents was calculated to lead the petitioner to suppose that the money was paid for the land alone, and did lead him to suppose so, then it was paid for the land alone. To lead a person reasonably to suppose that you assent to an oral arrangement is to assent to it, wholly irrespective of fraud. Assent, in the sense of the law, is a matter of overt acts, not of inward unanimity in motives, design, or the interpretation of words. See *Hall v. Holden*, *supra*; *Ford v. Ford*, 3 New Eng. Rep. 785, 143 Mass. 577, 578.

It was argued that the road commissioners had not power to make the arrangement testified to by the petitioner, and it is true that the \$200 was decreed, and the decree was accepted by the town, as an award for all the damages suffered. But, assuming that the commissioners had no right to offer the sum for less than all the damages, that did not make it impossible for them to do so in fact, and would not make a payment which purported to be made and accepted for land alone a payment for land and buildings. Of course, too, if the conduct of the commissioners, however innocent in intention, amounted to fraud by construction of law, the defendant, when it claims the benefit of an arrangement made through them, takes it with all its defects.

Upon the facts, as the petitioner states them, he had a right to repudiate the transaction when he found what he had signed. *Mullen v. Old Colony R. R. Co.* 127 Mass. 86; *Smith v. Holyoke*, 112 Mass. 517; *Michigan Cent. R. R. Co. v. Dunham*, 30 Mich. 128. If it was necessary for him to return the money, he did all that he was called upon to do. Had the commissioners accepted his tender, things would have been restored to their condition before the settlement. The money was left where the town could take it at any time, and the town was notified; but it is plain that the town did not accept his version of the facts, and denied his rights to repudiate the arrangement.

The petitioner's evidence as to a conversation at McGown's house was in reply to testimony put in by the defendant on the same matter. The other exception is waived.

Exceptions overruled.

William HALE

v.

Leonard V. SPAULDING, Aaron H. Saltmarsh, et al.

In an action against six obligors in an agreement under seal for the payment of money, an answer that the plaintiff had executed a release under seal to one or more of the joint obligors, in the words: "Rec'd of L. V. Spaulding \$1,000 in full satisfaction of his liability on the document signed by L. V. Spaulding," etc., presents a complete defense, and excludes parol evidence to show the actual intention. The instrument is a mere receipt, under seal, of money, from one of several joint obligors, in full satisfaction of his liability on the document signed by himself and others. There is nothing to get hold of to show an intent to reserve rights against the others. The plaintiff might already have discharged each of them by a similar release.

(Reex.—Filed January 4, 1888.)

ON plaintiff's exceptions. *Overruled.*

This was an action of contract brought by the plaintiff against six obligors in an agreement under seal, of which the following is a copy:

Know all men by these presents that, whereas William Hale, of Haverhill, in the Commonwealth of Massachusetts, is the owner of certain notes for \$3,000 given by the American Iron Glass Pipe and Plate Co. to Lyman R. Stockbridge, and secured by a mortgage upon real estate of said corporation, and whereas said Hale was the indorser of a certain promissory note given by said corporation to the Haverhill National Bank for the sum of \$2,500, which note said Hale has been obliged to pay; now, therefore, we, the undersigned, in consideration of one dollar to us paid, and other good and valuable consideration to us advanced, by said Hale, the receipt whereof is hereby acknowledged, do hereby covenant, promise, and agree, to and with said Hale, that we will, upon demand, pay to said Hale six sevenths of all loss, cost, harm, or expense to which he has been or may be subjected by reason of, or on account of, said notes and said indorsement; meaning and intending hereby to assume six sevenths of the indebtedness of said corporation to said Hale, in the event that he is unable to collect the same from said corporation, and shall thereby sustain loss. In witness whereof we hereunto set our hands and seals this 23d day of May, A. D. 1885.

L. V. Spaulding,	[Seal.]
Hazen M. Chase,	[Seal.]
Aaron H. Saltmarsh,	[Seal.]
Richard Webster,	[Seal.]
George A. Hall,	[Seal.]
William Hale,	[Seal.]
Cyrus D. Furber,	[Seal.]

The writ was entered on August, 1886, return day, and no answer was filed by any defendant except the defendant Saltmarsh, who answered that, since the execution of the con-

tract, the plaintiff has executed and delivered a release or discharge under seal to one or more of the joint obligors in said obligation, which reads as follows:

Haverhill, Mass., Sept. 20, 1886.

Rec'd of L. V. Spaulding \$1,000 in full satisfaction of his liability on the document signed by L. V. Spaulding, H. M. Chase, A. H. Saltmarsh, Richard Webster, George A. Hall, William Hale, and Cyrus D. Furber, and dated May 23, 1885.

William Hale. [Seal.]

Witness: Hazen M. Chase.

It appeared at the trial, where Saltmarsh alone defended, before a judge and jury, that on September 20, 1886, the defendants, except Saltmarsh, settled with the plaintiff for their proportionate part of the amount alleged to be due under the agreement declared on, and the plaintiff executed the paper under seal annexed to said answer, and delivered it to the defendant Spaulding. The plaintiff offered to show facts showing that, in giving said sealed paper annexed to the answer, there was no intention of releasing the defendant Saltmarsh. But the judge ruled that said offer was not material, and that said sealed paper released the defendant Saltmarsh, and ordered a verdict for the defendant, which was rendered; and plaintiff alleged exceptions.

Mr. W. H. Moody, for plaintiff:

A release to one joint obligor releases all, and the question in this case is whether the sealed paper delivered to Spaulding is a release; for nothing except a technical release under seal has the effect of releasing joint obligors.

Goodnow v. Smith, 18 Pick. 414; *Shaw v. Pratt*, 22 Pick. 305; *Sohier v. Loring*, 6 Cush. 537; *Gold Medal S. Co. v. Harris*, 124 Mass. 206; *Kenworthy v. Sawyer*, 125 Mass. 28; *Dean v. Newhall*, 8 T. R. 168; *Solly v. Forbes*, 2 Brod. & B. 46; *Parmelee v. Lawrence*, 44 Ill. 405; *Burke v. Noble*, 48 Pa. 168; *McAlister v. Sprague*, 34 Me. 296; *Russell v. Adderton*, 64 N. C. 417; *Prince v. Lynch*, 38 Cal. 528; *Walker v. McCulloch*, 4 Greenl. 421; *Rowley v. Stoddard*, 7 Johns. 207.

It is well settled that, where there is an express reservation of rights against other joint obligors, they are not released, whatever the form of release.

Kenworthy v. Sawyer, and *Solly v. Forbes*, *supra*.

The language of *Wilde, J.*, in *Goodnow v. Smith*, *supra*, and the decision in *Hutchings v. Nichols*, 10 Cush. 302, show that there is no difference between the effect of an express and an implied reservation.

If we take the receipt "in connection with the surrounding circumstances," as we may do, (*Parmelee v. Lawrence*, *supra*) the inference that the plaintiff did not intend to release the other obligors is strengthened, for reasons apparent on the exceptions.

Henry N. Merrill and J. Otis Wardwell, for defendant Saltmarsh:

The obligation sued was a joint obligation. The release of Spaulding is a technical release under seal. A seal is affixed to the instrument, and the legal presumption is that it was placed

there as the seal of the party executing the same.

Milldam Foundry v. Hovey, 21 Pick. 417.

A release of one joint promisor is a release of all.

Tuckerman v. Newhall, 17 Mass. 581; *Ward v. Johnson*, 13 Mass. 148; *Wiggin v. Tudor*, 23 Pick. 434.

Testimony as to the intent of parties was inadmissible, as tending to impair and limit the effect of a sealed instrument.

See *Tuckerman v. Newhall*, *supra*.

C. Allen, J., delivered the opinion of the court:

The words "in full satisfaction for his liability" import a release and discharge to Spaulding; and, the instrument being under seal, it amounts to a technical release. The plaintiff does not controvert the general rule that a release to one joint obligor releases all. *Wiggin v. Tudor*, 23 Pick. 434, 444; *Goodnow v. Smith*, 18 Pick. 414; *Pond v. Williams*, 1 Gray, 680, 686. But this result is avoided when the instrument is so drawn as to show a contrary intention. *Lindl. Partn.* 438; 2 Chitty, Cont. 11th Am. ed. § 1154 *et seq.*; *Ex parte Good*, L. R. 5 Ch. D. 46, 55.

The difficulty with the plaintiff's case is that there is nothing in the instrument before us to show such contrary intention. Usually a reservation of rights against other parties is inserted for that purpose; or the instrument is put in the form of a covenant not to sue. See *Kenworthy v. Sawyer*, 125 Mass. 28; *Willis v. De Castro*, 4 C. B. N. S. 216; *North v. Wakefield*, 13 Q. B. 536, 541.

Parol evidence to show the actual intention is incompetent. *Tuckerman v. Newhall*, 17 Mass. 585. The instrument given in this case was a mere receipt, under seal, of money, from one of several joint obligors, in full satisfaction for his liability on the document signed by himself and others. There is nothing to get hold of to show an intent to reserve rights against the others. He might already have discharged each of them by a similar release.

Exceptions overruled.

FIRST NATIONAL BANK OF NORTH-AMPTON

v.

Joseph CRAFTS, Assignee.

SAME v. HAMPSHIRE COUNTY NAT. BANK.

1. As a general rule, in suits concerning trust property the *cestuis que trust* are necessary parties, especially where the inquiry as to the rights of the trustee involves the necessity of investigating the relations between him and the *cestuis que trust*. If complete justice can be done to those immediately before the court, other parties may, in its discretion, be dispensed with; but when it is seen at the final hearing that justice cannot be done, on account of the want of parties whose interests are involved in the controversy, this objec-

tion may then be made, or the court may, of its own motion, decline to proceed to a final decree, and dismiss the bill.

2. Where a purchaser under a sale made in proceedings in insolvency under the order of the court has subsequently transferred the property to the assignee as trustee, relinquishing at the time of the purchase a claim, whether real or pretended, which he had against the insolvent estate for the use of the insolvents of several pieces of real estate of which the purchaser was tenant in common with them, also transferring to such assignee, as trustee, his interest as tenant in common with the insolvents in such real estate, the same being thereafter managed under the trust with the other real estate held by the insolvents; and such purchaser has become responsible in the sum of \$5,000 for the payment of a loan to the assignee as trustee to enable him to carry out the purposes of the trust, the loan having been only partially paid, and the purchaser reserving a right under the trust to receive whatever shall remain after the assignee shall have paid all expenses, and otherwise completed the execution of his trust,—in a proceeding by a creditor of the insolvents to require the assignee to account for the value of the property received by him, and the profits on the transaction, and to have the proof of the claim of another creditor who made the loan to the assignee expunged, such purchaser was a necessary party to the proceedings.

3. Assuming that the transaction by which the property of the insolvents estate was sold and passed into the hands of their assignee in trust, and the act of the creditor in advancing to him the sum of \$27,000 for the purpose of carrying out the objects of the trust, was one which was legally fraudulent, and which might be avoided by the creditors upon proper proceedings, through the assignee or otherwise, and the property conveyed, and any profits made in the sale or management of the same appropriated to the benefit of the creditors, this will furnish no ground for expunging the claim proved by the creditor who has made such advance, where such claim was honestly made and there is no evidence that such creditor had received any conveyance by way of preference or security, or that the debt was in any way diminished by any payment. The original claim is not fraudulent or illegal because the claimant may have subsequently done something which is justly the subject of animadversion, which may expose him to a demand for damages, or which may cause property which has been transferred for his benefit to be reclaimed.

ON report. *In first case, bill dismissed unless amended; in second case, bill dismissed.*

These cases are bills in equity, seeking the supervisory intervention of this court over the court of insolvency, and in the nature of appeals, asking that the account of an assignee be surcharged, and that the proof of the claim of a creditor be expunged.

Heard on master's report and reserved for the full court by consent of parties, the court to have authority to draw inferences from the facts stated.

The facts appear from the opinion.

Mr. W. S. B. Hopkins, for plaintiff:

Though from interlocutory decrees, these proceedings lie.

Conant v. Perkins, 107 Mass. 79.

Case against Crafts, Assignee.

The introduction of a third party is often of itself a badge of fraud.

Lewis v. Hillman, 3 H. L. Cas. 607; *Michoud v. Girod*, 45 U. S. 4 How. 554 (12 L. ed. 1099).

"Where the trustee himself makes sale of the trust property, under the authority vested in him as such,—whether the sale be made under judicial direction or otherwise,—if he becomes the purchaser himself, either directly or through a third person, the purchase is, by construction of law, fraudulent, and no showing of good faith or of the payment of a full consideration can sustain it against the objection of the *cestui que trust*, so long as the property remains in his hands, or in the hands of anyone who takes it with knowledge or notice of the facts. * * * The above rule applies to executors and administrators, guardians, assignees in bankruptcies," etc.

Cooley, Torts, 524.

Two other statements may be added, *i. e.*, the same rule applies to the trustee purchasing from himself, although he buy as the agent of a third party, or although a third party buys, by previous arrangement, for one in whom the trustee is interested.

Ex parte Reynolds, 5 Ves. Jr. 707; *Ex parte Lacey*, 6 Ves. 625; *Ex parte Baye*, 4 Madd. 459; *Ex parte Baddock*, 1 Mont. & MacA. 281; *Ex parte Bennett*, 10 Ves. Jr. 381; *Michoud v. Girod*, 45 U. S. 4 How. 509-554 (12 L. ed. 1099); *Greenfield Sav. Bank v. Simons*, 188 Mass. 415; *Clark v. Blackington*, 110 Mass. 369-376; *Litchfield v. Oudworth*, 15 Pick. 31; *Jennison v. Hapgood*, 10 Pick. 77-98; *Farnum v. Brooks*, 9 Pick. 212, 232; *Davou v. Fanning*, 2 Johns. Ch. 252; *Ogden v. Larrabee*, 57 Ill. 389; *Hammond v. Stanton*, 4 R. I. 65; *Moore v. Mandelbaum*, 8 Mich. 433; *North Balt. Bldg. Assn. v. Caldwell*, 25 Md. 420; *Story, Eq. Jurisp.* 322.

"He who should instruct the court how to sell should not buy under authority of the court."

McEnzie's Case, 6 Ves. 681, note.

Case against Hampshire County National Bank.

Is not the attempt by a creditor to overreach the other creditors, especially when made in conjunction with the assignee, whether successful or not, or whether prior or subsequent to his proof, a ground for denying him the benefit of the Act, by either refusing or expunging his proof?

2 Mass.

Claims may be expunged by this court.

Pub. Stat. 157, § 35, originally 1880, chap. 246, § 9; *New Bedford Inst. for Sav. v. Hathaway*, 184 Mass. 69; *Woodward v. Spurr*, 188 Mass. 592; *Spurr v. Dean*, 189 Mass. 84.

The transaction complained of was not known till more than a year after the proof of defendant's claim.

The power to expunge claims was declared to be incident to equity jurisdiction before the passage of the statute, and to apply with force when, from the nature of the case, there was no remedy by appeal.

Hill v. Hersey, 1 Gray, 584-586.

The general spirit of bankruptcy laws seems to demand the application of the principles in a case like this, by analogy to the many adjudicated cases under composition agreements. The agreements of this character present mutual express promises that no creditor shall have any advantage over another. Does not the whole doctrine of bankruptcy imply the same mutual undertaking as always existing, and never to be laid aside till the end?

Mallatieu v. Hodgson, 16 Q. B. 689; *Mare v. Sandford*, 1 Giff. 288; *Howden v. Haigh*, 11 Ad. & El. 1033; *Wells v. Girling*, 4 Moore, 78; *Re Cross*, 4 De G. & S. 364; *Smith v. Cuff*, 6 Maule & S. 165; *Breck v. Cole*, 4 Sandf. 79; *Way v. Langley*, 15 Ohio St. 392.

As to third party's interest being involved—

Coleman v. Waller, 3 Younge & J. 212; *Yeomans v. Chatterton*, 9 Johns. 294.

Where no money but only security was taken—

Leicester v. Rose, 4 East, 393.

Where the transaction was after the agreement—

Turner v. Hoole, Dowl. & R. N. P. C. 27.

Messrs. Gideon Wells and D. W. Bond, for defendant:

The power to expunge a claim only exists when the claim, or part of it, is founded in whole or in part in fraud, illegality, or mistake.

Robbins v. Bates, 4 Cush. 104; *Hill v. Hersey*, 1 Gray, 584; *Hall v. Marsh*, 11 Allen, 563; Acts 1880, chap. 246, § 9; Pub. Stat. chap. 157, § 35.

The allowance by the court of insolvency was an adjudication both as to its validity and the right of the bank to prove it.

Hall v. Marsh, 11 Allen, 563; *Palmer v. Dayton*, 4 Cush. 270.

The insolvent court had no right to revise its decree allowing the claim, except as stated in Pub. Stat. chap. 157, § 35.

The bank has not accepted any "preference" within the meaning of Pub. Stat. chap. 157, § 33.

The acceptance, by a creditor, of a new promise by the insolvent to pay the debt of the creditor, after the commencement of proceedings in insolvency, is not a preference within the meaning of the statute. A new promise is valid, provided it is not made in consideration of the creditor agreeing to consent to a discharge, or to use his influence to obtain a discharge of the insolvent.

Downs v. Lewis, 11 Cush. 76; *Dexter v. Snow*, 12 Cush. 594; *Kelley v. Pike*, 5 Cush. 484; *Lorow v. Wilmarth*, 7 Allen, 463; *Cook v. Shearman*, 103 Mass. 21; *Pierce v. Mann*, 180 Mass. 14.

The sale having been made in pursuance of

an order of court, its propriety cannot be questioned.

Winchester v. Thayer, 129 Mass. 129; *Marsh v. McKenzie*, 99 Mass. 64; *Horner v. Hasbrouck*, 41 Pa. 170; *Loring v. Steineman*, 1 Met. 204.

The insolvency court had jurisdiction to pass the decree.

Pub. Stat. chap. 157, § 50.

If there was an error of judgment on the part of the court in making the decree, the proper course for the plaintiff was to have applied to this court for a revision of that decree. It cannot be questioned in collateral proceedings.

Merriam v. Sewall, 8 Gray, 816; *Cummings v. Cummings*, 123 Mass. 270; *Boston & W. R. R. Corp. v. Sparhawk*, 1 Allen, 448; *Farwell v. Raddin*, 120 Mass. 7.

Crafts might, under the order, have sold to the defendant bank had it offered the best price, no purchaser having been named in the order. The court upon application, if satisfied that it was for the interest of the creditors, could have authorized the sale to the assignee.

See *Campbell v. Walker*, 5 Ves. 678.

Crafts is in no sense the bank. As a director he is the agent of the bank when engaged in the transaction of its business.

Smith v. Hurd, 12 Met. 371.

He might contract with the bank as with any other party.

Ellis v. Boston H. & E. R. R. Co. 107 Mass. 1; *Union P. R. R. Co. v. Credit Mobilier*, 135 Mass. 367; *U. S. Rolling Stock Co. v. Atlantic & G. W. R. R. Co.* 34 Ohio, 450; *Harts v. Brown*, 77 Ill. 226.

"Individuals who are officers are distinct from the corporation itself, and may make contracts with it, make conveyances to it, and receive conveyances from it."

Chapman, Ch. J., in *Ellis v. Boston, H. & E. R. R. Co.* 107 Mass. 13.

His relation to the bank as a director is that of agent to principal.

Cases above cited.

Devens, J., delivered the opinion of the court:

These cases are respectively bills in equity seeking the supervisory intervention of this court over the court of insolvency, and are in the nature of appeals from its decisions. In the first of them, the plaintiff, the Northampton Bank, seeks that the account of the assignee should be surcharged, and that he be denied any compensation as assignee, on the ground that he has wrongfully withheld from the general creditors large sums of money belonging to the insolvent estate of the Day Brothers, and has unlawfully gained and secured them for his own benefit, and that of the Hampshire County National Bank, which is made a party to the bill. In the second, the plaintiff seeks that this court shall order that the proof of the claim of the Hampshire Bank as a creditor of the Day Brothers, heretofore made, shall be expunged.

Without undertaking to state the facts in their complete details, they may be summarized from the allegations of the pleadings and the report of the master sufficiently for the immediate purpose of the present inquiry.

The Day Brothers became embarrassed in the

summer of 1884, and were largely and nearly equally indebted to the plaintiff and defendant banks, in each of which they had a regular line of discount. Before proceedings in insolvency were commenced, these banks conferred as to making further advances, determined that it was unwise to do so, and the insolvency of the Day Brothers followed. Mr. Crafts was a director of the defendant bank, was present at the conference, and was subsequently chosen assignee on August 30, 1884. On October 20, 1884, Crafts, as assignee, filed his petition for leave to sell all the property of the insolvents for the sum of \$41,500 at private sale, except certain pieces of real estate mortgaged for more than their value. The price offered for that which was proposed to be sold slightly exceeded its appraised value. This petition was supported by some fifteen of the creditors, including the defendant bank, and was opposed by the plaintiff bank, and on November 15 was granted. It was represented to the court that this offer was made by one Charles Day, and William C. Hall. Charles Day was a brother of the insolvents, was tenant in common of several pieces of real estate used by them in their business, but not a partner or interested therein. Before this leave was granted, he also relinquished any claim against the insolvents, if any he had, for the use made by them of his share of the real estate. On November 10, 1884, Charles Day had a conference with Luther Bodman, the president of the defendant bank, relative to a loan of some \$27,000 or \$28,000, to enable him to purchase the property which the assignee had petitioned for leave to sell at private sale. It was finally arranged that the Hampshire Bank should loan this sum, that the property should be conveyed to a trustee, to be used to repay this loan, and for other purposes, which appear in the declaration of trust which was made on November 15, the day when leave to sell was granted. It was also then arranged that Crafts should be the trustee. On November 15, 1884, Crafts, as assignee, acting under the authority given by the court of insolvency, conveyed to Charles Day and Hall all of the property, real and personal (except the five lots heretofore mentioned), and said Day and Hall reconveyed the same to Crafts for the purposes set forth in the declaration of trust. This declaration recited the conveyance to Crafts of all the real and personal estate of the insolvents, and also all the interest of Charles Day in their real estate, and also that Charles Day had given to Crafts, as trustee, his negotiable note for the sum of \$5,000; and that Crafts had given his note to the Hampshire Bank for \$27,000, loaned to him in order to carry out the trust. The declaration further stated, as the purpose of the trust, that Crafts should have power to manage all the estate and carry on the business for the best interest of those concerned, should sell or convey the same, and should devote the proceeds, first, to the payment of the sum of \$27,000, borrowed from the bank; that the note of \$5,000 given to him by Charles Day should not be collected except to such an amount as Crafts might fail to realize from the property conveyed,—what was necessary in order to pay the loan made to him from the Hampshire Bank. Second, Crafts was to pay to the

Hampshire Bank 75 per cent of its debt due from the insolvents, and proved by it, deducting therefrom the amount of any dividends which it might have received in the insolvency proceedings. Third, if any property remained, it was to be transferred or paid to Charles Day. Charles Day gave to Crafts his note for \$5,000 and a quitclaim deed of his undivided interest in the lots he had owned in common with his brothers. Crafts entered upon the management of the estate; has carried on the business of farming, brickmaking, and manufacturing lumber, making the necessary disbursements therefor; has sold certain parts of the property; has paid to the Hampshire Bank a portion of the sum borrowed from it. He is alleged to have conducted the business successfully; so that, estimating the value of the property now in his hands and charging him with what he has received and the fair value of the property when he received it, it will be shown that he has made a profit in the transaction, for which the plaintiff bank claims he should now account as assignee. The bill, in substance, seeks to set aside the whole transaction by which Crafts became trustee, and appropriate to the benefit of the general creditors all the property which passed to him by the sale made to him, together with the profits thereon. He certainly is not bound to account for this property, as assignee, nor for any profits arising from the transaction by which the property passed into his hands as trustee, unless the transaction itself was fraudulent, and voidable by general creditors. This cannot be investigated between himself and the creditors alone, but those must be made parties whose interests are directly concerned. The plaintiff has made the Hampshire Bank a party to the bill brought by him, but the interest of Charles Day in the matter is equally direct. He does not appear to have been made a party, either to the original proceeding in the court of insolvency (on which the bill is founded), in which it was sought to charge Crafts on account of the receipt of moneys and other property, or of profits made thereon, which, as alleged, ought properly to belong to the estate; or to the bill itself.

All parties interested in the object of a suit should, as a general rule, be made parties thereto. Story, Eq. Pl. § 872; Calvert, Parties, chap. 1, § 1. As a general rule, in suits concerning trust property, the *cestuis que trust* are necessary parties. This is especially so where the inquiry as to the rights of the trustee involves the necessity of investigating the relations between him and the *cestuis que trust*. *Boyd v. Partridge*, 2 Gray, 190. While the object of the court is to do justice to all parties interested in the subject-matter of a suit, if complete justice can be done to those immediately before the court, other parties may, in its discretion, be dispensed with. *Jewett v. Tucker*, 139 Mass. 566. But when it is seen, at the final hearing, that justice cannot be done, on account of a want of parties whose interests are involved in the controversy, this objection may then be made, or the court may, of its own motion, decline to proceed to a final decree, and dismiss the bill. *Sears v. Hardy*, 120 Mass. 524.

The position in which Crafts stands, in reference to the insolvent estate, cannot be de-

termined without passing upon the relation which he occupies to Charles Day, and upon the rights of Day, if he has a direct interest in the transaction sought to be inquired into and practically set aside. In such case, both for the protection of the Hampshire Bank, of Crafts, and of Day himself, and for a full investigation, it is necessary that Day should become a party. That Day has such an interest, by virtue of the declaration of trust and the acts which were done in connection with it, is quite apparent. He was one of the purchasers under the sale made by order of the judge of probate, subsequently transferring his purchase to Crafts as trustee. When the order was made he relinquished a claim—whether real or pretended we are not now called on to decide—which he had against the insolvent estate. He transferred to Crafts his interest, as tenant in common with the insolvents, in certain portions of the real estate,—who has since managed it with the other real estate formerly of the insolvents; he became responsible in the sum of \$5,000 for the payment of the loan agreed to be made, and which was, in fact, afterwards loaned to Crafts to enable him to carry out the purposes of the trust, which loan has been only partially paid. He is finally entitled, under the declaration, to receive whatever shall remain after Crafts shall have paid all expenses and otherwise completed the execution of his trust.

It would be premature now to discuss whether a bill can be brought, founded upon the interlocutory order of the court of insolvency; whether the investigation of such a transaction as the bill describes should be made upon a bill framed upon the supervisory power of this court in insolvency proceedings; or whether an original bill should be brought to set aside the transaction, to which all interested should be made parties. The discussion of these, as well as numerous other important questions suggested by the pleadings or the master's report, must be postponed until Charles Day is made a party to the proceeding.

The plaintiff may move before a single justice to make Charles Day a party, and to make such other amendments to his bill, if any, as he shall be advised will bring the inquiry he desires to present, properly before the court; which motion may be there considered. If such motion is not made within a reasonable time, the bill must be dismissed.

In the case of the First National Bank of Northampton v. Crafts, Assignee, it is as above so ordered.

The bill brought by *The First National Bank of Northampton v. The Hampshire County National Bank* involves a different subject of inquiry. We assume, in considering this case in favor of plaintiff's contention, without in any way intending so to decide, that the transaction by which the property of the insolvent estate was sold, and finally passed into the hands of Crafts in trust,—the Hampshire Bank advancing to him the sum of \$27,000, for the purpose of carrying out the objects of his declaration,—was one which was legally fraudulent, and which might be avoided by the creditors upon proper proceedings, through the assignee or otherwise, and the property conveyed, and any profits made in the sale or management of the

same appropriated to the benefit of the creditors. If this be so, the plaintiff contends that an order should now be made that the proof of the claim of the Hampshire Bank should be expunged. It has made application to the court of insolvency by petition to the same effect, which petition has been refused, and it is upon this refusal that the bill before us, invoking the supervisory power of this court, is founded. Having sought to obtain an advantage over other creditors in the payment of its claim, and to prevent an equal division of the property of the insolvents by the conveyance thereof to Crafts, through Day and Hall, upon the trust heretofore stated, the plaintiff urges that the claim "proved by said Hampshire Bank ought to be expunged, for that it is founded in fraud and illegality." But the case shows that the claim proved by the Hampshire Bank was honestly due, nor is there any evidence that it had received any conveyance by way of preference or security, or that it was in any way diminished by any payment. Under certain circumstances, the court of insolvency has power to expunge a claim, or may alter it, as when "the evidence shows that it was founded in whole or in part in fraud, illegality, or mistake." Pub. Stat. chap. 157, § 85. If the Hampshire Bank has participated in a transaction prejudicial to the rights of creditors, and in fraud of the insolvent law, of such a character that it may be avoided by them or may afford ground for an action in which a remedy may be sought in damages commensurate with the wrong inflicted, it is a transaction subsequent to the proof of its claim, and having no connection with such proof. The original claim is not the less valid. It is not founded in fraud or illegality because the claimant may have subsequently done something which is justly the subject of animadversion, which may expose him to a demand for damages, or which may cause property which has been transferred for his benefit to be reclaimed. It would be to inflict a punishment purely arbitrary, to expunge a claim in itself entirely honest and correct, on any such ground. We can find no warrant for doing so on any general legal principle, or by virtue of any provision of the statute.

In the case of The First National Bank of Northampton v. The Hampshire County National Bank, the entry must therefore be—
Bill dismissed.

Job T. WILSON, *Petitioner,*

v.

James H. WILSON *et al.*

1. On a petition by the father of one of the trustees under a will, for his removal, where the will contemplates that a part of the income is to be applied to the benefit of the petitioner, unless some cause exists to the contrary, and a very broad discretion is given to the trustees, it was held that they are required to act upon their discretion and judgment, not upon their mere will or caprice, or from selfish or improper motives. The petitioner has a right to demand of them that, in determining

how much of the income should be paid to him or for his benefit, they should exercise a fair and reasonable discretion and judgment; and if they unfairly or corruptly refuse to do this, he is a party "beneficially interested in the trust" who, under Pub. Stat. chap. 141, § 9, may apply for the removal of the trustees.

2. Under this statute, providing that the supreme judicial court and the probate courts may, "upon application of the parties beneficially interested in the trust," remove a trustee under a written instrument, if such removal appears essential to the interests of the applicant,—the question of the exercise of the broad power given is left very largely to the discretion of the court.
3. Where the justice who heard the case upon appeal from the probate court has found that the respondent is the dominant member of the board of trustees appointed by the will; that there exists a strong hostility between the respondent and the petitioner; that he cannot satisfactorily apportion the blame for the existing quarrel; and that he does not find any misconduct of the trustee distinctly attributable to hostility; but he finds that, "in view of the absolute discretion reposed in the trustee as to the allowance to the petitioner, and the whole state of affairs disclosed by the evidence, the trustee ought to be removed if the petitioner has a *locus standi*, and unless mutual hostility not attributable to the trustee, without distinct proof of misconduct in consequence of it, is never a sufficient ground of removal in a case like the present,"—it was within the province of the presiding justice to decide whether, upon all the evidence, the trustee should be removed. In a case like this, where the duty of a trustee is so delicate; where the hostility has arisen since the trust was created, and is attributable in part to the fault of the trustee; where the existence of the hostility would naturally pervert his findings and judgment,—it is competent for the justice to remove a trustee without further proof of misconduct, upon the ground that the removal appears essential to the interests of the beneficiary.

(Bristol—Filed January 5, 1888.)

ON report. Decree of probate court affirmed. This is a petition for the removal of the respondent, James H. Wilson, from the position of trustee under the will of Deborah Wilson.

The respondent, James H. Wilson, is one of the executors, and his children are devisees of one half, and, in event of the other devisee dying without issue, take the other half. None of the other parties interested petition for respondent's removal. The probate court removed the respondent, and he appealed.

The respondent contends that the petitioner

has no *locus standi*, and also contests the case on the merits.

At the time the will was made, the petitioner had recently passed through insolvency, and a considerable portion of the property had been purchased by him from his assignees, and conveyed by them to his wife. The petitioner contended that these facts had some bearing on the construction of the will with regard to his *locus standi*.

At request of defendant, respondent, the case was reported to the full court for such decree as equity may require.

Other facts appear from the opinion.

Mr. J. M. Wood, for petitioner:

The *locus standi* of the petitioner is established in the will. The petitioner was the husband of testatrix, and accepted the provision made for him in the will in lieu of a life tenancy in all her real estate.

It is a fair inference that the testatrix and her husband understood the will alike, as he assented to it at the same time she executed it, and she did not intend to cut him off from all interest in her estate and think she had done so in the same instrument which he thought had provided for him. Besides, property bought with the husband's money in the wife's name may be regarded as held by the wife in trust for the husband, and through his equitable interest the petitioner would have a right to be heard as to the management of the estate. Even where he paid a part of the money, a resulting trust arises in his favor.

Heath v. Stocum, 7 Cent. Rep. 648; *Cade v. Davis* (N. C.), 2 S. E. Rep. 225; *Hazeltine v. Fournay*, 9 West. Rep. 456; *Keller v. Kunkel*, 40 Md. 565.

As to the removal of trustees without misconduct attributable to hostility, courts will remove them whenever it is essential to the due exercise of the trust, even when they have been guilty of no misconduct, and wish to remain.

Atty-Gen. v. Garrison, 101 Mass. 228; *Ellison v. Ellison*, 6 Ves. Jr. 656; *Jauncey v. Rutherford*, 9 Paige, 273; *Atty-Gen. v. Coopers Company*, 19 Ves. 187, 192.

When the duties of trustee are merely formal and immaterial, and require no personal intercourse between the trustee and *cestui que trust*, and there is no misconduct of trustee, hostility will not be a cause for removal.

McPherson v. Cox, 96 U. S. 419 (24 L. ed. 751).

The report justifies the assumption that such facts were found which would bring the case within that class where hostility would be a cause for removal. By Acts 1817, chap. 190, § 41 (Rev. Stat. chap. 69, § 7), it was provided that a trustee might be removed for cause existing in the trustee. By Acts 1852, chap. 212, which is the present law (Pub. Stat. chap. 141, § 9), it is provided that a trustee may be removed at the desire of the beneficiary, when it shall appear to be essential to his interest.

Messrs. Morton & Jennings, for defendant:

The petitioner has no *locus standi*. No trust is created in his favor. The court has no jurisdiction unless it appears that the trustee has acted "from selfish, corrupt, or improper motives; and the burden is upon the donee to prove such motives."

Perry, Tr. § 508; *Gibbins v. Shepard*, 125 Mass. 541; *Spooner v. Lovejoy*, 108 Mass. 529; *Sears v. Cunningham*, 122 Mass. 588; *Hess v. Singler*, 114 Mass. 56; *Barrett v. Marsh*, 126 Mass. 218; *Warner v. Bates*, 98 Mass. 277; *Costabadie v. Costabadie*, 6 Hare, 410; *Tabor v. Brooks*, L. R. 10 Ch. D. 273; *Marquis Camden v. Murray*, L. R. 16 Ch. D. 161; *French v. Davidson*, 3 Madd. Ch. *402; *Walker v. Walker*, 5 Madd. Ch. *424.

In order to constitute a trust in favor of the petitioner, it must appear, from the will and all the circumstances, that the clause in the will which provides that the trustees may pay a portion of the income to the petitioner was intended to be imperative and peremptory.

Cases cited *supra*.

Nothing in the case shows bad faith, or selfish or corrupt or improper motives on the part of the trustee; and it is only in cases where some one or all of those elements appear that the court can interfere with the exercise of his discretion by the trustee, or remove him.

Cases cited *supra*.

Upon the merits the respondent should not be removed. No charge or finding of fraud, appropriation of the trust funds, mismanagement of the estate, mingling of its funds with his own, loss or danger to the trust fund from his want of care, or any other state of facts coming within any of the various instances which are conveniently grouped as cases in which courts will remove trustees, in *Perry on Trusts*, § 275 *et seq.*, appear in this case.

Unfriendly or hostile feelings between the trustee and *cestui que trust* are not of themselves sufficient to justify the removal of the trustee.

Forster v. Davies, 4 De G. F. & J. 188; *Gibbes v. Smith*, 2 Rich. Eq. 181; *Berry v. Williamson*, 11 B. Mon. 245; *Lothrop v. Smalley*, 28 N. J. Eq. 192; *Nickels v. Philips*, 18 Fla. 732.

Morton, Ch. J., delivered the opinion of the court:

The will of the testatrix, who was the wife of the petitioner, gives the most of her estate to the respondent and two others, upon the trusts that they may pay to the petitioner, in the exercise of their discretion, such portion of the income, "or no portion at all thereof, as they shall from time to time think fitting and proper;" shall invest the surplus income for accumulation; and, at the death of the petitioner, shall convey one half of the trust estate to her daughter or her issue, or, if she left no issue, to the issue of the respondent, and shall hold the other half interest until the death of the respondent, when it shall be conveyed to his issue. It is also provided in the last clause that "if either of the recipients under this will, husband, children, or grandchildren, or children's issue, shall be wanting in thrift," the trustees are ordered and charged with making the conveyances and payments before provided in such way and to such persons as shall be most likely to enure to the benefit of the recipients, exercising in all such case and cases the judgment that would be expected from a good father to each of such recipients respectively."

The will contemplates that a part of the income is to be applied to the benefit of the petitioner, unless some cause exists to the con-

trary. Although the discretion given to the trustees is very broad, yet they are to act upon their discretion and judgment, not upon their mere will or caprice, or from selfish or improper motives; they are to exercise the judgment to be expected from a good father.

The petitioner has a right to demand of them that, in determining how much of the income should be paid to him or for his benefit, they should exercise a fair and reasonable discretion and judgment; and if they unfairly or corruptly refuse to do this, he is a party "beneficially interested in the trust," who, under the statute, may apply for the removal of the trustees. Pub. Stat. chap. 141, § 9.

We come, then, to the merits of the case. The statute provides that the supreme judicial court and the probate courts may, "upon application of the parties beneficially interested in the trust, remove a trustee under a written instrument, if such removal appears essential to the interests of the applicants." This gives a broad power to the court, and leaves the question of the removal of a trustee very largely to its discretion.

In this case the justice who heard the case upon appeal from the probate court has not reported the evidence; we cannot, therefore, revise his findings. He has found, as the result of the hearing, that the respondent is the dominant member of the board of trustees appointed by the will; that there exists a strong hostility between the respondent and the petitioner, who is his father; that he cannot satisfactorily apportion the blame for the existing quarrel; and that he does not find any misconduct of the trustee distinctly attributable to hostility. But he finds that, "in view of the absolute discretion reposed in the trustees as to the allowance to the petitioner, and the whole state of affairs disclosed by the evidence, the trustee ought to be removed, if the petitioner has a *locus standi*, and unless mutual hostility not attributable to the trustee, without distinct proof of misconduct in consequence of it, is never a sufficient ground of removal in a case like the present." This is equivalent to a finding by the justice that the respondent ought to be removed unless, upon the facts in the case, he had no right in law to remove him.

We think it was within the province of the presiding justice to decide whether, upon all the evidence, the trustee should be removed. The relation between the father and the son, created by the will, is one of extreme delicacy. The trustees have full power to determine what allowance the father shall have, limited only by the duty of exercising a fair and reasonable discretion. Everyone instinctively feels that a state of mutual hostility between the trustee and such a beneficiary, arising after the trust was created, caused in part by the fault of the trustee, unfits him, to a greater or less degree, for the fair execution of the trust. But, from the nature of the case, it would be very difficult, if not impossible, to find distinct proof that, in exercising his discretion, the trustee was actuated or influenced by such hostility. And yet it may be apparent that, according to the laws which generally govern human action, he could not be relied on to act fairly towards the beneficiary. We think that, in a case like this, where the duty of a trustee is so delicate; where the hostility has arisen since the trust

was created, and is attributable in part to the fault of the trustee; where the existence of the hostility would naturally pervert his feelings and judgment,—it is competent for a justice to remove a trustee without further proof of misconduct, upon the ground that the removal appears essential to the interests of the beneficiary.

In *McPherson v. Cox*, 96 U. S. 404 (24 L. ed. 746), Mr. Justice Miller states that, "when a trustee is charged with an active trust, which gives him some discretionary power over the rights of the *cestui que trust*, and which brings him into constant personal intercourse with the latter, it may be conceded that the mere existence of strong, mutual ill feeling between the parties will, under some circumstances, justify a change by the court."

In *Scott v. Rand*, 118 Mass. 215, it is said in the opinion that the question of removing a trustee depends upon "a careful consideration of all the circumstances, the existing relations, and, to some extent, the state of feeling between the parties. It is addressed to the reasonable discretion of the court." And the trustee was removed, although he had acted from honest motives, mainly upon the ground that, in a quarrel between the *cestui que trust* and her husband, he had taken the part of the husband, and thus created unfriendly relations with her.

The respondent relies upon the case of *Forster v. Davies*, 4 De G. F. & J. 188, and *Nichols v. Philips*, 18 Fla. 185. But they are quite different from the case at bar. It does not appear in those cases that any blame attached to the trustees for the existing feud or hostility; and the trustees had no discretionary power over the rights of the *cestui que trust*; so that the existence of hostility was of minor importance, as it could not affect the execution of the trust.

Decree of Probate Court affirmed.

SOUTH DANVERS NATIONAL BANK.

Petitioner to Prove Exceptions,
v.

James H. JACKSON, Assignee.

1. In a suit by the assignee of an insolvent debtor to recover the amount of a payment made to the defendant (a bank), by the insolvent debtor, in fraud of the insolvent laws, where the whole transaction of the preference was between the insolvent and the president and the cashier of the bank, they were naturally and necessarily, when placed upon the witness stand by the plaintiff, hostile to him; and the case afforded the strongest ground for the exercise of the judicial discretion to permit the plaintiff to cross-examine the witnesses, and renders it improbable that the cross-examination was admitted upon the narrower ground that they were adverse parties, within Pub. Stat. chap. 109, § 20.
2. The statement of a judge, made immediately after the trial, certifying the reasons which affected his mind in admitting evidence,—a matter he alone

could fully know,—is of the **highest weight**, and can be controlled only by the fullest and most direct proof.

(Essex—Filed January 5, 1888.)

PETITION to establish exceptions. *Petition dismissed.*

The facts appear from the opinion.

Mr. H. Wardwell, for defendant, petitioner: The exceptions alleged are all waived by the petitioner, and were before the hearing before the commissioner, except the one to the ruling of the presiding judge that the president and cashier of the bank, who had been called as witnesses by the plaintiff in the original suit, were adverse parties, within the meaning of the statute (Pub. Stat. 169, § 20), and for that reason the plaintiff was allowed the same liberty in their examination that is allowed upon cross-examination.

This exception is wholly distinct from the others, and may be proved.

Cullen v. Sears, 112 Mass. 299, 307; *Sawyer v. Yale Iron Works*, 116 Mass. 424, 433, and cases there cited.

Pub. Stat. chap. 169, § 20, is in these words: "A party to a cause, who calls the adverse party as a witness, shall be allowed the same liberty in the examination of such witness as is allowed upon cross-examination."

It may be claimed, as a ground for sustaining the ruling, that in such a case as the present, if the officers of the bank could not be cross-examined, there was no adverse party whom the plaintiff could cross-examine, and that it was within the meaning or spirit of the statute that the plaintiff should have such right in the present case.

No representations, declarations, or admissions of these officers would bind the defendant, unless shown to be within the scope of their authority.

Ang. & A. Corp. 7th ed. § 809, and cases there cited.

If the Legislature had so intended, it would have been easy and natural to have so expressed the intention, as was done in Pub. Stat. chap. 167, § 53, in reference to filing interrogatories.

Nothing can be inferred from the fact that, in this last-mentioned statute, the right is given to file written interrogatories, to be answered by officers.

There is a great and essential difference between this and the case of a party to a cause calling the adverse party as a witness at the trial of a cause, and giving the right of cross-examination.

Pub. Stat. chap. 167, § 53, gives no right like that of cross-examination.

But it is not enough in such cases to say that cross-examination is permitted in the discretion of the judge, under all the circumstances of the case.

It must appear that the circumstances of the case were such as, under the rules of law, to warrant giving the right of cross-examination.

Moody v. Rowell, 17 Pick. 498; *York v. Pease*, 2 Gray, 282; and 1 Greenl. Ev. § 435, are not to the contrary.

The question, however, here is as to the right of the plaintiff under the statute, not the exercise of the discretion of the judge.

2 Mass.

See *Maggi v. Cutts*, 123 Mass. 535, 537 *c' seq.* **Mr. H. P. Moulton**, for plaintiff, respondent:

An objection to the admission of evidence can be supported only by showing that it was not admissible for any purpose, or that it was permitted to be used for a purpose for which it was not competent, and, further, if incompetent, was in some way injurious to the excepting party.

Howe v. Ray, 118 Mass. 91.

The fact that a party is allowed to put leading questions to his own witness is never a subject of exception, because it is a matter entirely in the discretion of the court.

York v. Pease, 2 Gray, 282; *Green v. Gould*, 3 Allen, 465.

The rules of evidence are exactly the same in civil and criminal cases, and in both it is in the discretion of the judge how far he will allow the examination in chief of a witness to be by leading questions, or, in other words, how far it shall assume the form of a cross-examination.

Coleridge, J., in *Reg. v. Murphy*, 8 Car. & P. 305.

A similar rule is laid down in *Doran v. Mullen*, 78 Ill. 845, and in *State v. Benner*, 64 Me. 267, in which the question at issue is very fully discussed.

In practice, great latitude of cross-examination is allowed in cases involving questions of fraud, especially where one of the parties to the alleged fraudulent transaction is upon the stand.

Jacobson v. Metzger, 35 Mich. 103; *Anderson v. Walter*, 34 Mich. 113.

The position of the witnesses being necessarily adverse, the party calling them could, "as a matter of right," cross-examine them.

Best, Ch. J., in *Clarke v. Saffery*, Ryan & M. 126; *Wood v. Hubbell*, 10 N. Y. 479.

Pub. Stat. chap. 169, § 20, does not limit the court in the exercise of its discretion in allowing leading questions in the nature of cross-examination, in any case, but prevents the court from refusing a cross examination when the adverse party is called as a witness.

If the law up to this point, and all the facts in the case, are exactly as claimed by the petitioner, it does not appear that it was in any way prejudiced by the ruling of the court. It was not prejudiced by a mere abstract ruling, and the petitioner shows no question or answer by the admission of which its rights were impaired.

Fuller v. Ruby, 10 Gray, 285; *Wing v. Chesterfield*, 116 Mass. 353; *Sweetser v. Bates*, 117 Mass. 466-468.

Morton, Ch. J., delivered the opinion of the court:

The jury having returned a verdict for the plaintiff, the defendant filed a bill of exceptions, which was disallowed by the presiding justice of the superior court. The defendant thereupon filed a petition in this court to establish the truth of his exceptions, and a commissioner was appointed "to take the evidence and to make report thereof to the court." The commissioner has accordingly reported all the evidence taken before him, for the consideration of the court. At the hearing before the

commissioner, the defendant waived all the exceptions alleged in his bill, except the one as to the ruling of the court as to the right of cross-examination, by the plaintiff, of the president and cashier of the defendant bank. The exception claimed by it states, in substance, that the court ruled that, as matter of law, the officers of the bank were adverse parties, within the meaning of Pub Stat. chap. 169, § 20. The first question for us to consider is whether this exception has been proved. There is no question that the plaintiff, having called the president and cashier as witnesses, was allowed to put leading questions to them in the nature of cross-examination. It is settled that, where a party calls a witness who appears to be adverse, or who is in such a situation in regard to the case that he is not really hostile, it is within the discretion of the court to allow him to cross-examine such witness. *Moody v. Rowell*, 17 Pick. 490; *York v. Pease*, 2 Gray, 282; 1 Greenl. Ev. § 435. The plaintiff claims that he was permitted to cross-examine the witnesses under this rule, in the discretion of the presiding justice. This suit was brought by the assignee of an insolvent debtor to recover the amount of a payment made to the defendant by the insolvent debtor in fraud of the insolvent law. The whole transaction of the preference was between the insolvent and the president and cashier: they were the persons who committed the fraud, and they were in a position which naturally and necessarily made them hostile to the plaintiff. The case thus affords the strongest ground for the exercise of the judicial discretion to permit the plaintiff to cross-examine the witnesses, and renders it very improbable that the presiding justice would admit the cross-examination upon the narrow ground that the witnesses were adverse parties, within the statute. It is difficult to believe this, except upon the fullest proof.

Upon a careful consideration of the evidence, we are not satisfied that the defendant has proved his exceptions as alleged. The defendant's counsel is the only witness who testifies directly to the truth of his exception as he has alleged it. The other witnesses called for the defendant testify that the plaintiff's counsel claimed the right to cross-examine the witnesses as adverse parties, and that there was some discussion on this claim; one witness, a counselor at law, testifies that his recollection is "that the judge did rule that Mr. Moulton had the right of cross-examination of the witness as an adverse party;" but he has an imperfect recollection of what the judge in fact said, and does not undertake to say what the final ruling was. The other witnesses did not say what was the ground upon which the judge ruled. On the other hand, the counsel for the plaintiff directly testifies that the judge did not decide the question whether he had the right to examine the witness as a party, but permitted the cross-examination as proper, within his discretion, under the circumstances of the case; and in this he is supported by the presiding justice. A statement of a judge made immediately after the trial, certifying the reasons which affected his mind in admitting evidence, a matter he alone could fully know, is of the highest weight, and can be controlled only by the fullest and most direct proof.

We think the evidence preponderates in favor of the plaintiff, and that the defendant has failed to prove his exceptions.

Petition dismissed.

Joseph A. WILSON

Walter O. CROOKER.

1. The holder of a mortgage of personal property may protect his interests against attaching creditors of the mortgagor, by demanding of the attaching officer payment of his claim, and stating in writing a just and true account of the debt for which the property is liable to him.
2. The demand should state, not merely the amount due, but the nature of the debt upon which it is due.
3. A mortgage to secure a note, stipulating neither time of payment, nor rate of interest, which by the terms of the note was to be 36 per cent, was assigned to plaintiff. By arrangement between plaintiff and mortgagor, a portion of the property was sold, and proceeds applied in part in payment of commissions claimed by plaintiff, and of interest five months in advance. On seizure of a portion of unsold property at instance of attaching creditors, demand was served by the assignee of the mortgage, stating neither names of parties to the mortgage, time of making, date of payment, nor rate of interest. Held, that demand was insufficient and misleading.

(Norfolk—Filed January 6, 1886.)

ON defendant's exceptions. *Sustained.*

Tort in one count for the conversion of two horses.

At the trial, without a jury, it appeared that a note dated May 20, 1886, for \$650, at six months, interest to be \$19.30 a month payable monthly, was secured by a mortgage upon the property in question, together with household and other goods. The mortgage was of usual form, with power of sale, except that it did not state the rate of interest and the time payable, but read that interest was to be paid as stated in the note, and was duly recorded on said May 20.

It further appeared that the note and mortgage were assigned to the plaintiff for \$767, stated therein as the consideration, which sum was paid by the plaintiff to mortgagee; that his assignment being in due form was recorded June 19, 1886; that mortgagee would not sell and assign the mortgage for less than its face, and interest for six months,—that is, for \$767; that at mortgagor's request plaintiff paid mortgagee that sum, and received the assignment and note,—they first agreeing that the mortgaged goods should be sold at once by mortgagor, and that the proceeds of the sale should be paid to plaintiff, and that he might first apply them to the payment of the \$117 paid by plaintiff, and

also to the payment of \$25 for plaintiff's trouble, expenses, and commission; that June 18, 1886, an auction sale was made by mortgagor of a part of the mortgaged goods, the same netting \$300, which was paid to the plaintiff, and was by him applied to the payment of the \$117 and \$25, with the consent of mortgagor, leaving the balance to go towards the payment of the mortgage note.

It was also in evidence that the defendant, as a constable of Holbrook, lawfully attached the horses upon writs against said mortgagors, and removed the same from his possession; that the plaintiff caused the following notice to be served upon the defendant:

To Walter O. Crooker, of Holbrook:

You are hereby notified that I hold a mortgage upon the horses you have attached upon the writ of Walter E. White and James E. Daniels against Michael Quinlan. Said mortgage is for \$492, now due and unpaid, and I demand of you said sum due upon said mortgage, which is duly recorded upon the records of the town of Holbrook, where reference may be made for further particulars if desired.

Joseph F. Wilson,

By Jos. W. Lombard, his Attorney.
June 23, 1886.

More than ten days, after the service of the demand, passed before the action was brought.

The defendant qualified under his writs and attachments.

The defendant asked the court to rule that the plaintiff, upon the above facts, which were all in evidence, could not maintain his action; that the evidence of the agreement as to the application of the proceeds of the sale was incompetent (the evidence was admitted under defendant's exception), and that the amount of the mortgage and note was reduced by the same so much, notwithstanding that the demand was for more than was due on the mortgage; that it was invalid and insufficient in failing to mention interest and the rate, the date of the mortgage, the name of the mortgagor, and a description of the mortgaged property; that the demand did not contain a just and true account of the debt for which the mortgaged property was liable to the plaintiff, but that the demand was for more than that.

The court found that, at the time of the demand, there was due on the note the sum therein named; and found for the plaintiff the value of both horses.

The defendant duly excepted to the rulings given and refused as aforesaid.

Mr. J. L. Eldridge, for defendant:

1. The action cannot be maintained. The mortgage was invalid, and its record without effect. The rate of interest was not stated therein. Reference for a material part of the mortgage contract is made to the note. If material parts of a mortgage contract can be shown by reference to unrecorded papers, subject to alteration and substitution at pleasure, the object of the statute requiring registration is defeated, and the door opened to fraud.

2. The evidence of an agreement, made at or before the assignment, for a sale by Quinlan, and the appropriation of the proceeds, was incompetent.

Clark v. Houghton, 12 Gray, 41.

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3. The conversion relied on was the attachment of the horses.

4. The demand was invalid and insufficient as to both attachments; if not, then as to one. The defendant was the agent of each attaching creditor, and was entitled to a demand and notice for each creditor. (See cases of the successive attachments of the same property.) But one was proved, and it referred to one writ and attachment.

Howe v. Bartlett, 1 Allen, 29; Macomber v. Baker, 3 Allen, 241; Wheeler v. Bacon, 4 Gray, 550.

The demand and notice tended to mislead and prejudice the attaching creditors. It did not state the rate of interest; the record, to which reference was made, did not state the rate; nor did the demand state that six months' interest had been paid in advance, or that it had not been paid. These facts, made known to them, might have induced them to pay the \$492. It did not state that goods other than the horses were covered by the mortgage, that a part had been sold, the name of the mortgagor, the date of the mortgage, and that the plaintiff was an assignee. A reasonable examination of the record would not have discovered these facts. It did not state a just and true account.

The mortgage security, the terms and conditions of the mortgage, the mortgage and assignment, were waived, discharged, and rendered void by the agreement that Quinlan might take and sell the mortgaged goods, and then give to the plaintiff the proceeds.

Briggs v. Parkman, 2 Met. 258; Rickerson v. Raeder, 1 Keyes, 492; Ford v. Williams, 13 N. Y. 577; Delaware v. Ensign, 21 Barb. 85.

Mr. J. E. Tirrell, for plaintiff:

1. The agreement was made before any attachment was made, and the parties had a right to agree as to what should go on the mortgage, as goods were sold not covered by the mortgage. 2. The notice was sufficient in description of property, and stating amount due, and for defendant to identify the mortgage. 3. The demand was for the exact amount due. 4. The demand was for the horse attached and embraced in the mortgage.

Knowlton, J., delivered the opinion of the court:

The plaintiff held a mortgage covering two horses, which are alleged to have been converted by the defendant. The defendant attached them as the property of the mortgagor; one upon a writ in favor of one creditor, and the other upon another writ in favor of a different creditor. The plaintiff could protect his rights against each attachment, by demanding of the defendant payment of his claim, and stating "in writing a just and true account of the debt or demand for which the property was liable to him," in accordance with the provisions of Pub. Stat. chap. 161, § 75.

The purpose of the statute in requiring an account is to enable the attaching creditor to definitely know what the mortgage secures.

The information called for is important, not merely as fixing a sum to be paid, but also as assisting the creditor in determining whether the mortgage was made in good faith, and whether the debt, demand, or obligation will be valuable to him if he retains his attachment and

takes to himself the benefit of the mortgage, as he has a right to do. The law gives him ten days after the demand in which to decide whether he will pay the mortgage debt. The words "just and true account of the debt or demand" mean something more than a bare statement of a sum due. They call for a description of the debt or demand, such as will give the attaching creditor a reasonably full and accurate understanding of the nature and particulars of it. The account should state, not merely what amount is due, but also upon what kind of a debt it is due.

In many cases this has been held to have been sufficiently done by very general language; only a reference to the provisions of the mortgage no precise form, is required. It is enough if the attaching creditor can know from the statement the nature and qualities of the debt or demand which the mortgage secures, and the amount that is due upon it. It has also been repeatedly held that innocent inaccuracies or errors in the account, resulting from accident or mistake, and which do not mislead or injuriously affect the attaching creditor, do not invalidate the demand. *Rowley v. Rice*, 10 Met. 7; *Hills v. Farrington*, 6 Allen, 80; *Folsom v. Clemence*, 111 Mass. 278; *Bicknell v. Cierterly*, 125 Mass. 164; *Robinson v. Sprague*, Id. 582. But no demand is sufficient which fails to give the attaching creditor such information as will enable him to act understandingly in reference to the claims.

In the case at bar the plaintiff gave notice in his demand that he held a mortgage on the horses for \$492 then due, and referred to the records of the town, without stating when the mortgage was given, or by whom, or to whom. If the attaching creditor succeeded in finding and identifying the mortgage as recorded, it gave him little valuable information. It purported to secure payment of a note for \$650, and interest; but it did not show when the note would become due, or what rate of interest it bore. The case finds that the note was payable six months after date, with interest monthly at the rate of 36 per cent per annum; that it was made to one Reynolds, and, with the mortgage, was by him transferred to the plaintiff a short time before the attachment; and that, by an arrangement between the plaintiff and the mortgagor, a part of the mortgaged property had been sold, and the proceeds applied to the payment (1) of \$25 to the plaintiff, for his trouble and as a commission; (2) of interest upon the note for six months in advance; and (3) of \$158 upon the principal. From reading together the plaintiff's demand and the mortgage, the creditor would naturally have inferred that the note of \$650, payable at some unknown time, and running at an unknown, but presumably common, rate of interest, had been reduced, by payment, to \$492; and that it was a valid debt for that amount, bearing interest until maturity. He would not have suspected that the rate of interest was exorbitant, or that a large part of the mortgaged property had been applied to the payment of a commission to the plaintiff, and of interest for a period extending nearly five months beyond the time of the demand. And it can hardly be doubted that if these matters, of which he was ignorant, had

been disclosed, he would have carefully considered them in determining his course.

The plaintiff's demand, with all the aid to be derived from a mortgage which did not fully describe the note, gave the defendant no sufficient account of the nature of the mortgage debt as it then existed. It was misleading even as to the amount secured. For the sum which it stated to be due was not payable for nearly five months, and the interest for that period had been paid in advance. It was not, therefore, a "just and true account of the debtor's demand," within the meaning of the statute, and the other defenses set up at the time need not be considered.

Exceptions sustained.

Milton S. JENKINS

v.

John T. WOOD.

1. The provisions of Pub. Stat. chap. 179, §§ 6, 7, are highly positive or penal in their character, and should be strictly construed, and held to apply only to such cases as are clearly intended by the Legislature. The provisions should apply only to cases of known and recognized tenancies in common or joint tenancies, and not to cases where a party enters upon land and cuts wood or timber under an honest claim that he owns the whole in fee or by some other title than that of a tenant in common or joint tenant. The object of the statute is to enforce a penalty against tenants in common or joint tenants who knowingly encroach upon the rights of their cotenants. Before cutting wood or timber they are to give notice to their cotenants of their intention to enter upon and improve the land. Such a notice could not be given by a person who did not know that he was a tenant in common.
2. Where the defendant owned one undivided half of the premises, and the other half descended to the plaintiff as the heir of the deceased wife of the defendant; and a child had been born during the marriage of the defendant, which he believed was born alive, and defendant, believing he was tenant by the curtesy of the undivided half of the premises, had cut wood and timber thereon; and, upon a trial of a petition for partition, it was determined that the child was not born alive, and judgment for partition was entered against the defendant,—an action for tort by the plaintiff as tenant in common to recover the forfeiture for the cutting of the wood upon the land, cannot be enforced under Pub. Stat. chap. 179, § 6, but, under a stipulation fixing the value of the timber, a judgment was entered for the damages.

(Essex—Filed January 5, 1883.)

A PPEAL by plaintiff from a judgment of the Superior Court of Essex County in favor of plaintiff, in an action to recover the forfeiture for the cutting of wood upon lands of tenants in common under Pub. Stat. chap. 179, § 6. *Affirmed.*

Agreed facts:

This was an action of tort brought by the plaintiff as tenant in common of an undivided half of certain land in Boxford, with the defendant, to recover the forfeiture for the cutting of wood and timber upon said land, provided by Pub. Stat. chap. 179, § 6.

The defendant at the time of the cutting was a tenant in common of said land with the plaintiff, and did not give the notice to his cotenant provided in said section, or any notice.

The damage to the whole land resulting from said cutting is agreed to be \$350.

The premises originally were the property of Sarah Wood, the deceased wife of the defendant, who died on the 4th day of July, 1871, without leaving issue living.

The defendant owns one undivided half of the premises, and the other half descended to the plaintiff as the heir of the said Sarah Wood.

A child was born during the marriage of the defendant, and the said Sarah and the defendant believed that the said child was born alive, and that he was tenant by the curtesy of the undivided half of the premises, the remainder in which belonged to the plaintiff, as he believed.

The defendant, so believing, cut the wood and timber aforesaid.

After the said cutting, the plaintiff brought a petition for partition of the said premises in the superior court, against the defendant. Upon the trial of said petition, the defendant was a witness, and testified that he was present at the birth of the said child, and that it was born alive; and other witnesses testified upon the question of issue. It was determined that the child aforesaid was not born alive, and judgment for partition was entered.

Subsequent to the said judgment the present action was brought. The case is submitted to the superior court upon the foregoing facts. If the plaintiff is entitled to recover the forfeiture provided in Pub. Stat. chap. 179, § 6, judgment is to be entered for the plaintiff in accordance therewith. If, upon the foregoing facts, the plaintiff is not entitled to recover said forfeiture, but in any form of action can recover the actual damage occasioned by said cutting, judgment is to be entered for such damages.

Upon agreed facts the court orders judgment for plaintiff for \$175. Plaintiff appeals.

Mr. W. S. Knox, for plaintiff:

The agreed statement of facts sets forth every fact necessary to bring the plaintiff's action within the provisions of Pub. Stat. chap. 179, § 6.

The purpose of the statute, and its language, are analogous to that of Stat. 1875, chap. 99, § 5.

Roberge v. Burnham, 124 Mass. 277.

In order to recover a penalty imposed by statute, the plaintiff must allege all the essential facts necessary to support the action.

Soper v. Harvard College, 1 Pick. 177.

But a declaration which sets forth the stat-

ute in words, with proper averments, is sufficient.

Williams v. Taunton, 16 Gray, 288.

The plaintiff in this case set forth all the essential facts to support his case, and all that he could be required to prove. The state of the defendant's belief, or the extent of his knowledge, would be a most difficult matter of inquiry; and if these were to be shown in actions upon this statute, the statute itself would be of little consequence. But, outside of the express provisions of the statute, if those provisions are not conclusive, the knowledge and belief of the defendant are immaterial. The action is in its nature a remedial action.

Palmer v. York Bank, 18 Me. 166; *Reed v. Northfield*, 13 Pick. 94; *Goodridge v. Rogers*, 22 Pick. 495.

In acts *malæ prohibita* the only inquiry is, Has the law been violated?—and ignorance is no excuse for a violation of a statute in a civil action.

Myers v. State, 1 Conn. 502; *Hyde v. Melvin*, 11 Johns. 521; *Calcraft v. Gibbs*, 5 T. R. 20; *Donahue v. Dougherty*, 5 Rawle, 124; *Miller v. Lockwood*, 17 Pa. 248; *Robinson v. Kinne*, 1 Thomp. & C. 60; *Rutherford v. Aiken*, 8 Thomp. & C. 60.

But it is submitted that the defendant does not bring himself within the pale of the discussion of this question. There was no fact connected with the title to this real estate, of which the defendant was ignorant. In one aspect the defense to this case is quite remarkable. The defendant says he supposed he was tenant by curtesy of an undivided half of the wood lot, with the remainder to the plaintiff. That would give him no right to cut off the wood and timber, and he would be liable as a life tenant committing waste, under Pub. Stat. chap. 179, § 1.

Messrs. D. & C. & C. G. Saunders, for defendant:

The plaintiff seeks treble damages under the provisions of Pub. Stat. chap. 179, § 6; but it is respectfully submitted that this statute does not apply to the case at bar.

The Gloucester Statute only applied to tenants for life or years, and not to tenants in common.

The statute under which the plaintiff claims is of a penal nature, and to be strictly construed.

Adams v. Palmer, 6 Gray, 388; *Boston Iron Co. v. King*, 2 Cush. 400, 405; *Byam v. Bickford*, 140 Mass. 31, 35.

It is intended to apply only to cases in which the relation of joint tenancy is recognized by the parties, and when the cutting by one tenant is not done in good faith, but is a known and willful violation of the rights of the cotenant.

Great hardship might be done should the court rule that, in all cases where a tenancy in common was proved, this severe penalty should be inflicted, however innocent of wrong the defendant might have been when he committed the waste complained of.

Evidence should always be admitted, in such cases, of the intent and the circumstances under which the act was done.

Adams v. Palmer, *supra*; *Batchelder v. Kelly*, 10 N. H. 436; *Russell v. Irby*, 13 Ala. 181; *Whitcraft v. Vanderver*, 12 Ill. 235; *Barnes v. Jones*, 51 Cal. 308.

The amount of the damage is that done to the plaintiff's interest, and not that to the whole estate.

A person claiming single damages under § 3 can only recover "such damages as he has suffered by reason of the waste." It is not to be supposed that the Legislature, giving a joint tenant a remedy under § 6, intended, not only to give three times as much as when a life tenant commits waste, but that the damages should be computed on an entirely different basis, namely, the injury to the whole estate, rather than to the plaintiff's interest in it.

It is significant in this connection that, while the original Act inflicting this heavy penalty upon joint tenants committing waste (that of March 16, 1784) imposed a penalty of twenty or forty shillings, according to the size of the tree, and three times its value, upon a joint tenant who cut down timber, the Revised Statutes modified the forfeiture to three times the amount of the damage.

Rev. Stat. chap. 105, § 8. See also Act of March 9, 1786.

Morton, Ch. J., delivered the opinion of the court:

The statute provides that, "if a joint tenant, coparcener, or tenant in common of undivided lands, cuts down, destroys, or carries away any trees, timber, wood, or underwood, standing or lying on such lands, or digs up or carries away any stone, ore, or other valuable thing found there, or commits any other strip, or waste, without first giving thirty days' notice in writing, under his hand, to all the other persons interested therein, or their agents or attorneys, of his intention to enter upon and improve the land; or if he does any of said acts during the pendency of a petition or other suit for the partition of the premises,—he shall forfeit three times the amount of the damages that shall be assessed therefor," to be recovered in an action of tort by his cotenant. Pub. Stat. chap. 179, §§ 6, 7.

Although such action is not strictly an action for a penalty (*Goodridge v. Rogers*, 22 Pick. 495), yet the provisions of the statute are highly positive or penal in their character, and should be strictly construed and held to apply only to such cases as are clearly intended by the Legislature. *Adams v. Palmer*, 6 Gray, 388; *Byam v. Bickford*, 140 Mass. 31. Similar statutes have been in force for more than a century. Stat. 1783, chap. 52, § 1; Stat. 1785, chap. 62, § 1; Rev. Stat. chap. 145, § 7; Gen. Stat. chap. 138, § 7; Pub. Stat. chap. 179, § 6.

We are of opinion that the Legislature intended that these statutes should apply only to cases of known and recognized tenancies in common or joint tenancies, and not to cases where a party enters upon land and cuts wood or timber under an honest claim that he owns the whole in fee, or by some other title than that of a tenant in common or joint tenant. If a man in good faith buys land, supposing that he gets a title in fee to the whole, and cuts wood from it, it is not to be presumed that the statute intended that he should be subject to the severe penalty of threefold the amount of damage done, if he afterwards discovers that he has a title to an undivided portion instead of to the whole of the land. The object of the statute is

to enforce a penalty against tenants in common, or joint tenants, who knowingly encroach upon the rights of their cotenants. Before cutting wood or timber they are to give notice to their cotenants of their intention to enter upon and improve the land, or, as it is expressed in the earlier statutes, that they have "occasion for and shall enter upon and improve such lot or lots of land lying in common." Such a notice could not be given by a person who did not know that he was a tenant in common, and the provision tends strongly to show that the object of the statute is to deal with cases of known and recognized tenancies in common. A similar question was decided in *Reed v. Davis*, 8 Pick. 514.

The Statute of 1795, chap. 75, § 8, provides that, if any person shall commence any action for recovering possession of land, and the person in possession, or any other person, shall, pending such action, commit strip or waste, he shall forfeit and pay treble damages. It was held that an action for the penalty could not be maintained against a person who did not know of the pendency of the action.

We are therefore of opinion that, upon the facts agreed in this case, the plaintiff cannot maintain an action under the statute for the penalty; but, under the stipulation in the case stated, that, if the plaintiff can in any form of action recover the actual damage he has sustained, judgment is to be entered for such damage, the superior court rightly entered judgment for such damages.

Judgment affirmed.

COMMONWEALTH of Massachusetts

v.

Francis L. WHITE.

1. Where, so far as appears, evidence was offered and admitted generally, for any purpose for which it was competent; and although at the time there was a possibility that its chief use was to sustain counts in an indictment which were dismissed before the close of the trial, and the opposite possibility was no less plain to the defendant, who was insisting that these counts were bad; and this uncertainty was by the defendant's consent, who had agreed that the objectionable counts need not be passed upon until the evidence was in; and the evidence was admissible under the counts not held bad, upon which the defendant was convicted,—there can be no exception to the refusal of the court to strike out the evidence thus admitted.
2. Where the defendant was charged with forging certain receipted bills for hides, etc., and for uttering the same; and the evidence objected to tended to show that the defendant fabricated certain other unreceipted bills of a like character, and uttered them to the same parties by a continuous series of transactions, extending some months later than the latest forgery of which the defendant was convicted,—the ev-

idence was nevertheless admissible. All the bills, receipted or unreceipted, if known by the defendant not to be genuine, were used by him in a single scheme of fraud, under his contract; and, on the question of the defendant's knowledge that the bills in issue were not genuine, his possession and use of other similar false bills, about the same time, whether before or afterwards, in a continuous series of transactions with the same parties under the same contract, was competent to show that his use of the former was not innocent.

3. Evidence of knowledge that the instruments were forgeries, which otherwise would be admissible, is not made inadmissible by the fact that there is other strong evidence of knowledge in the case.
4. A receipted bill for goods purports to be an acquittance and discharge for the money due in respect to these goods. The instruments being set out, and purporting on their face to be the thing forged, there is no need of further allegation to show how it was that thing, or how it could be used as an instrument of fraud, or that it was so used in fact.
5. Where a receipt bears, in addition to the words "terms cash," the words "our sight draft," the word "settled," followed by the signature, imports a discharge of the money due for the price, whether it was discharged by money or draft.

(Suffolk—Filed January 2, 1888.)

ON defendant's exceptions. *Overruled.*

Defendant was indicted for forgery and uttering forged paper. On May 8, 1888, defendant entered into a contract with H. Leonard & Co. by which Leonard & Co. agreed to sell to White, and White agreed to buy from Leonard & Co. from time to time, hides at such prices as might be from time to time agreed upon between them; that White should convey the hides from the place where they were when contracted for, to his tannery at Woburn, and there, in a good and workmanlike manner, tan and curry them, and manufacture them into merchantable leather; that, at the time of the payment for any lot of hides by Leonard & Co., White should give to Leonard & Co. his negotiable promissory notes on four months' time, which should cover the amount paid out and $\frac{1}{4}$ of 1 per cent per pound on the net weight of the hides, together with interest from the date of the payment at 7 per cent per annum, except in case the hides were bought by Leonard & Co. for White, when interest for the same time and the same rate should be added from the date of the bill of lading; that the hides and the leather should be and remain the property of Leonard & Co. until all the notes were fully paid and satisfied. White agreed that, at the end of the year over which the agreement extended, he would pay to Leonard & Co. a sum of money equal to one tenth of the net profits arising from the tanning, currying, and manufacture, and sale, of the

leather made from the hides delivered to White under the agreement.

Defendant was indicted upon the ground that he had forged receipts of payment for hides apparently purchased on behalf of Leonard & Co., and for which they were liable under the contract, the contention being that he would receive from Leonard & Co. the money apparently advanced on the forged receipts, and give his own notes to Leonard & Co. as provided by the contract, when there had been no purchases and no advances made.

Defendant, having been convicted, alleged exceptions.

The points raised by the exceptions sufficiently appear in the opinion.

Mr. Edward Avery, for defendant:

Pub. Stat. chap. 204, § 1, designates certain instruments, the forging of which is punishable by imprisonment in the State's prison. If any one of the instruments thus named in the statute is set out by its name in an indictment, it must, if it be set out in full, or when produced at the trial, correspond to the name given it in the indictment, or the indictment is bad.

Com. v. Lawless, 101 Mass. 82.

If the alleged forgery is of an instrument not named in the statute, it may be forgery at common law; but when the instrument, as designated in the indictment, is one of those named in the statute, and the indictment concludes *contra formam statuti*, the pleader is held to have intended to set out an offense under the statute. Each of the counts in the indictment under which the defendant was convicted was intended to set out an offense under the statute.

As the instrument alleged to have been forged is set out in full in each count, any repugnancy between it and the name given it, being apparent on the record, may be taken advantage of by a motion to quash.

A receipted bill of parcels does not necessarily, and to the exclusion of every other method, imply or prove a payment of money. It may have been settled by note or draft, and, if so settled, it would not be an acquittance and discharge for money.

Hildreth v. O'Brien, 10 Allen, 104.

If, by the terms of the sale, payment was to be made by note or draft, the receipted bill would be evidence of the giving of the note, or the acceptance of the draft, but not of the payment of the money on the note or draft.

This court has treated bills of parcels as in the nature of receipts open to evidence of the real terms upon which the agreement of sale was made (*Hazard v. Loring*, 18 Cush. 267); or as memoranda of the amount and value of merchandise transmitted (*Schenck v. Saunders*, 18 Gray, 87).

There was error in the disposition of the motion to quash. The court was peremptorily bound by the statute to pass upon it in the first instance.

Com. v. McGovern, 10 Allen, 194.

The motion was not passed upon until the evidence was closed on both sides.

Evidence was introduced, in the first instance, as direct evidence to prove that the defendant was guilty, under the general issue of not guilty; in the second instance, under the instruction of the court, as collateral. As the case was disposed of, the counts that were

quashed, and the evidence pertaining to them, were and should be regarded as nullities.

"A defendant cannot even expressly waive a fatal defect in an indictment."

Com. v. Mahar, 16 Pick. 120.

The instruments set out in the indictment are misdescribed. No one of them is an "acquittance and discharge for money."

An inconsistency between the instrument set out and the description given to it constitutes a repugnancy which is fatal to the indictment.

Com. v. Lawless, 101 Mass. 32.

If the fraudulent character of the instrument, as set forth in the indictment, is not manifest on its face, this deficiency should be supplied by such averments as to extrinsic matter as would enable the court judicially to see that it has such a tendency.

Com. v. Hinds, 101 Mass. 209; *Com. v. Costello*, 120 Mass. 358, 369; *Com. v. Spilman*, 124 Mass. 327.

Each count in an indictment is, in fact and theory, a separate indictment (*Lotham v. Reg.* 5 B. & S. 642, 643; *Reg. v. O'Brien*, 1 Ir. C. L. 174, 175; *United States v. Furlong*, 18 U. S. 5 Wheat. 185, 201 (5 L. ed. 64); and the rights of the defendant are in no respect different from what they would have been if the charge had been set out in a separate indictment (*Com. v. Burke*, 16 Gray, 33; *Com. v. Carey*, 103 Mass. 215).

The evidence applicable to each count must be clearly and distinctly defined and applied.

Upon the trial of a single issue in a criminal cause, no other distinct acts of the defendant can be given in evidence, especially if these acts amount to another offense.

Com. v. Eastman, 1 Cush. 216; *Com. v. Miller*, 3 Cush. 244, 251; *Com. v. Tuckerman*, 10 Gray, 173, 200; *Com. v. Shepard*, 1 Allen, 575, 581. See *Reg. v. Oddy*, 20 L. J. M. C. 198; *S. C. 5 Cox*, C. C. 210.

The issue submitted to the jury was whether or not the defendant had forged and uttered forged acquittances and discharges for money.

The papers admitted were unsigned, unrecipited bills of parcels. They were not contracts, or receipts, or acquittances, or discharges. They were not evidences of title to property, nor did they purport to convey title to property. They were not and could not legally be treated or held to be forgeries.

Rex v. Harvey, Russ. & R. C. C. 227; *Rex v. Richards*, Id. 198; *Rex v. Randall*, Id. 195.

Reg. v. Gibson, L. R. 18 Q. B. D. 537, is a striking exemplification of the spirit which animates the administration of the criminal law of England. A prisoner may be found guilty, upon the most overwhelming evidence, and yet, if one particle of evidence has been admitted against him which ought not to have been admitted, and which might in any degree have weighed with the jury, the verdict is vitiated, and the conviction must be quashed.

See *Reg. v. Riley*, L. R. 18 Q. B. D. 481, for misrejection of evidence.

There was not sufficient evidence to warrant this jury in finding the defendant guilty under any one of the counts.

Mr. Andrew J. Waterman, for the Commonwealth:

The case went to the jury on the first, second, seventh, eighth, thirteenth, and fourteenth 888

counts. In all these counts the instrument set forth purported that certain goods had been sold to White at a certain price, and that the obligation arising therefrom had been discharged by force of the signature of the seller.

It was not in mere assertion that money had been due and been paid by White: the instrument, by force of the pretended signature, imported an acknowledgment and acquittance by the obligee of the debt.

Com. v. Ladd, 15 Mass. 536; *Com. v. Murphy*, 2 Allen, 163; *Rex v. Harvey*, 1 British Cr. Cas. 227; 2 East, P. C. 985.

The motion to quash was therefore properly denied, and the rulings requested upon the same point properly refused.

When transactions form a general scheme, and are made up of a series of closely-allied acts which throw light upon each other, they may be offered subject to such instructions as were given by the presiding judge in this case.

Com. v. Stone, 4 Met. 43, 47; *Com. v. Coo*, 115 Mass. 481, 501; *Com. v. Tuckerman*, 10 Gray, 173, 197; *Com. v. Price*, 10 Gray, 472, 476; *Com. v. Stearns*, 10 Met. 256; *Jordan v. Osgood*, 109 Mass. 461, 457; *Com. v. Jackson*, 133 Mass. 19; *Rex v. Ellis*, 6 B. & C. 145; 1 Cush. 216.

The rule as to evidence of guilty intent is not varied because the acts offered to be shown are subject to separate indictments.

Com. v. Stearns, 10 Met. 257.

The contract objected to and admitted showed interest, and predicated motive and intent.

Com. v. Snell, 3 Mass. 82, 84.

Holmes, J., delivered the opinion of the court:

The most serious question in this case arises in a way for which the defendant is partly responsible. The indictment was in fifty-four counts, for forging and uttering twelve bills or parcels; and a motion to quash was filed. But the defendant, instead of arguing the motion at the outset, consented that the court should reserve all his rights under it, with the understanding that it would be disposed of at a later stage. Accordingly the trial proceeded, and evidence was put in under all the counts. Then, at the close of the government's case, the motion to quash was called up, and, by the consent of the government, all but six counts were quashed. The defendant thereupon asked that the evidence introduced under the other counts should be stricken out, but the court refused so to order. It is suggested that the defendant has suffered by a device intended to get before the jury evidence which was not admissible on the issues upon which he was convicted, under the pretense that it sustained other issues, which were abandoned when the evidence was in. It need not be said that, if this appeared to be the fact, the verdict could not stand. But we cannot gather any such conclusion from the record. The question whether the evidence was admissible upon the issues finally tried is as fully open, and is to be considered on the same principles, as if the counts not quashed had been the only ones from the beginning. If it were true that evidence was offered upon an issue, and retained for its bearing upon another, it would be hard to see how the defend-

ant had suffered if it was admissible upon that other, even though the former was a charge of a distinct, substantive felony. See *Com. v. Stearns*, 10 Met. 256.

But, so far as appears, the evidence was offered and admitted generally, for any purpose for which it was competent; and if at the time there was a possibility that its chief use was to sustain the other counts, the opposite possibility was no less plain to the defendant, who was insisting that those counts were bad. The uncertainty was by the defendant's consent, who had agreed that they need not be passed upon until the evidence was in. We see no reason why he could not consent to a course which preserved all his rights.

We are of opinion that the evidence was admissible under the counts not quashed, upon which the defendant was convicted. These counts were for forging certain receipted bills for hides, etc., and for uttering the same. The evidence objected to tended to show that the defendant fabricated certain other unreceipted bills of a like character, and uttered them to the same parties, by a continuous series of transactions extending some months later than the latest forgery of which the defendant was convicted.

It appeared that there was a contract between H. Leonard & Co. and the defendant, by which H. Leonard & Co. were to sell the defendant hides, which were to be tanned and sold by him, he giving Leonard & Co. his note at four months for a little more than the sum paid by them, and the property in the hides remaining in Leonard & Co. until all the notes were paid.

The government's evidence tended to show that a frequent course of dealing, or at least the course of dealing as it was made to appear to Leonard & Co. in the alleged fraudulent transactions, was that, instead of Leonard & Co. themselves purchasing the hides which the defendant was to tan, the defendant purchased them, presented the bill from the sellers to him, receipted in the earlier transactions, afterwards unreceipted, to Leonard & Co., wrote upon it that the hides belonged to Leonard & Co. under the contract, or to that effect, received the cash to pay for them, and gave his note as provided in the contract, just as if Leonard & Co. had themselves ordered and paid for the hides, and had then consigned them to him. It will be seen that the use made of the bill, receipted or unreceipted, was to show it to Leonard & Co., in order to satisfy them that hides had been bought which were to belong to them, and for which they were to pay in the first instance, under the contract, and thus to enable the defendant to get cash, giving his note in return.

All the bills, then, receipted or unreceipted, if known by the defendant not to be genuine, were used by him in a single scheme of fraud under his contract with Leonard & Co. *Lynde v. McGregor*, 13 Allen, 172, 180; *Jordan v. Osgood*, 109 Mass. 457; *Com. v. Eastman*, 1 Cush. 189, 216. And, on the question of the defendant's knowledge that the bills in issue were not genuine, his possession and use of other similar false bills, about the same time, whether before or afterwards, in a continuous series of transactions with the same party under

the same contract, was competent to show that his use of the former was not innocent. *Com. v. Coe*, 115 Mass. 481, 501; *Com. v. Hall*, 4 Allen, 805, 806; *Com. v. Price*, 10 Gray, 472, 476; *Reg. v. Foster*, Dears. Cr. Cas. 456. Thus the evidence satisfies the general conditions which have been laid down in similar cases. See further *Com. v. Jackson*, 132 Mass. 16, 18. To be sure, the evidence was not admissible to prove that the bills in issue were forged (*Costello v. Crowell*, 139 Mass. 588), and the jury was so instructed; and it might be thought that, in a case like this, when the bills ran to the defendant, purported to be for hides bought by him, and were certified by him, if the jury believed that the bills were forged, it would follow, almost necessarily, that the defendant knew them to be so; and so it might be thought that the evidence of his use of other false bills was unnecessary for the purpose for which it was admitted, while it tended to prejudice the defendant in the eyes of the jury. But the defendant's knowledge was not admitted (on the contrary it is still argued that there was no sufficient evidence to warrant the verdict), and evidence of knowledge which otherwise would be admissible is not made inadmissible by the fact that there is other strong evidence of knowledge in the case.

It is argued that the bills not in issue which were put in were not signed, and therefore were not forgeries, and were inadmissible for that reason. It is not necessary to consider whether they were technically forgeries. See *Com. v. Ayer*, 3 Cush. 150, 152; *Com. v. Hinds*, 101 Mass. 209, 210. For if they were not, they were none the less admissible. Being fabricated instruments, similar to those in issue in every respect except in regard to signature, their tendency to show knowledge and a fraudulent scheme on the defendant's part was not affected by the degree or kind of fraud committed in their manufacture and use. They equally purported to be a declaration by the supposed sellers, in the course of business, that they had sold the hides mentioned in them to the defendant. Whether they acknowledged or demanded payment, and signed or unsigned, they equally served the purpose of getting the amount of the bill from Leonard & Co.

We can have no doubt that the evidence warranted a conviction. The person by whom the bills purported to have been made out and signed testified that they were not genuine, and did not represent genuine transactions. The defendant, who fairly might be presumed by the jury to know the facts about sales purporting to have been made to him, used the bills; certified upon them, and received the money for them, as has been stated. It is suggested that, by the contract, Leonard & Co. were authorized to buy for him, and that they may have had the bills made out, or at least that he may have supposed the bills to be genuine and correct. But it is a mistake to say that the contract authorized Leonard & Co. to buy as agents for the defendant, or to charge goods to him. The phrase in the contract, "except in case the hides are bought by said Leonard & Co. for said White," does not import any such authority. It means only to distinguish hides bought for the purpose of being sold to White, from those bought by Leonard & Co. in the

ordinary course of their business, and afterwards sold to him. And it appears, on the face of the contract, that the only purpose of this distinction is to adopt a different way of fixing the date from which White shall be charged with interest. The contract throughout contemplated Leonard & Co. purchasing hides on their own behalf, and selling them to the defendant only after his notes had been paid. There was no evidence of any course of dealing by which they bought in his name, or of any case where they had done so, and there was no reason why they should have given their check to him if they had conducted, or had purported to have conducted, the dealings with the supposed seller of the hides. On the face of the transactions, there was evidence that the defendant uttered the bills (8 Inst. 171), knowing them to be false, if they were false in fact. But in addition there was evidence, as to the Morey bill, that Leonard & Co. had no transaction with Morey, and that the defendant did buy hides corresponding to a part of the hides set forth in the bill and evidence tending in the same direction; as to the other parties named in the indictment, and that all that Leonard knew of the supposed transactions with them he learned from the defendant. It is true that the defendant's clerk could not say from whom he received any particular bill, but he testified that they were all brought by the defendant, or left at the office, where the defendant then wrote his name on them, and got the money. We do not think it necessary to state the evidence in greater detail. See *Com. v. Talbot*, 2 Allen, 161. The fact, if it be one, that the defendant intended to pay his notes at maturity, did not affect his liability. *Com. v. Henry*, 118 Mass. 468.

The motion to quash was rightly overruled. A receipted bill for goods purports to be an acquittance and discharge for the money due in respect of those goods. *Com. v. Ladd*, 15 Mass. 526. See *Com. v. Talbot*, *supra*. The instruments being set out, and purporting on their face to be the thing prohibited to be forged (Pub. Stat. chap. 204, § 1), there is no need of further allegations to show how it was that thing, or how it could be used as an instrument of fraud, or that it was so used in fact. 2 East, P. C. 977; *Com. v. Costello*, 120 Mass. 358; *Com. v. Ladd*, *supra*.

There is a slight peculiarity in the receipt set out in the seventh count, as it bears, in addition to the words "terms cash," the words "our sight draft." But the word "settled," followed by the signature, imports a discharge of the money due for the price, whether it was discharged by money or draft. Whether it is not to be read as importing a settlement in money, especially in view of the words "paid for by H. Leonard & Co." in the margin, we need not consider. We notice nothing else in the exceptions which calls for particular remark.

Exceptions overruled.

John D. DOYLE, Admr.,
v.

BOSTON & ALBANY R. R. CO.

1. Where the deceased was not guilty of
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such gross negligence as would prevent a recovery by the terms of Pub. Stat. chap. 112, § 213, then, although there was some neglect or mistake on his part, or on the part of the railroad company's employee, or of both, in the flurry of approaching danger, such error would not necessarily prevent the neglect to give warning, by blowing the whistle or ringing the bell, from "contributing" to the injury received. If there was evidence that the defendant's neglect contributed to bring the deceased to where he heard the shout of warning, there was evidence that it contributed to the injury sufficient to be submitted to the jury.

2. The plaintiff must allege and prove that the neglect of the defendant contributed to the injury, but the statute cannot have meant to require direct evidence of the connection. A fact proved by a legitimate inference is proved no less than when it is directly sworn to. What inferences are legitimate are not determined by the terms of the statute, but are to be settled in accordance with the general principles of law.

3. Where, from the proof, the jury might have concluded that the deceased was awake a quarter of a mile before reaching the crossing, was informed of where the crossing was, and had a customer to serve a short distance on the other side of the crossing, and was not driving in a reckless manner, they might from this find that the deceased would have stopped if the bell had been rung or the whistle sounded; and where the plaintiff's evidence tended to show that the deceased had got half-way across before there was any warning and before the gates were shut, and that the first warning he received was when the gates were shut and the gateman shouted, "Stop,"—which he may have heard only as an alarming sound.—and deceased whipped his horse, the gateman shouting to him to come on and opening again the gate in front of him, the court cannot say that going on under these circumstances was gross negligence. Something must be allowed for the natural impulse felt by some, when suddenly alarmed, to leap forward, and more for the natural tendency to follow the gateman's direction.

(Suffolk—Filed January 2, 1888.)

ON defendant's exceptions. *Overruled.*

The deceased was riding in a regular milk-wagon, covered. The crossing was provided with two gates across Everett Street,—one at the north side of the railroad, about 6 feet north of the most northerly track across the street, about 35 feet south of the corner of Lincoln and Everett streets; and one 168 feet from the north gate, on the south side of the railroad, 6 feet south of the most southerly track, which was a freight track 8 feet south of the track on

which the train was running. The gates were single wooden bars, which turned on a pivot from a perpendicular to a horizontal position. There were ten tracks across the street at the crossing, and an eleventh track north of the ten, which came up substantially to Everett Street from the west, but did not cross it. On this last-named track, at a point very near to Everett Street, was permanently located a stationary car.

The intestate was employed by one Kendall as a milk-peddler, and had been so employed for six months, and had passed over this crossing daily during that time between two and three o'clock in the morning, but usually nearer three than two. He had also crossed it occasionally later in the day, on his return from his milk route.

On the morning of the accident the wind was from the northeast, and it was dark and cloudy.

The "nigger-head," which sounded the gong on the gatehouse, was 2,025 feet west of this crossing.

The track was straight from Everett Street westerly for more than half a mile.

The lamp-post named in the testimony of Studley was about 52 feet north from the northerly rail of the track on which the train was running.

The horse, and wagon containing intestate, came through the north gate upon the tracks, and was struck by the locomotive of defendant, and intestate was killed.

The plaintiff introduced evidence tending to prove that the gateman heard the gong, which was rung at the gatehouse by the approaching train, and lowered the south gate, then raised it, and called to the man in the wagon to come along.

Defendant's evidence tended to show that the gateman, upon hearing the gong, immediately lowered the south gate, and began lowering the north gate, when he saw the wagon immediately under the north gate and coming upon the tracks, and stopped lowering the gate, and halloosed to the driver to "stop there." That the wagon did not stop, and he halloosed again, when the driver struck his horse three times and the horse started into a jump.

Verdict for the plaintiff, and defendant allowed exceptions.

Further facts appear from the opinion.

Mr. Samuel Hoar, for defendant:

Pub. Stat. chap. 112, § 213, provides that a railroad corporation shall be liable for injury or death occasioned by collision with its engines or cars at a grade crossing, if "it appears that the corporation neglected to give the signals required" by law, "and that such neglect contributed to the injury." And it is well settled that the plaintiff, in an action under this section, must allege and prove "that the collision occurred upon a crossing of a highway at grade;" "that the statutory signals required at such crossings were neglected by the defendant;" and "that such neglect contributed to the injury."

Wright v. Boston & M. R. Co. 129 Mass. 440, 444; *Fuller v. Boston & A. R. Co.* 133 Mass. 491.

It is a sound rule of construction that every clause and word of a statute shall be presumed

to have been intended to have some force and effect.

Opinion of Justices, 22 Pick. 571, 578; *Commonwealth v. McCaughey*, 9 Gray, 296, 297.

Under like statutory provisions in Illinois and in Missouri, the courts of those States have repeatedly decided that, where nothing was proved but failure to give the statutory signals and concurrent injury, a verdict for the defendant must be directed.

Stoneman v. Atlantic & P. R. Co. 58 Mo. 508; *Holman v. Chicago, R. I. & P. R. Co.* 62 Mo. 563; *Braxton v. Hannibal & St. J. R. Co.* 77 Mo. 455; *Galena & C. U. R. Co. v. Loomis*, 13 Ill. 548; *Chicago & R. I. R. Co. v. McKean*, 40 Ill. 218; *Chicago, B. & Q. R. Co. v. Van Patten*, 64 Ill. 510; *Chicago, B. & Q. R. Co. v. Notzki*, 66 Ill. 455; *Chicago, B. & Q. R. Co. v. Harwood*, 90 Ill. 425.

The circumstances which appear do not warrant the inference that the neglect to give the statutory signals contributed to the injury. The belief that it did not contribute is perfectly consistent with the evidence. In such a case it is well settled that a verdict for the defendant should be directed.

Smith v. Westfield First Nat. Bank, 99 Mass. 605; *Crafts v. Boston*, 109 Mass. 519.

The jury could only guess how the accident happened, and a guess is no foundation for a verdict.

Kennedy v. Standard Sugar Ref. 125 Mass. 90, 92; *Corcoran v. Boston & A. R. Co.* 133 Mass. 507; *Tully v. Fitchburg R. Co.* 134 Mass. 499, 502; *Riley v. Connecticut River R. Co.* 135 Mass. 292; *Merrill v. Eastern R. Co.* 139 Mass. 238, 241.

On the undisputed facts it is submitted that, as a matter of law, deceased was grossly negligent.

Wright v. Boston & M. R. Co. supra; *Wabash, St. L. & P. R. Co. v. Hicks*, 13 Bradw. 407; *Wabash, St. L. & P. R. Co. v. Weisbeck*, 14 Bradw. 525.

Had he not been grossly negligent, the intestate could have seen the approaching train, as is shown by the undisputed fact that the headlight shone directly into his wagon before he struck his horse. He could have seen the lighted lantern on the south gate in front of him. It must be presumed, either that he saw these warnings and recklessly disregarded them, or else that he was utterly lacking in the watchfulness which, by a line of decisions, is required of a man crossing a railroad.

Butterfield v. Western R. Co. 10 Allen, 532; *Atlyn v. Boston & A. R. Co.* 105 Mass. 77; *Hinckley v. Cape Cod R. Co.* 120 Mass. 257; *Wright v. Boston & M. R. Co.*, and *Tully v. Fitchburg R. Co. supra*; *Barstow v. Old Colony R. Co.* 8 New Eng. Rep. 748, 143 Mass. 535; *Burns v. Boston & L. R. Co.* 101 Mass. 50; *Salter v. Utica & B. R. R. Co.* 75 N. Y. 278; *Tolman v. Syracuse, B. & N. Y. R. Co.* 98 N. Y. 198.

Messrs. Horatio E. Swasey and George R. Swasey, for plaintiff:

Gross negligence upon the part of the intestate was an affirmative proposition for the defendant to establish. Being such, the defendant was not entitled to a ruling that the evidence established that proposition. The court may rule that certain evidence does not establish a proposition, but it is the province of the

jury to find affirmative and positive conclusions upon the evidence.

Copley v. New Haven & N. R. Co. 186 Mass. 6; *Commonwealth v. Boston & L. R. Co.* 134 Mass. 211; *Merrill v. Eastern R. Co.* 139 Mass. 252; *Williams v. Grealy*, 112 Mass. 79, 82; *McKimble v. Boston & M. R. Co.* 139 Mass. 542.

If it were theoretically proper for the court to rule, upon sufficient grounds, that the defendant had proved the intestate to have been grossly negligent, the evidence in the case did not justify such a conclusion. The evidence was such that the court would have been compelled to leave the case to the jury, even had it been the plaintiff's duty to prove his intestate in the exercise of due care or ordinary diligence,—a degree of care greater than was imposed upon him by the statute which governs the case.

Pub. Stat. chap. 112, § 213; *Copley v. New Haven & N. R. Co.* *supra*; *Bayley v. Eastern R. Co.* 125 Mass. 62; *Tyler v. New York & N. E. R. Co.* 187 Mass. 288; *French v. Taunton Branch R. Co.* 116 Mass. 587; *Craig v. New York, N. H. & H. R. Co.* 118 Mass. 481; *Elkins v. Boston & A. R. Co.* 115 Mass. 190; *Matley v. Whittier Machine Co.* 1 New Eng. Rep. 482, 140 Mass. 887; *Commonwealth v. Fitchburg R. Co.* 10 Allen, 189; *Sweeney v. Old Colony & W. R. Co.* Id. 368-370, 377, *Cawwell v. Boston & W. R. Co.* 98 Mass. 194; *Stokes v. Saltonstall*, 88 U. S. 18 Pet. 181 (10 L. ed. 115); *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 27 Fed. Rep. 159.

The court cannot lay down, as a matter of law, what precautions one should use in approaching a railroad track, even if plaintiff is bound to prove due care.

Chicago, St. L. & P. R. Co. v. Hutchinson, 9 West. Rep. 544, 120 Ill. 587; *Klanowski v. Grand Trunk R. Co.* 57 Mich. 525.

The intestate had a right to rely, to some extent, upon the signals required by law, and upon others usually given, even if he was bound to exercise due care. The fact that this was an extra train running at a time when there was ordinarily very little traffic on the road, and the fact that the intestate crossed the tracks every night at about the same time, and at a time when there was the least done upon the tracks, were very important considerations in the case.

Central Trust Co. v. Wabash, St. L. & P. R. Co. *supra*; *Gaynor v. Old Colony & N. R. Co.* 100 Mass. 211-218; *Chaffee v. Boston & L. R. Co.* 104 Mass. 115.

If the plaintiff had been bound to prove due care upon the part of his intestate, it would not have been necessary for him to do so by directly affirmative evidence, but the inference of such care might properly have been deduced from all the circumstances—from certain facts which existed and which were proved.

Mayo v. Boston & M. R. Co. 104 Mass. 187; *Commonwealth v. Metropolitan R. Co.* 107 Mass. 286; *Chicago & A. R. Co. v. Carey*, 2 West. Rep. 78, 115 Ill. 115, 119.

Whether the failure to ring the bell contributed to the injury was a question peculiarly of fact. Proof of this fact can rarely, if ever, be found in direct evidence to that point, but must necessarily and inevitably be inferred

from circumstances which are shown to have existed at the time; such contribution must be deduced by the jury from all the facts in the case. When a case rests, not only upon the existence of certain admitted or proven facts, but also upon the inferences or deductions to be drawn from them, it is the province of the jury to make such deductions; it is not proper for the court to make them except in the most extreme cases, in which there could be but one conceivable deduction.

Commonwealth v. Fitchburg R. Co. 10 Allen, 189; *Stout City & P. R. Co. v. Stout*, 84 U.S. 17 Wall. 657, 663, (21 L. ed. 745); *Bayley v. Eastern R. Co.* 125 Mass. 64; *Tyler v. New York & N. E. R. Co.* 187 Mass. 288, 242, 248; *Greany v. Long Island R. Co.* 2 Cent. Rep. 452, 101 N. Y. 419, 428; *Taylor v. Delaware & H. Canal Co.* 4 Cent. Rep. 628, 118 Pa. 176; *Chicago & A. R. Co. v. Carey*, and *Matley v. Whittier Machine Co.*, *supra*.

A thing in law may be said to contribute to a result although there is an intervening and concurrent cause.

McDonald v. Snelling, 14 Allen, 290; *Norton v. Eastern R. Co.* 118 Mass. 366; *Martin, B.*, in *Wilson v. Newport Dock Co.* L. R. 1 Exch. 186.

Holmes, J., delivered the opinion of the court:

This is an action brought under Pub. Stat. chap. 112, § 213, by an administrator to recover for the death of his intestate. It was admitted that deceased was killed by a collision with the defendant's engine upon a crossing of a highway at grade, within § 163, and there was evidence that the engineer neglected to blow the whistle or to ring the bell. But the defendant denies that "it appears that such neglect contributed to the injury," as required by § 213, and argues that to allow the connection to be inferred from the neglect and the accident alone is to make the clause of the statute nugatory.

The accident happened more than half way across the distance of 168 feet between the gates of the crossing; and the defendant further argues that the conduct of the deceased, the moment before, constituted gross negligence, which would prevent a recovery by the terms of the statute. But if the deceased was not guilty of such gross negligence as would prevent a recovery by the terms of the statute, then, whether there was some neglect on his part or on the part of the defendant's servant, or the conduct of both was not more ill-judged than might have been expected in the flurry of approaching danger, the intervention of these later causes would not necessarily prevent the neglect to give warning from "contributing" to the injury. *Elmer v. Locke*, 135 Mass. 575, 576, and cases cited; *Norton v. Eastern R. Co.* 118 Mass. 366; *Commonwealth v. Boston & L. R. Co.* 134 Mass. 211. The later conduct of the parties, therefore, may be laid out of the case, so far as the first question is concerned, and it may be assumed that, if there was evidence that the defendant's neglect contributed to bring deceased to where he heard the shout of warning, there was evidence that it contributed to the injury.

Coming, then, to defendant's argument, which

we have stated, we agree that the plaintiff must allege and prove that the neglect contributed to the injury. *Wright v. Boston & M. R. Co.* 129 Mass. 440, 444. But it is plain that we cannot expect, and the statute cannot have meant to require, direct evidence of the connection. The only absolutely direct proof possible would have to come from the lips of the person killed. Even if eyewitnesses were produced who saw him watching and listening as he approached, the connection would still be an inference. But a fact proved by a legitimate inference is proved no less than when it is directly sworn to. *Commonwealth v. Doherty*, 187 Mass. 245, 247. And the question, What inferences are legitimate?—is not affected by the terms of the statute, but is to be answered in accordance with the general principles of law. To answer this question, the court refers to its own knowledge of the ordinary course of events so far as to consider whether it can say that there is no probability or presumption of fact that, when facts A and B exist, of which there is direct evidence, facts C, etc., also exist by way of cause and effect, or concomitant. If it cannot, then it leaves it to the jury to say whether, according to their experience, there is such a probability or presumption. *Commonwealth v. Briant*, 8 New Eng. Rep. 33; 142 Mass. 463, 464.

In this case we have a man who was awake a quarter of a mile before reaching the crossing, and who knew where the crossing was, and who had to serve another customer a short distance on the other side of the crossing. Very plainly we cannot say that there is no probability that the man was awake as he approached the crossing, or that the jury might not find that there was such a probability, and therefore infer that the deceased was awake. The warning, if it had been sounded, would have been audible; and, as the deceased was not driving in a furious or reckless manner, the jury might infer that he would have heard it. People do not generally try to drive across railway tracks when they know by the bell or whistle that a train is approaching. The jury therefore might find that the deceased would have stopped if the bell had been rung or the whistle sounded.

We cannot say as matter of law that the deceased was guilty of gross negligence. The plaintiff's evidence tended to show that he had got half-way across before there was any warning, and before the gates were shut, and that the first warning he received was when the gates were shut and the gateman shouted "Stop,"—a shout which he may have heard only as an alarming sound; that then—practically all at once—the deceased whipped his horse, the gateman shouted to him to come on, and opened again the gate in front of him. We do not say that this seems to us the most probable view of the facts, but it is one which the jury might have taken on the evidence. Going on under these circumstances was a mistake, but we cannot say it was gross negligence. Something must be allowed for the natural impulse which some people feel, when suddenly startled and alarmed, to leap forward, and more for the natural tendency to follow the gateman's directions. It is not argued that

there was gross negligence before the deceased whipped his horse.

See *Copley v. New Haven & N. R. Co.* 136 Mass. 6; *Bayley v. Eastern R. Co.* 125 Mass. 62; *Commonwealth v. Fitchburg R. R. Co.* 10 Allen, 189.

Exceptions overruled.

John W. BRYAN

v.

TRADERS' FIRE INSURANCE CO.

Where, under a statutory policy of insurance which contains the provision that the policy shall be void if, without the written assent of the company, "the said property shall be sold," the assured conveyed the building by a deed absolute in form, duly recorded, receiving from the grantee a bond, with the condition that she would reconvey the property upon being indemnified against her liability as surety in a recognizance in a criminal suit, the bond for the deed never being recorded, but the grantee, with the knowledge and for the benefit of the assured, mortgaging the premises,—the mortgage being recorded, but no seal being attached, and nothing paid upon it,—and after the destruction of the property the mortgage was discharged, and the property reconveyed to the assured, the condition of the bond having been performed,—*Held*, in a suit upon the policy, that the assured may recover.

(Suffolk—Filed January 2, 1888.)

ON report upon verdict for plaintiff. *Verdict to stand.*

The facts are stated in the opinion.

Messrs. Crowley & Maxwell and J. D. McLaughlin, for defendant:

By the laws of this Commonwealth a separate instruction of defeasance will convert a deed, purporting to be an absolute conveyance, into a mortgage, when both instruments are executed and delivered at the same time. This rule, however, is subject to the express provision of the statutes, that such deed shall not be thus affected as against any person other than the maker of the instrument of defeasance, and his heirs and devisees, and persons having actual notice of it, unless such instrument be duly recorded.

Pub. Stat. chap. 120, § 28.

The deed from Bryan to Madigan purported to contain an absolute conveyance of the insured property; its purport could not, by the terms of the statute, be explained away by the unrecorded bond. As a result there was a sale, and the condition imposed by the company was violated.

Foot v. Hartford F. Ins. Co. 119 Mass. 259.

Under a similar statute in Maine the decisions are in conformity with this view. Where the policy of insurance forbade alienation by sale or otherwise, the insured having given and re-

corded an absolute deed, and, as a part of the same transaction, having taken back from the grantee a bond of defeasance which was never recorded, it was held inadmissible to defeat the terms of the registered conveyance.

Tomlinson v. Monmouth Mut. F. Ins. Co. 47 Me. 232; *Smith v. Monmouth Mut. F. Ins. Co.* 50 Me. 96.

But by a number of decisions in that State, under policies containing precisely the same condition, a mortgage duly recorded is held not to avoid the contract.

Pollard v. Somerset Mut. F. Ins. Co. 42 Me. 221, and cases there cited.

That the term "alienate" contained in the policies in question in the three cases last cited does not narrow the power of the insured to mortgage the premises, and thereby lessen their authority in the case at bar, see—

Jackson v. Massachusetts Mut. F. Ins. Co. 23 Pick. 418; *Edmonds v. Mutual S. Ins. Co.* 1 Allen, 311; *Rice v. Tower*, 1 Gray, 426; *Pollard v. Somerset Mut. F. Ins. Co. supra*; *Masters v. Madison County Mut. Ins. Co.* 11 Barb. 624, and cases cited.

That there may be an alienation or change of title which will avoid the policy, and still leave an insurable interest, see—

Orrell v. Hampden F. Ins. Co. 18 Gray, 481; *Williams v. Roger Williams Ins. Co.* 107 Mass. 377; *Eastern R. Co. v. Relief F. Ins. Co.* 98 Mass. 420, and cases cited.

Such alienation may even constitute an absolute sale, such as, if there were in the policy a condition against the sale of the property insured, would prevent recovery; and yet, if there were no such condition, the insured might yet retain such an insurable interest as would entitle him to recover.

Gordon v. Massachusetts F. & M. Ins. Co. 2 Pick. 249.

Under a policy similar to the one in question, the plaintiff conveyed his estate in such a manner as still to retain an insurable interest, but which, nevertheless, did not entitle him to recover.

Dailey v. Westchester F. Ins. Co. 131 Mass. 178.

But by our laws it is enacted that the unrecorded bond shall not affect the original deed as against any other person than the maker of the instrument of defeasance, etc.

Gallagher v. Galletley, 128 Mass. 367.

So, under a conveyance precisely similar to the one in question, where the grantee had given an unrecorded bond of defeasance, it was held that he was liable to be proceeded against under the Mill Act, as owner of the premises.

Hennessey v. Andrews, 6 Cush. 170.

The court below erred in admitting the bond as evidence at the trial while it was still unrecorded.

Smith v. Monmouth Mut. F. Ins. Co. 50 Me. 96; *Burghardt v. Turner*, 12 Pick. 534-539; *Palmer v. Paine*, 9 Gray, 56; *Wolcott v. Winchester*, 15 Gray, 461-467; *Howland v. Crocker*, 7 Allen, 153.

Messrs. **Joseph Bennett and Edward O. Cooke**, for plaintiff:

The word "sold," as used in the policy, must mean an absolute parting with the title, so that the insured had no longer an insurable interest in the premises.

Gordon v. Massachusetts F. & M. Ins. Co. 2 Pick. 249; *Strong v. Manufacturers Ins. Co.* 10 Pick. 40; *Kyle v. Commercial U. Assur. Co.* 8 New Eng. Rep. 884, 144 Mass. 48.

The whole transaction constituted a mortgage.

Pub. Stat. chap. 181, § 44; *Trull v. Skinner*, 17 Pick. 218; *Bayley v. Bailey*, 5 Gray, 505; *Erskine v. Townsend*, 2 Mass. 493; *Murphy v. Calley*, 1 Allen, 107; *Gilson v. Gilson*, 2 Allen, 115.

The bond was properly admitted by the court.

Bayley v. Bailey, supra; *Walsh v. Fire Assn.* 127 Mass. 383; *Smith v. Monmouth Mut. F. Ins. Co.* 50 Me. 96.

The mortgage by Madigan (the only intervening right claimed by the defendant) was never a legal mortgage. It never had a seal, and was void.

Springfield Sav. Bank v. Springfield Cong. Soc. 127 Mass. 516; *Stewart v. Clark*, 18 Met. 79.

Nothing was ever paid therefor, and it was recorded by Madigan. There was therefore never any delivery of it.

Maynard v. Maynard, 10 Mass. 456.

"The rights of the parties under this contract of insurance are to be settled according to the relations which were in fact created between the parties to these conveyances, although the defeasance was never recorded. It is not a question between the plaintiff and attaching creditor and purchaser without notice."

Walsh v. Philadelphia F. Assn. 127 Mass. 386; *Bayley v. Bailey, supra*.

Morton, Ch. J., delivered the opinion of the court:

The policy in suit is of the standard form provided by our statute, and contains the provision that the policy shall be void if, without the written assent of the company, "the said property shall be sold." After the policy was issued, the plaintiff, who is the assured, conveyed the building insured to one Mary Madigan, by a deed absolute in form, which was duly recorded. At the same time, and as a part of the same transaction, the said Madigan executed to the assured a bond, upon the conditions that she would reconvey the property to him upon his indemnifying her against any damage by reason of her having become his surety in a recognizance in a criminal suit. This bond was never recorded. Afterwards, said Madigan, with the knowledge and for the benefit of the plaintiff, mortgaged the premises to one Gallagher for the sum of \$3,000, which mortgage was recorded; but there was no seal to it, and nothing was paid upon it. After the loss, the said mortgage was discharged, and said Madigan reconveyed the premises to the plaintiff, the condition of her bond having been performed.

It is clear that, as between the parties, the transaction between the plaintiff and Madigan constituted a mortgage. Its purpose was not to convey an absolute estate, but to give security for the performance of a duty by the plaintiff. It has been repeatedly held that such a transaction is a mortgage, although the bond to reconvey is not recorded. *Murphy v. Calley*, 1 Allen, 107; *Foot v. Hartford F. Ins. Co.*

119 Mass. 259; *Walsh v. Philadelphia Fire Assn.* 127 Mass. 383.

The last-cited case is singularly like the case at bar upon this point, and it was held that, although the plaintiff had given a deed of the premises insured, absolute in form, taking back a defeasance which was never recorded, he was only a mortgagor, and still had an insurable interest.

The defendant contends that, although the transaction was a mortgage as between the parties, yet, as to the defendant, it is to be treated in all respects as an absolute conveyance. He relies upon the provision of the statute that, "where a deed purports to contain an absolute conveyance of real estate, but is made defeasible by a deed, bond, or other instrument, the original deed shall not be thereby affected, as against any person other than the maker of the instrument of defeasance, and his heirs and devisees, and persons having actual notice of it, unless such instrument is recorded in the registry of deeds for the county or district in which the real estate to which it relates is situated." Pub. Stat. chap. 120, § 28.

The purpose of requiring the instrument of defeasance to be recorded is to give notice to purchasers, attaching creditors, and others who may become interested in the estate, and may rely upon the apparently absolute deed, and thus be misled by the record if the defeasance is not recorded. *Bayley v. Bailey*, 5 Gray, 505; *Pratt v. Harlow*, 16 Gray, 879.

Looking at the object of the statute, and the mischief intended to be guarded against, we are of opinion that it does not apply to a case like this, where the defendant makes no claim to the property, and could not in any way have been misled by the failure to record the defeasance.

The defendant relies upon *Foote v. Hartford F. Ins. Co.* 119 Mass. 259.

Some of the expressions in the opinion support his claim, but they were not necessary to the decision, which may be supported upon the ground that, under the peculiar terms of the policy in that case, providing that it shall be void if any change takes place in the title or possession of the property, a mortgage would avoid the policy. The question before us was not involved in that case; but in a later case, where the question was involved, it was held that a person who had given an absolute deed, taking back an instrument of defeasance which was never recorded, was a mortgagor, and, as against the insurance company, had an insurable interest.

The opinion, written by the same justice, states that "the rights of the parties under this contract of insurance are to be settled according to the relations which were in fact created between the parties to these conveyances, although the defeasances were never recorded. It is not a question between the plaintiff and attaching creditors and purchasers without notice." *Walsh v. Philadelphia Fire Assn.* 127 Mass. 383.

We do not consider that the attempted mortgage from Madigan to Gallagher is of any importance. Having no seal, it was inoperative, and does not affect the rights of the parties. *Springfield Sav. Bank v. Springfield Cong. Soc.* 127 Mass. 516.

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We are then to regard the plaintiff as in the position of one who, after a policy is issued to him, mortgages the property insured; and the remaining question is whether such mortgage avoids the policy, under the provision that it shall be void "if the said property shall be sold" without the written assent of the company. We do not understand the defendant to claim that this would be the effect of a mortgage, and it is clear that such would not be the effect. After the mortgage, the plaintiff retained an insurable interest to the same extent as before. He was interested to the amount of the whole value of the premises, and would bear all the loss in case of fire.

It has been repeatedly held in this and other jurisdictions that, where a policy contains a condition that it shall be void upon an alienation by sale or otherwise, a mortgage does not avoid the policy. *Judge v. Connecticut F. Ins. Co.* 132 Mass. 521, and cases cited.

Alienation is a broader term than sale. A mortgage is not a sale, and it cannot fairly be contended that the policy in suit was avoided by the mortgage made by the plaintiff.

Verdict to stand.

Daniel F. McCARTHY *et al.*

v.

Alvin E. MACK, Exr.

1. Where, during the pendency of an action of contract, the parties entered into an agreement, referring all matters in dispute between the plaintiffs and the defendant, including a claim, by a person not a party to the suit, against the defendant, in which the plaintiffs had no interest, providing that the referee should report to the court what sum, if any, is due from the defendant to said parties, or either of them, and that a final judgment should be entered for such sum, in the action, upon the coming in of the referee's report, and, if no sum be found due to either of the parties, final judgment should be entered for the defendant, which judgment the parties agree should have the same effect as though said third party were a party plaintiff to the suit, —the agreement of reference did not have the effect to discontinue the plaintiffs' action.
2. The agreement contemplated that the claims of the plaintiffs, and of the one who was not a party to the suit, should be treated and passed upon separately. This agreement falls short of constituting a substitution or novation of parties. The effect of the agreement, therefore, was that the referee should hear and pass upon a new and separate cause of action held by one who was not, and could not be, a party to the record, and make report thereon to the court. The court could not give effect to such an agreement. A reference, under rule of court cannot embrace the claim of a party not before the court. The agreement cannot be carried into effect, according to the rules of law.

(Essex—Filed January 4, 1888.)

ON report, after judgment for defendant.
Judgment reversed.

This was an action of contract. The original defendant was Albert D. Swan, who died, and whose executor came in to defend a commission in ordinary form issued to W. Fisk Gile, Esq., as auditor. It appeared that under this commission the parties appeared before the auditor on February 13, 1885, at which time the agreement of reference was entered into by the parties to the suit, and by William Sullivan, of which the following is a copy:

In the above-entitled action all matters in dispute between Daniel F. McCarthy, Mary McCarthy, and William Sullivan, and Albert D. Swan, arising out of the transactions and relations of the parties in the construction of the sewer in Somerville, which is referred to in the declaration, are referred to the final determination of W. Fisk Gile, Esq., of Lawrence in said county, who shall hear the parties and report to said court what sum, if any, is due from said Swan to said parties, or either of them. And in case the referee shall find and report that anything is due from said Swan to said parties, or either of them, final judgment shall be entered for such sum in this action upon the coming in of the referee's report. And, in case no sum is found to be due from said Swan to these parties, or either of them, final judgment shall be entered for the defendant in this suit; which judgment the parties agree shall have the same effect as though said Sullivan were a party plaintiff to this suit.

Wm. S. Knox, Att'y for Albert D. Swan;
D. & C. & C. G. Saunders, Att'ys for Mary McCarthy & Daniel F. McCarthy;
Sherman & Bell, for William Sullivan.

No rule of reference was ever taken out.

The hearing was had before Mr. Gile; and subsequently he filed, in the clerk's office, his report.

The defendant filed objections to the award.

The plaintiffs filed a motion to amend the record by the issue of a rule of reference as of the day of the filing of said agreement, and a motion for the acceptance of the report, and for judgment.

The court overruled the defendant's objections to said report, and defendant excepted.

The court ruled that it had no power to amend the record by ordering the issue of a rule of reference as of the date of the filing of said agreement, and refused, for that reason, and not as a matter of discretion, to grant the plaintiffs' motion for such rule; and held, as a matter of law on the defendant's objection as filed, that said report could not be accepted, nor judgment ordered thereon.

The court further ruled, upon the defendant's objection as filed, that the agreement of reference was a submission *in pais*, and did not entitle the plaintiffs to judgment upon the award, and worked a discontinuance of the action; and ordered judgment therein as on a discontinuance.

To these rulings the plaintiffs excepted.
Judgment for defendant.

Reported, by the consent of parties, to the Supreme Judicial Court, for its determination.

Messrs. S. Lincoln, C. U. Bell, and J. P. Sweeney, for plaintiffs:

The objection that a rule was not taken out, if taken seasonably, could and would have been remedied.

Where the party has not seasonably taken his objection, the principle of waiver applies, and the objection is lost to him.

Clark v. Montague, 1 Gray, 446.

There can be no legal reason why a claim of a third party connected with the principal suit cannot be included in a judgment, if the parties so agree.

But if the agreement did introduce new matters, this can be done.

Haakell v. Whitney, 12 Mass. 47; *Berkshire Woolen Co. v. Day*, 12 Cush. 128; *Commonwealth v. Pejepscut Proprietors*, 7 Mass. 417.

The court had at common law, and is given by statute, the broadest power to allow amendments (Pub. Stat. 167, § 42), and can order a rule to issue *nunc pro tunc*. It appears by the records of the court that a rule was so issued in *Hicks v. McDonnell*, 99 Mass. 459. It was expressly decided that it could be done in *Bucklin v. Chapin*, 53 Barb. 488. "And why should a court be restrained, by any artificial rule, from the power of doing justice between the parties?"

Commonwealth v. Pejepscut Proprietors, 7 Mass. 414, 415.

The fourteenth, fifteenth, and sixteenth objections rest upon the claim that the agreement was revoked by Swan's death. But the law is the other way, and the subsequent proceedings would amount to a renewal of it by the executor.

Bacon v. Crandon, 15 Pick. 79.

The remaining objections are to the form of the award.

The first claim is that the award should have been special, and not general. Of this nature are the first four objections. But a general report is good (*Bigelow v. Maynard*, 4 Cush. 317; *Houston v. Pollard*, 9 Met. 164, 169; *Strong v. Strong*, 9 Cush. 560; *Whitworth v. Hulse*, L. R. 1 Exch. 251; *Karthauss v. Ferrer*, 26 U. S. 1 Pet. 222 (7 L. ed. 121); and the presumption is that it conforms to the agreement of reference; and the contrary must be shown (*Sperry v. Ricker*, 4 Allen, 17; *Strong v. Strong*, 9 Cush. 560; *Tallman v. Tallman*, 5 Cush. 325; *Leominster v. Fitchburg & W. R. R. Co.* 7 Allen, 38; *Gaylord v. Norton*, 130 Mass. 74).

It was no part of the referee's duties, and he had no power to determine the extent of his own authority.

Samuel v. Cooper, 2 Ad. & El. 752; *Fatell v. Eastern Counties R. Co.* 2 Exch. 344.

Messrs. Andrew C. Stone and Wm. S. Knox, for defendant:

The fact that the submission in this case provides for the entry of judgment upon the coming in of the referee's report does not prevent either of the parties to the submission setting up and receiving the benefit of valid objections to the award.

Woodbury v. Proctor, 9 Gray, 18; *Carter v. Carter*, 109 Mass. 306.

As to all the counterclaims submitted by the parties, the arbitrator was bound to consider and pass upon the questions whether those claims were, at the time of the submission,

valid and existing claims, and whether they grew out of the transactions connected with the construction of the sewer in Somerville; and, if the arbitrator refused or neglected to consider and pass upon these questions in reference to any substantial matter submitted to him, the award is bad, and evidence is admissible to show, in defense, that the arbitrator so refused or neglected to consider and pass upon a claim submitted to him.

Mitchell v. Staveley, 16 East, 58; *Bean v. Farnam*, 6 Pick. 269; *Warfield v. Holbrook*, 20 Pick. 531; *Houston v. Pollard*, 9 Met. 164; *Edwards v. Steens*, 1 Allen, 315; *Rollins v. Townsend*, 118 Mass. 224; *Gaylor v. Norton*, 180 Mass. 74; *Boston & L. R. Co. v. Nashua & L. R. Co.* 139 Mass. 464.

The general doctrine is that, whatever the parties submit, they intend to have decided; and what they intended to submit is to be determined by a consideration of the whole language of the submission, and the nature and relation of the matters submitted; and that the award ought to so determine and dispose of the controversies submitted that they cannot become the basis of future litigation.

Edwards v. Stevens, *supra*; *McNear v. Bailey*, 18 Me. 251; *Waite v. Barry*, 12 Wend. 377; *Fletcher v. Webster*, 5 Allen, 566; *Estes v. Mansfield*, 6 Allen, 69; *Calcord v. Fletcher*, 50 Me. 398; *Re Williams*, 4 Denio, 194; *Paine v. Paine*, 15 Gray, 299.

An award should be a bar to litigation upon all matters submitted and presented to the arbitrator.

King v. Savory, 8 Cush. 309.

The law upon this subject is settled in the leading case of *Strong v. Strong*, 9 Cush. 560.

Where the matters submitted and presented are those relating to a particular subject, and general matters are presented, and there is a controversy whether they refer to the particular subject, such an award does not necessarily imply that all the matters of the submission were included in the award, without showing what matters were found to relate to the particular subject.

Houston v. Pollard, 9 Met. 164; *Randall v. Randall*, 7 East, 81.

The failure of the award to decide all the substantial matters of the submission is not aided by any of the general statements, often contained in awards, that the arbitrator has considered the whole case, or all the matters submitted.

Schier v. Esterbrook, 5 Allen, 311; *Karthaus v. Ferrer*, 26 U. S. 1 Pet. 222, 227 (7 L. ed. 121). See *Porter v. Dickerman*, 11 Gray, 482.

If the submission was in any sense a reference of the pending action under rule of court, which the defendant denies, then the submission included all the issues of law and fact raised by the pleadings, and no other. The pleadings in this case did not "substantially develop" the cause of action upon which the arbitrator awarded in favor of Sullivan.

Merrill v. Gold, 1 Cush. 457; *Page v. Monks*, 5 Gray, 492; *Cushing v. Babcock*, 38 Me. 452; *Sumner v. Brown*, 84 Vt. 194; *Ellis v. Ridgway*, 1 Allen, 597; *York & L. R. Co. v. Myers*, 59 U. S. 18 How. 246 (15 L. ed. 380).

A reference of a case by rule of court, where
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the cause of action survives, is not abrogated by the death of the parties to the case; but a submission *in pais*, or the reference of a case pending *in pais*, is abrogated by the death of either of the parties to the submission or reference before award published, only to be revived by a fresh delegation of authority.

Wms. Exrs. 907; *Bacon v. Crandon*, 15 Pick. 79; *Power v. Power*, 7 Watts (Pa.), 205; *Potts v. Ward*, 1 Marsh. (Eng.) 866; *Cooper v. Johnson*, 2 Barn. & Ald. 394; *Rhodes v. Haigh*, 2 Barn. & C. 845; *Re Hare*, 6 Bing. N. C. 158, 168; *Tyler v. Jones*, 8 Barn. & C. 144; *Bailey v. Stewart*, 8 Watts & S. 560.

A submission under a rule of court may comprehend other matters in controversy between the parties, not embraced in the action, but cannot include strangers to the record.

Berkshire Woolen Co. v. Day, 12 Cush. 128.

The contention of the defendant, that an award returned by virtue of a submission *in pais*, or of a reference *in pais* of a pending action, cannot have the effect of a verdict, and be the basis of a judgment; that a submission or reference by rule of court is matter of record, and proved by the record; that all the authority of the arbitrator is derived from the court, and not from the agreement of parties; and that the submission in this case was not, as matter of substance, of fact, or of record by rule of court,—rests upon well-settled principles in this Commonwealth, which have been enunciated or recognized in all the following cases:

Commonwealth v. Pejepscut Proprietors, 7 Mass. 417; *Kingsley v. Bill*, 9 Mass. 197; *Eaton v. Arnold*, Id. 579; *Haskell v. Whitney*, 12 Mass. 47; *Bacon v. Crandon*, 15 Pick. 79; *Shearer v. Movers*, 19 Pick. 308; *Carpenter v. Adams*, 10 Met. 200; *Vose v. How*, 13 Met. 243; *Blood v. Robinson*, 1 Cush. 389; *Foster v. Durant*, 2 Cush. 544; *Woodbury v. Proctor*, 9 Gray, 18; *Hubbell v. Bissell*, 15 Gray, 551; *Jones v. Carter*, 8 Allen, 481; *Hicks v. McDonnell*, 99 Mass. 459; *Carter v. Carter*, 109 Mass. 306; *Searcy v. Beckler*, 18 Mass. 208.

The further ruling of the court that the agreement of reference was a submission *in pais* is sustained by the same reasons and authority as the claim that the submission was not by rule of court. If the submission was not by rule of court, it must have been in the country if it had any force or validity. The result is the same, whether it is held simply that this was not a submission by rule of court, or that it was a submission *in pais*; in neither case can the award be accepted or judgment entered thereon. If the submission was *in pais*, inasmuch as it was broader and more comprehensive, as to the matters submitted, than the declarations in the action, it necessarily included the subject-matter of the declarations and of the action, and worked a discontinuance of the action.

Carpenter v. Edwards, 10 Met. 200; *Sears v. Vincent*, 8 Allen, 507; *Rixford v. Nye*, 20 Vt. 132; *McNulty v. Solley*, 95 N. Y. 242; *Smith v. Barse*, 2 Hill, 387; *Crooker v. Buck*, 41 Me. 355.

The plaintiffs and parties must be in a condition for judgment, although the action as an action is said to be at an end.

Wilson v. Williams, 66 Barb. 209.

C. Allen, J., delivered the opinion of the court:

1. The agreement of reference did not have the effect to discontinue the plaintiffs' action. It was not intended to take effect as a submission *in pais*; but as a reference in court. It is entitled as an agreement in the action which was pending between the plaintiffs and the defendant in the superior court. It is stated to be a submission "in the above-entitled action." The referee was to "report to said court;" final judgment was to be entered in this action upon the coming in of the referee's report. The whole phraseology of the agreement contemplated a reference as a step in the action, and as a means of determining the judgment to be entered in the action. The agreement therefore could not take effect as an agreement for a reference *in pais*, which would work a discontinuance of the action. Such was not the intention of the parties.

2. Sullivan was no party to the action, nor could he be. There was no pretense of an indebtedness of the defendant to the plaintiffs and Sullivan jointly. The claims of the plaintiffs and of Sullivan grew out of the same matter, but they were, in law, distinct. Nor was there any agreement of parties by which the plaintiffs should be substituted as creditors of the defendant, in place of Sullivan. Sullivan did not release Swan. Swan did not promise to pay to the plaintiffs whatever sum he might owe Sullivan. It was merely an agreement that the amount due to Sullivan, if any, should be ascertained and included in a judgment in favor of the plaintiffs; but if nothing should be found due either to Sullivan or to the plaintiffs, then judgment should be entered for the defendant, which judgment should have the same effect as though Sullivan were a party plaintiff. Under this agreement, if the referee should find that something was due to the plaintiffs, but that nothing was due to Sullivan, the plaintiffs would have judgment for the sum so found due to them; but no judgment could be rendered against Sullivan, and the stipulation did not include this contingency. It was contemplated, by the parties, that the claims of the plaintiffs and of Sullivan should be treated and passed upon separately; and they were so treated and passed upon. This agreement falls short of constituting a substitution or novation of parties (2 Chitty, Cont. 11th Am. ed. 1374; *Derby v. Sanford*, 9 Cush. 263); and indeed it has not been contended otherwise in argument. The effect of the agreement, therefore, was that the referee should hear and pass upon a new and separate cause of action,—held by one who was not, and could not be, a party to the record,—and make report thereon to the court. If application had been reasonably made to the court for a rule of reference upon this agreement, such rule could not properly have been issued, because neither Sullivan nor his claim was or could be before the court. *Porter v. Dickerman*, 11 Gray, 482. The court could not give effect to such an agreement. A reference under rule of court cannot properly embrace the claim of a party not before the court. Nothing short of an agreement which would amount to a novation, by which the plaintiffs should be substituted for Sullivan as creditors of Swan, to all intents and purposes,

and the claim of Sullivan extinguished, would enable the plaintiffs to declare in their own names upon this claim against the defendant, and to amend their pleadings by adding this new cause of action. Nothing short of this would make it proper to issue a rule of reference embracing the claim of Sullivan. None of the cases heretofore decided have gone further than to hold that other matters of controversy between the parties to the action might be included in a submission under rule of court. *Berkshire Woolen Co. v. Day*, 12 Cush. 128; *Commonwealth v. Pejepscut Proprietors*, 7 Mass. 417; *Haskell v. Whitney*, 12 Mass. 47. The agreement of the parties in this case, as in *Foster v. Durant*, 2 Cush. 544, cannot be carried into effect according to the rules of law.

It is objected by the defendant that a rule of reference should not be issued *nunc pro tunc*, even if it might properly have been issued before the hearing; but we do not need to go into that question, being of opinion that it could not properly have been issued at the outset.

The result is that the judgment for the defendant must be reversed, that a rule of reference under the agreement must be refused, and that the case stand for further proceedings.

Judgment reversed.

Jarvis COUNSELL

v.

Sylvanus M. HALL.

Where the defendant replaced a broken glass water-gauge with one not fitted

NOTE.—In a very carefully-considered opinion by Judge Elliott, December 27, 1887, in the case of Indianapolis & St. L. R. Co. v. Watson, 12 West. Rep. 285, pronouncing the judgment of the Supreme Court of Indiana, an instruction was approved which was given by the court below as follows: "If the servant knows that his service is dangerous, and that he has not been provided with proper means or implements for the reasonably safe performance of the duties of his employment, and makes complaint to his master, who promises that suitable and proper instruments shall be provided him to render his service less dangerous, then such servant may continue in the service a reasonable time, and may recover for an injury sustained by him within such time, if, on account of the master's negligence in failing to supply the means of avoiding danger, the injury results; provided such servant at the time of the injury was not guilty of any negligence which contributed to produce the injury," etc. The instruction also left it to the jury to determine what would be a reasonable time, and also what would be ordinary care, the want of which would constitute negligence on the part of the servant. The review of the authorities in the opinion is exhaustive and discriminating, and results in the statement that "the rule which we regard as sound in principle and supported by authority may be thus expressed: The employee who continues in the service of an employer after notice of a defect augmenting the danger of the service assumes the risk as increased by the defect, unless the master expressly or impliedly promises to remedy the defect. The promise of the master is the basis of the exception. If the promise be absent, the exception cannot exist." "It is probably true that the promise of the employer, when relied on by the employee, will rebut a presumption of contributory negligence in cases where the danger is not great and immediate; but this presumption yields whenever it appears that the employee voluntarily incurs a known and immediate danger of so great a character that it would deter a reasonably prudent man from incurring it." The court declined to follow the decision by the Michigan Supreme Court in *Pt.*

or adapted for the purpose, and, in attempting to adapt it, the end was cracked about an inch; and the defendant directed the plaintiff to put it in place in connection with the boiler, to which the plaintiff objected; and, the defendant directed him to do so, and promised that, when he got time to go in the city, he would procure a suitable one, but failed to do so; and, two weeks after, the water-gauge exploded, injuring the plaintiff.—an instruction was properly refused that, upon these facts, the defendant was guilty of negligence.

(Bristol—Filed January 4, 1888.)

ON plaintiff's exceptions. *Overruled.*
This is an action of tort.

The evidence of plaintiff tended to show that he entered into the employment of defendant in the month of March, 1885, taking charge of a small steam engine of about six horse power, as engineer, and continued in such employment until July, 1886, the time of his injury; that on the 28th of June, 1886, the glass water-gauge, which had been used since the preceding September, gave out, and defendant bought a water-gauge that was not fitted or adapted for the purpose, being too long and otherwise defective; that defendant thereupon applied an end thereof to a grindstone and ground it down, and told plaintiff to put it in place in connection with the boiler; that plaintiff tried it as directed, and told defendant that it was too long, and not adapted to the purpose; that thereupon he handed it back to defendant, who took it and ground it down still more, leaving the end jagged, and cracked about an eighth of an inch from the end; the defendant then directed plaintiff to put it in place in connection with the boiler; that plaintiff objected to putting it in, and told defendant that it was not suitable, and that it was shameful to put such a glass in; that the defendant replied, "Put it in now, and use it, and I will get another one;" that plaintiff then put it in, but it jammed,

and did not properly fit in the place like those that had been before used, which were fitted and adapted to the purpose by the manufacturer; that the gauge, so cracked and fitted, was dangerous to be used; that on the morning of the 29th of June, the next morning, plaintiff requested defendant to get a proper one, and defendant said he would when he got time to go in the city,—though he did not procure one.

The plaintiff continued in the employment, running the boiler, until the morning of July 13, when, while plaintiff was attending to his duty about the boiler and engine, using due care, the said glass water-gauge exploded, and a piece of the glass flew into his eye, causing the injury alleged. (It appeared in the course of the trial that the defendant was unskilled in the management of a steam engine.)

The defendant introduced evidence tending to contradict all the claims of plaintiff, referred to in his request for ruling, hereinafter stated; and there was much other evidence touching the question of negligence and the other questions of the case. There was also testimony tending to show that, when plaintiff entered the service of defendant, he undertook to assume the responsibility of the management of the engine and boiler, defendant not being skilled in that business.

The plaintiff, among other things, requested the presiding judge to instruct the jury as follows: That if a servant enters into the employment when the machinery is in a state of safety, and continues in the service, and while in the service an appliance of the machinery becomes out of repair, and it is necessary to withdraw it and replace it by another, and the employer for a temporary purpose replaces it by an appliance that is not suitable for the purpose, and the use of which exposes the servant to greater risk and danger of injury, and the servant complains of it and tells his employer that it is unsuitable, and the employer promises to replace it by a suitable one, but fails to do so, he is guilty of negligence; and if an injury to the servant ensues in consequence thereof, he is responsible to the servant in damages therefor.

Wayne, J. & S. R. Co. v. Gildersleeve, 33 Mich. 133, that the promise of the employer exonerates the employee entirely, even though the continuance in the service is known to him to be constantly and immediately dangerous. The court also declines to follow the line of authorities that the master is liable where the employee merely objects to the safety of the appliances furnished him, and his injury occurs within a reasonable time after urging the objection, without any promise having been made. Union Mfg. Co. v. Morrissey, 22 Am. Law Rep. 574; Thorp v. Missouri Pac. R. Co. 6 West. Rep. 671, 89 Mo. 630; 2 Thomp. Neg. 1009.

In Green v. Minneapolis & St. L. R. Co. 32 Minn. 248, it is said: "If the emergencies of the master's business require him temporarily to use defective machinery, we fail to see what right he has, in law or natural justice, to insist that it shall be done at the risk of the servant, and not his own, when, notwithstanding the servant's objection to the machinery, he has requested or induced him to continue in its use, under a promise thereafter to repair it;" and the master is liable where the servant gives notice of the defects, and the "master thereupon promises that they shall be remedied." In Holmes v. Clarke, 6 Burl. & N. 349, it was said: "Where machinery is required by Act of Parliament to be protected so as to guard against danger to persons working it, if the servant enters into the employment when the machinery is in a state of safety, and continues in the service after it has become dangerous, in con-

sequence of the protection being decayed or withdrawn; but complains of the want of protection; and the master promises to restore it, but fails to do so,—we think he is guilty of negligence; and that, if any accident occurs to the servant, he is responsible." See Atkinson, etc. R. Co. v. Sadler, Sup. Ct. Kan. Dec. 10, 1887.

That there are facts which require the court to decide the question of negligence as matter of law is recognized in the case of Cleaves v. Pigeon Hill Granite Co., decided Mass. Sup. Jud. Ct. January 6, 1888, post, p.—, where it is said, in regard to the question of the negligence of the plaintiff in a suit to recover for injury while crossing a tramway: "Four witnesses testified that they saw the plaintiff drive over the crossing. They described her manner of driving, as fully as the parties asked them to, and it was for the jury to say whether she was driving in an ordinary way and with ordinary care, unless some fact appeared which showed, as matter of law, that she was negligent. Unless there was some such fact, the question was plainly for the jury." The difficulty of determining when the question, under the evidence, is for the court, and when for the jury, is illustrated in Metropolitan R. Co. v. Jackson, L. R. 3 App. Cas. 193, 197; Bridges v. North London R. Co. L. R. 7 H. L. 213; S. C. 43 L. J. Q. B. 151; Robson v. North Eastern R. Co. 46 L. J. Q. B. 50; L. R. 2 Q. B. D. 85; S. C. in Ct. of App.; Rose v. North Eastern R. Co. L. R. 2 Exch. D. 248, per Ct. of App.; 46 L. J. Exch. 374.

C. A. R.

He refused to give the above instruction, but instructed the jury generally, in terms not excepted to, in relation to the rights, duties, and liabilities of master and servant, and to the law of negligence and what constitutes negligence, but did not state that any particular matters testified to would or would not constitute negligence; and plaintiff excepted to said refusal.

A verdict was returned for defendant, and plaintiff alleged exceptions.

Mr. J. Brown, for plaintiff:

The instructions asked for and refused were nearly identical with the statement of the law on the points raised in the following cases:

Holmes v. Clarke, 6 Hurlst. & N. 349; *Clarke v. Holmes*, 7 Hurlst. & N. 987.

The same has been held as a true statement of the law in—

Patterson v. Pittsburg & C. R. R. Co. 76 Pa. 389.

In *Ladd v. New Bedford R. R. Co.* 119 Mass. 412, 414, the court, while holding that, under the circumstances proved in that case, plaintiff could not recover, stated the law as follows, Gray, (C. J.): "This is not like a case in which the premises or instruments upon or by means of which the business is carried on are temporarily defective, in which case the master may be liable, especially if he has promised the servant to repair them, and has failed to do so." Several cases are referred to, including two of those above quoted, thus showing that the instructions requested are in accordance with doctrines of law heretofore approved by this court, and which do not appear to have been doubted. The instructions requested should therefore have been given, as directly adapted to the case on the facts in evidence.

Mr. Walter Clifford, for defendant:

If the presiding justice "stated the law accurately, and all the law which the evidence in the case required to be stated, he will have done his whole duty."

Hovees v. Grush, 181 Mass. 211.

The presiding judge is not required to adopt the phraseology of counsel, although the prayer, which was refused, asked for nothing which he had not a right to ask.

Peterson v. Farnum, 121 Mass. 485.

A request for specific instructions based on the assumption of a fact in controversy is properly refused.

Ely v. James, 123 Mass. 48; *Commonwealth v. Carroll*, 122 Mass. 18; *Pearson v. Mason*, 120 Mass. 57.

As plaintiff assumed the management of the engine and boiler as part of his original contract of employment, which was in force at the time of the acts of defendant which are complained of, it must be held that he was responsible for the proper management thereof; and, unless it be made clear that there had been a modification of the original contract, whereby plaintiff was relieved from responsibility (which does not appear), the responsibility for the management continued to rest with plaintiff, and, if plaintiff in said management followed the instructions of a person known to plaintiff to be unskilled therein, and he was injured thereby, plaintiff was guilty of negligence, even though the unskilled person who gave the instructions was the defendant.

Robinson v. Blake Mfg. Co. 143 Mass. 528.

Holmes, J., delivered the opinion of the court:

If machinery upon which a servant is employed has become dangerous, and the servant has complained of it, and has been promised that it shall be repaired, but is injured before the defect is remedied, and while he is reasonably expecting the promise to be performed, the promise is a circumstance to be considered by the jury in determining whether he has assumed the risk in the mean time, and whether he was using due care in working when he knew there was danger. But no case, we believe, has gone the length of deciding that the promise entitles the servant to recover, as matter of law; which was the effect of the ruling asked. And if, as supposed in the request, the time for performance has gone by before the accident, and, as must have been the fact, the servant knows that the repair has not been made, there is a very strong argument that the servant is no longer relying upon the promise, and has decided to take the risk.

Exceptions overruled.

Joseph SIMPSON

v.

Arthur D. STORY *et al.*

U. S. Stat. 1884, chap. 121 (the "Dingley Bill"), § 18*, did not, prior to the enactment of U. S. Stat. 1886, chap. 121, extend the limitation of responsibility therein provided for to **owners of fishing-vessels**; and the common-law liability of such owners remained.

(Essex—Filed January 5, 1886.)

ON defendant's exceptions. *Overruled.*

This was an action of contract tried before Brigham, Ch. J., in the Superior Court, Essex County, and was brought by Joseph Simpson against Arthur D. Story and Eli Wilson, who, at the time the bill hereinafter mentioned was contracted, were owners each of one-half part of the fishing schooner "A. M. Burnham," of Gloucester, Mass., and of which the said Wilson was then master, to recover the sum of \$529.33 upon an account annexed,—being the balance of the price of a mackerel seine, purchased at Gloucester of the plaintiff, for and on account of the said schooner, by the defendant Wilson, in July, 1885, and for repairs made thereon by the plaintiff, and ordered by Wilson, in the years 1885 and 1886. The defendant Wilson was defaulted, and the defendant Story appeared and defended the action, as against himself, on the ground that at and during the time of the purchase of the seine for the

*This section is as follows: "§ 18. That the individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel, on account of the same, shall not exceed the value of such vessels and freight pending; provided that this provision shall not affect the liability of any owner, incurred previous to the passage of this Act, nor prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said shipowners.

schooner by the defendant Wilson, and at and during the time the repairs were made thereon by the plaintiff, the schooner was chartered by the said Story to the said Wilson, and that he had the whole control and management of her, and received all her earnings; and also pleaded § 18 of chap. 21 of the U. S. Statutes of 1884, commonly known as the "Dingley Bill," which was read and offered in evidence at the trial, and claimed that, if he was liable at all for any part of the plaintiff's bill, under the provisions of the said 18th section he was not liable, in the absence of any special contract, for any larger proportion thereof than his individual share of said schooner, and the plaintiff's right to recover in this action, as against him, the said Story, was limited to such proportion, and asked the court so to instruct the jury. The court declined so to rule, and ruled as follows: "I shall submit the case to the jury irrespective of the Dingley Bill. It is a very voluminous bill, and was evidently intended to apply to American vessels engaged in foreign trade, and incurring liabilities in foreign ports, very many of which would be enforced against the vessels or against the owners in the home ports. I cannot think it was intended to apply to contracts that are made in the home ports in relation to repairs or in relation to equipments; and I shall eliminate that from the case." The court gave other instructions, not excepted to; the jury returned a verdict against the defendant Story for the full amount of the plaintiff's bill; and the defendant Story alleged exceptions.

Mr. Charles A. Russell, for defendant Story:

The only question raised by this bill of exceptions is what construction is to be given to the Act of Congress, § 18, commonly known as the Dingley Bill.

Up to the time of its passage, under the established principles of the common and maritime law, which had theretofore prevailed in the United States, every vessel-owner, however small his interest therein, in the absence of special circumstances, was liable individually, on the general ground of agency, for all bills for repairs done and supplies furnished to the master for the vessel, to an indefinite amount, even though it should infinitely exceed the value of the vessel.

It operates to modify and restrain the personal liability, under the common and maritime law, of a vessel-owner, to such proportion of any and all debts and liabilities incurred on account of such vessel, as his interest therein bears to the whole; and also limits the aggregate liabilities of all the owners, to the value of the vessel and freight pending. The measure and extent of the owners' liability is thus definitely fixed and determined.

There is nothing in the language or expressions of the statute indicating an intention to exclude from its wise and salutary provisions any class of vessels, or any kind of debts or liabilities contracted on such account.

The word "shipowner" is not restricted in meaning to vessels of that peculiar class. Such an interpretation would exclude from the operation of the statute barques, brigs, steamboats, and other large vessels. It appears conclusively from the context that the words

"shipowner," and "owners of a vessel," are used interchangeably in the statute, as having the same comprehensive meaning and significance.

In a nautical sense the word "vessel" is a general name given to the different sorts of crafts which are navigated.

Briggs v. A Light Boat, 7 Allen, 298.

The word "vessel" is defined by U. S. Rev. Stat. title 1, chap. 1, § 3, to "include every description of watercraft or other artificial contrivance, used, or capable of being used, as a means of transportation on water;" and by U. S. Rev. Stat. § 4612, "to comprehend every description of vessel navigating on any sea or channel, lake or river."

The words "any or all debts and liabilities," in the statute, are also clear, precise, and comprehensive. They must include all debts and liabilities of every kind and nature, contracted by one owner or master on account of a vessel, whether for supplies, repairs, or equipments, and whether in the home or any other port in the United States. The statute could not, and was not intended to, limit and apply only to the liability of a vessel-owner for debts incurred for such purposes in foreign ports. In such cases the law of the place, if out of the United States, where the contract was entered into, would govern and fix the liability of the owners, irrespective of the law at the vessel's home port.

The effect of the statute is that the power and authority which one part-owner or the master of a vessel formerly had, under our law, to pledge the personal credit of, and bind, his other part-owner for debts arising out of contracts made on account of the vessel, is now restrained and limited to such proportional part thereof as his interest is in the vessel itself.

Mr. William A. Pew, for plaintiff:

U. S. Stat. 1884, chap. 121, § 18, applies to vessels engaged in commerce, and does not, either in terms or by implication, and taken in connection with the rest of the chapter, apply to fishing vessels. The bill of exceptions shows that the liability sought to be enforced against the defendant Story was not one arising out of the fact of his being a ship or vessel owner. The defendant Story's liability was placed solely upon the ground of his own contract. The jury must have found that the defendant Story became a party to the contract, by having authorized Wilson to make it, or by his subsequent ratification of it.

C. Allen, J., delivered the opinion of the court:

In construing an Act of Congress, the title of the Act, the objects to be accomplished, the other provisions found in connection with these under especial consideration, the provisions and arrangement of the statutes which were amended, the mode in which the embarrassing words were introduced, as shown by the journals and records, the history of the times, and especially of prior legislation upon the same general subject, may all be considered. *Meyer v. Western Car Co.* 102 U. S. 11, 12 (28 L. ed. 59); *United States v. Union Pac. R. Co.* 91 U. S. 72, 79, 82 (23 L. ed. 224); *Hadden v. The Collector*, 72 U. S. 5 Wall. 110, 111 (18 L. ed.

518); *Blake v. National Bank*, 90 U. S. 23 Wall. 307, 319 (28 L. ed. 119). See also *Fried v. Gooding*, 106 Mass. 310, 313; *Commonwealth v. Mutual Redemption Bank*, 4 Allen, 13; *Holbrook v. Holbrook*, 1 Pick. 250.

Looking at the statute now under consideration (U. S. Stat. 1884, chap. 121, § 18) in this manner, it appears that it was not the design of Congress to include fishing-vessels within its provisions. Its title is, "An Act To Remove Certain Burdens on the American Merchant Marine, and Encourage the American Foreign Trade, and For Other Purposes." The object of the prior legislation, which was amended, as well as of the Act in question, was to promote the building of ships, and to encourage persons engaged in the business of navigation, with special reference to the foreign carrying trade; so that American vessels might enter into this trade in competition with foreign vessels, and on more nearly the same terms. See *Moore v. American Trans. Co.* 65 U. S. 24 How. 1 (16 L. ed. 674); *Walker v. Western Trans. Co.* 70 U. S. 3 Wall. 150 (18 L. ed. 172). This is shown by the whole history of the legislation, and by the course of the discussions in Congress. See Cong. Globe, 48th Congress. American vessels were subject to burdens which foreign vessels were free from, and all the other sections of the statute had reference to the removal of such burdens. Section 18 was not in the original bill introduced in the House of Representatives, but it is found in substance in a bill introduced in the Senate, which proceeded concurrently with that in the House; and it was retained in the report of a joint committee of conference. Prior statutes had established an exemption or limitation of responsibility for losses by fire, embezzlement, and otherwise; but they did not include any exemption in respect to debts; and similar limitations existed in foreign countries. U. S. Stat. 1857, chap. 43, §§ 1-4; U. S. Rev. Stat. §§ 4282-4284; *The Scotland*, 105 U. S. 24 (26 L. ed. 1001); *Norwich Co. v. Wright*, 80 U. S. 18 Wall. 104 (20 L. ed. 585); *The Rebecca*, Ware, 188. A similar statute had long existed in Massachusetts. Stat. 1818, chap. 122; Rev. Stat. chap. 32, §§ 1-4. Except as thus limited, the responsibility of joint owners of vessels was joint, while the *delectus personarum* of a partnership did not exist, since one joint owner could transfer his share in the vessel without the consent of the others. A vessel engaged in foreign trade is liable to be away from home for long periods of time, under the control of agents. Section 18 sought to place the owners of such vessels more nearly on the footing of stockholders in a corporation, in order that men of wealth might be encouraged to invest in ships. Congress was not, however, at this time, dealing with fishing-vessels, but with vessels engaged in foreign commerce. The merchant shipping is treated as a subject distinct from the fisheries in legislation, in decisions of the courts, and in text-books. U. S. Rev. Stat. titles 48-58; *Wait v. Gibbs*, 4 Pick. 298; *The Boat Swallow*, Ware, 21; *Taber v. United States*, 1 Story, C. Ct. 1, 6, 7; *The Three Brothers*, 1 Gall. 142; Abb. Ship. 605, 606.

Section 18 appears to have been intended to relate to the same common object with the rest of the statute, and does not extend the

limitation of responsibility to owners of fishing vessels; and the common-law liability of such owners remains.

Exceptions overruled.

Since the decision of this case the attention of the court has been called to U. S. Stat. 1884, chap. 421, § 4, extending the provisions of U. S. Stat. 1884, chap. 121, § 18, to all seagoing vessels. While this does not affect the liability of the defendant in the present case, it confirms the construction put by the court upon Stat. 1884, chap. 121, § 18.

Edward P. SHAW

v.

Frederic A. SILLOWAY and Trustee.

1. An instrument dated June 10, 1873, whereby defendant, in consideration of a sum of money advanced by plaintiff upon his note of even date at four months, **consigns to plaintiff for sale, as security for said note and any contracts of defendant payable to plaintiffs order, certain personal property therein mentioned, and proceeds of sales thereof, to be delivered on demand of plaintiff,—is a mere power of sale, with an agreement to deliver the property on demand, or the proceeds in case of sale.**
2. Such **note, and new notes for the unpaid balance thereof, maturing more than six years prior to the commencement of an action thereon, are barred by the Statute of Limitations.**
3. A separate collateral agreement to deliver, on demand, certain property as security, by implication requires a demand **within the continuance of legal liability** upon the debt.

(Essex—Filed January 5, 1888.)

ON defendant's exceptions. *Sustained.*

Writs issued October 8, 1886. First count of declaration alleges that defendant has converted to his own use certain goods and chattels mentioned, being the property of the plaintiff. Second count alleges that defendant made and delivered the following agreement, viz.:

Newburyport, June 10, 1878.

I, Frederic A. Silloway, in consideration of the receipt of \$324 on my note of this date, payable to Edward P. Shaw, or to his order, in four months from date, herewith consign for sale to Edward P. Shaw the following merchandise, to wit, the property in question, and as security for the payment of said note and all contracts due from me payable to the order of said E. P. Shaw, and the proceeds of all sales of merchandise herewith consigned, and to satisfy full payment of all contracts said Shaw may hold against me, payable to his order, which I will deliver on demand of said E. P. Shaw.

F. A. Silloway,

By Amos Noyes, his Attorney.

That there is now due to plaintiff, from defendant, the sum of \$238.44 on two prom-

promissory notes to the order of plaintiff for \$89, each dated October 12, 1878, at four months, upon each of which there is indorsed \$12.50, of date August 1, 1883; that defendant has refused to deliver to plaintiff said goods and chattels, or any of them, although frequently requested so to do, and within six years last past has illegally converted said goods to his own use, whereby the plaintiff has lost his security or the payment of said notes.

To the first count defendant pleaded general denial and Statute of Limitations; to the second he demurred on the ground that the matters herein contained are not sufficient to constitute a cause of action, and, also answering said second count, the defendant pleaded general denial, Statute of Limitations, and former adjudication and judgment upon said notes.

Demurrer overruled; defendant appealed. Action tried by court without a jury.

The plaintiff's evidence tended to show that, on June 10, 1878, the defendant made and delivered to the plaintiff a promissory note, payable in four months to the plaintiff or his order, for \$224; and executed and delivered, at the same time, to the plaintiff, the instrument set forth in the declaration. The chattels enumerated in said instrument were then in the defendant's possession and continued always in his possession up to the time of the trial. When the note of June 10, 1878, became due, the defendant paid a part of it, and gave for the balance the two notes mentioned in the declaration. The defendant proved that the plaintiff brought an action against the defendant in the Superior Court for the County of Essex, wherein he declared upon said last-mentioned notes. The answer in said suit was a general denial and the Statute of Limitations, and further, that the indorsements on the notes were not by authority of the defendant therein, and that, after hearing, a verdict and judgment for the defendant was rendered. Neither party introduced any evidence showing upon what ground this verdict was rendered.

The plaintiff testified said last-mentioned note had not been paid; that he made a demand upon the defendant for the goods enumerated in the instrument of June 10, 1878, in October, 1886. This testimony was not contradicted or controlled. The court found, as a fact, that the demand of October, 1886, was within a reasonable time; and ruled that the Statute of Limitations was not a bar to this action; to which ruling the defendant duly excepted.

The defendant asked the court to rule:

1. There is no evidence of a conversion, and for that reason there must be a finding for defendant on the first count.

2. The action cannot be maintained on the evidence on either count.

3. The Statute of Limitations is a bar to this action.

4. The evidence and writ showing that no demand was made for the goods described in the writing dated July 10, 1878, until after more than six years from its date, and no action brought until after six years from its date, this action is barred.

5. The writing of July 10, 1878, does not secure the payment of the two notes of October 12, 1878.

2 Mass.

But the court ruled that the action could be maintained, and declined to make the rulings requested, except the first, and found for the defendant on the first count, and for the plaintiff on the second count for value of the property at time of the demand.

To all of which rulings and refusals to rule, defendant duly excepted.

Mr. William H. Moody, for defendant:

I. The contract upon which the plaintiff counted in his second count was dated June 10, 1878, and this action was begun October 8, 1886.

The goods enumerated in the schedule were "consigned for sale" to the plaintiff, and their place of storage was designated. The plaintiff's right to a special property in them was complete. There was no provision that the defendant should retain the goods until a demand. The agreement to deliver on demand was inconsistent with the other provisions of the contract, was unnecessary, meaningless, and did not create any contingency upon which the plaintiff's rights depended. The statute therefore began to run from the date of the contract.

Assuming, however, that a demand was a condition to the plaintiff's right of action, and that the statute ran from the date of the demand, still the demand (October, 1886) was eight years and four months from the date of the contract, and was too late.

Where a demand is a condition precedent to the right of action, the demand must ordinarily be made within six years from the date of the contract.

Codman v. Rogers, 10 Pick. 112; *Pittsburgh & C. R. Co. v. Byers*, 82 Pa. 22; *Morrison v. Mullin*, 84 Pa. 12; *Rhines v. Evans*, 66 Pa. 195; *Palmer v. Palmer*, 86 Mich. 487; *Stanton v. Stanton*, 87 Vt. 411; *Thrall v. Mead*, 40 Vt. 540; *Stafford v. Richardson*, 15 Wend. 302.

Where, however, the contract shows that the parties intend, or the subject-matter necessitates, a delay in the demand itself, the demand need not be made within six years.

Emmons v. Haynard, 6 Cush. 501; *Stanton v. Stanton*, *supra*.

The exception suggested in *Codman v. Rogers*, *supra*, does not apply to the case at bar. Here no cause for delay was shown. It is true that it has been found, as a fact, that the demand was within a reasonable time, but the whole evidence is reported, and it is submitted that there was no evidence to warrant such a finding.

II. It is impossible to reason satisfactorily on the proper construction of this obscure instrument.

The only "contracts payable to Edward P. Shaw or to his order," or "contracts which said Shaw may hold," were two notes made subsequently to the date of the instrument; and on these notes the defendant heretofore has had final judgment. On the ground that the instrument did not purport to secure contracts afterward made, or contracts extinguished by judgment, the defendant submits that the second and fifth requests should have been granted.

Mr. Amos Noyes, for plaintiff:

I. The goods and chattels described in the declaration are and were the property of the de-

defendant. The defendant owes the plaintiff a debt, founded upon contract, of more than \$158. Plaintiff avers that the debt of defendant to him has not been paid, and that the goods and chattels have not been delivered, although a demand was made within six years of the time of bringing the action; and avers that defendant owes him, by reason of breach of said agreement, the sum of \$238.44.

II. The form of action comes under the head of trespass on the case at common law; and hence by Pub. Stat. chap. 167, § 1, it is properly included under actions of tort.

It has been held that an action of case will lie where a person or corporation fails to deliver goods or stock not acknowledged to be then the property of the person asking for it.

Rez v. Bank of England, 2 Doug. 524; *Gray v. Portland Bank*, 3 Mass. 364; *Hussey v. Manufacturers & M. Bank*, 10 Pick. 415; *Bush v. Canfield*, 2 Conn. 487.

III. Of the exceptions, it is said that the action cannot be maintained on the evidence. This seems like a general demurrer to the evidence. But no objection was entered at trial, or appears in the exception, as to the competency or admissibility of any piece of evidence. It was admitted without objection, and its admissibility cannot now be objected to (*Peterson v. Farnum*, 121 Mass. 476); nor can it be said that the decision of the superior court in an action of contract upon the two notes conflicts with and nullifies the evidence in this case. No presumption of their illegality, or of their payment, or recoupment, can have arisen in that suit; for the reason that these issues were not made by the pleadings. The defense of payment, or illegality, or recoupment, or set-off etc., must be specially pleaded, and is not raised by a general denial.

Granger v. Holey, 2 Gray, 521; *Fogg v. Griffin*, 2 Allen, 1; *Parker v. Lowell*, 11 Gray, 353; *Bruce v. Matheus*, 101 Mass. 64; *Stanley v. McKinzer*, 7 Lea, 454.

IV. The cause of action is a failure to deliver goods as agreed. The notes merely show that the debt arose by contract, and is one for which the agreement is collateral security. It is an agreement to deliver goods belonging to defendant, on demand of plaintiff, and meanwhile to hold them for him as security till he demands, and this demand was in October, 1886. The Statute of Limitations of action on such contracts begins to run from the time of demand.

Wood, Lim. Act. 256, 257; *Brewster v. Hobart*, 15 Pick. 307; *Stanton v. Stanton*, 37 Vt. 411; *Branch v. Dawson*, 33 Minn. 399; *Scott v. United States*, 18 Ct. Cl. 1; *Icey v. Owens*, 28 Ala. 641; *Sterens v. Adams*, 45 Me. 611.

As to the objection that the demand was not made in a reasonable time: There are numerous decisions in which it has been held, in contracts similar in principle to this, that a delay much longer than the statutory period of six years was allowable. Thus, in a note payable in wood, demand was not made for twelve years.

Stanton v. Stanton, 37 Vt. 411; *French v. Merrill*, 132 Mass. 527.

And in a note payable on a contingency, demand ten years after date was held sufficient.

Jameson v. Jameson, 72 Mo. 640. See also *Evans v. Hardeman*, 15 Tex. 480.

No absolute presumption of payment arises from taking a new note for an old one; that is a question of fact rather than law, and has been found against defendant.

2 Pars. Cont. 137, note o; *Cadiz Bank v. Slemmons*, 34 Ohio, 142; *Butts v. Dean*, 2 Met. 76; *Parham Sewing Machine Co. v. Brock*, 111 Mass. 196.

The fact that a presumption of payment would deprive the creditor, taking the note, of some substantial security, such as a mortgage, guaranty, or the like, has been held sufficient to rebut the presumption of payment by taking a new note.

Lovell v. Williams, 125 Mass. 442; *Butts v. Dean*, 2 Met. 76; *Appleton v. Parker*, 15 Gray, 175; *Dodge v. Emerson*, 181 Mass. 467.

C. Allen, J., delivered the opinion of the court:

The instrument upon which this action is brought is not clearly expressed, but its purpose and meaning seem to be reasonably plain. The defendant executed his promissory note for \$224 to the plaintiff, and, on the same day, also executed and delivered to the plaintiff this instrument, reciting the receipt of \$224 on his note, and consigning for sale to the plaintiff the personal property therein mentioned, as security for the payment of the note and of all contracts due from him and payable to the plaintiff's order. The property in question consisted chiefly of a horse and vehicles,—articles which would naturally be used by the person in possession of them. The instrument contained a promise to deliver this property to the plaintiff on demand. This shows that it was not necessarily to be delivered at once, and that it was contemplated that the defendant might remain in possession of it until a demand should be made. It must also have been understood that the defendant might himself sell part of the property, since the words "and the proceeds of all sales or merchandise herewith consigned" can only refer to sales by the defendant.

This instrument did not amount to a mortgage. There are no words in it which import a transfer of the legal title to the plaintiff; and there are no words of defeasance. It has been held that a bill of parcels which contains no words of defeasance, and which is intended merely as security, if accompanied by delivery, is at most only a pledge, and is not a mortgage. *Thompson v. Dolliver*, 132 Mass. 108; *Walker v. Staples*, 5 Allen, 34; *Whittaker v. Sumner*, 20 Pick. 399. But the instrument now before us does not purport to convey the title; it is merely a consignment for sale. If possession of the property had accompanied the delivery of the instrument, the transaction would have been a pledge. The fact that possession was retained by the defendant did not have the effect to make the instrument a mortgage. The instrument therefore is merely a power of sale, with an agreement to deliver the property on demand, or the proceeds in case the property or any part of it should be sold by the defendant. Meanwhile he was to keep the possession until a demand by the plaintiff. It is an agree-

ment to make a pledge as security for the demand referred to. This did not divest the defendant's title; it did not even create a lien. It would not authorize the plaintiff to take possession of the property without the defendant's consent. It was a mere executory agreement. The property might have been sold by the defendant, or attached upon a writ against him. The contract might or might not be enforceable in equity, according to the circumstances. *City F. Ins. Co. v. Olmsted*, 83 Conn. 476; *Beeman v. Lawton*, 37 Me. 543.

When the defendant's note fell due, it was partly paid in cash, and new notes were given to the plaintiff for the unpaid balance. These have never been paid. The finding of the court necessarily implies that these notes cannot be deemed to have been taken in payment of the original note, in such a sense as to destroy the security of the defendant's agreement. But the new notes, as well as the original note, are now barred by the Statute of Limitations; and an action brought upon them was defeated, as we must infer, on that ground. And this was the state of things at the time of the plaintiff's demand, under the agreement. The question therefore is whether the action can be maintained upon the agreement, after the debts to be secured have become barred by the Statute of Limitations, and have been adjudged to be barred; or whether the agreement falls with the right to enforce the debt.

If there is an actual pledge, and the debt becomes barred, this does not give to the debtor a right to reclaim his pledged property.

The debt is not extinguished, the statute only takes away the remedy. *Hancock v. Franklin Ins. Co.* 114 Mass. 156. In case of a mortgage of real or personal estate, the security is not lost, though the debt be barred. *Thayer v. Mann*, 19 Pick. 535. The rule is the same where there is a lien. *Spears v. Hartley*, 3 Esp. 81; *Higgins v. Scott*, 2 B. & Ad. 413; *Re Broomhead*, 16 L. J. Q. B. D. 355. And in New York it has been held, under the statutes of that State, that the lien of a judgment is not lost, although an action upon the judgment is barred. *Waltermire v. Westorer*, 14 N. Y. 16. And there appears to be no good reason why an independent collateral agreement, given by way of guaranty or other security, should not outlive the remedy upon the debt which it was given to secure, under proper circumstances.

It is, however, objected in the present case that the demand was made too late. The question has often arisen elsewhere, whether a court of law can properly lay down a general rule, that where a demand is necessary, as preliminary to the bringing of an action, such demand must be made within a reasonable time, and that, by analogy to the Statute of Limitations, six years should ordinarily be considered as a reasonable time. Such rule has been repudiated, or at least not acted upon, in the following cases: *Holmes v. Kerrison*, 2 Taunt. 323; *Thorpe v. Coombe*, 8 Dowl. & R. 347; *Rhind v. Hyndman*, 54 Md. 527; *Taylor v. Witman*, 8 Grant (Penn.), 138; *Girard Bank v. Penn. Trp. Bank*, 39 Pa. 92. It has been adopted in the following cases: *Pittsburg & C. R. Co. v. Byers*, 82 Pa. 22; *Morrison v. Mullin*, 34 Pa. 12; *Rhines v. Evans*, 66 Pa. 195; *Palmer v. Palmer*, 36 Mich. 487; *Atchison, T. & S. F. R. Co. v.*

Burlingham Trp. 36 Kan. 628; *Thrall v. Mead*, 40 Vt. 540; *Keihler v. Foster*, 22 Ohio St. 27; *Jameson v. Jameson*, 72 Mo. 640; *Brown v. Rutherford*, 42 L. T. N. S. 659; *S. C.* on appeal, *Re Rutherford*, L. R. 14 Ch. Div. 687. This question has not been determined in Massachusetts. *Codman v. Rogers*, 10 Pick. 112, was a case in equity, and the doctrine declared was merely the ordinary doctrine of laches in equity. See also *Western U. Tel. Co. v. Caldwell*, 2 New Eng. Rep. 396, 141 Mass. 489, 494. In *Emmons v. Hayward*, 6 Cush. 501, the agreement contained a stipulation that the demand should not be made until the plaintiffs, who were assignees under an assignment for the benefit of creditors, should make up their accounts; and they were prevented from doing this, until the expiration of thirteen years from the date of the agreement, by reason of proceedings in equity instituted against them by the defendant. Under these circumstances, a demand having been made within about fourteen months after the termination of the suit in equity, it was held that the defendant could not be allowed to object that it was not made within a reasonable time. In *French v. Merrill*, 132 Mass. 525, it was held that an officer who held the avails of property sold under an attachment could not be allowed to object that a demand made upon him for the same, by the party entitled thereto, after the lapse of eleven years, was too late, as the funds were in the custody of the law, whose officer he was.

We have no occasion to determine the general question here, because we are of opinion that, where, as in the present case, there is merely a separate collateral agreement to deliver, on demand, certain property as security for the payment of an existing debt, it is not a just or reasonable construction of such agreement to hold that a demand may be made upon it at any time, however remote, and although the debt to be secured has become barred by the Statute of Limitations. Otherwise the claim might continue open forever. It is not to be supposed that such was the intention of the parties. It is true that no cause of action accrues until a demand, and that therefore the Statute of Limitations does not begin to run till such demand. But our decision rests on the ground that the contract, by implication, requires a demand within the time of the continuance of legal liability upon the debt, and that a demand after the expiration of that time is too late.

Exceptions sustained.

Josiah A. BRIGHAM *et al.*, Exrs. of the Estate of Azubah Brigham,

v.

Louis J. ELWELL.

1. Income of the real estate of a testator, received by his executors, under arrangement with the devisee that they should manage the property for the benefit of the estate, is to be accounted for as assets.
2. The presumption that a devisee of land who enters upon it, enters under his title as such, may be overthrown.

3. The fact that he is devisee does not disqualify him to assent to **occupancy of the land by the executors**, or to occupy with his coexecutor.
4. Whether the **devisee has assented to occupancy by the executors** for the benefit of the estate is a question of fact.
5. **Assent by the devisee** to such occupancy prevents him from claiming rents and profits, and leaves them assets.
6. An **executor occupying real estate of his testator** may account for the income thereof, by charging himself with a proper sum as rents and profits, in which case the products of the land belong to him personally; but if he choose to regard himself as bailiff, charging himself with such receipts and products, the products belong to him as executor.

(Worcester—Filed January 6, 1888.)

ON defendant's exceptions. *Overruled.*

This was an action of tort to recover the value of certain hay and cider alleged to be the property of the plaintiffs as executors, and to have been converted to his own use by the defendant. Defendant, who was deputy sheriff, denied that the property alleged, to have been converted was the property of the plaintiffs, and alleged the same to be the general property of plaintiff Josiah A. Brigham; denied also the conversion, and qualified under his writ and attachments. The evidence showed that the plaintiffs were executors of the will of Azubah Brigham, who died December 6, 1888, seised of a farm; that Josiah A. Brigham was also sole devisee under said will, and lived on the farm; that a portion of the stock on the farm was sold off by the executors; that, by arrangement between the plaintiffs, the farm was to be managed the following year for the benefit of the estate, an account kept and rendered; that certain young stock was retained on the farm, the cornfields let out to be planted on shares, the hay and fruit of 1884 gathered by hiring the work done; that the fruit was made into cider, which, with the hay, was the property in question in this action; and that an account was rendered to the probate court of the products of the farm.

At the close of the evidence the defendant asked the court to rule (1) that there was no evidence to go to the jury, which would warrant them in finding that the property in question belonged to the plaintiffs, and that the plaintiffs, upon all the evidence, could not recover; (2) that the parties who were alleged to have made the arrangement were not competent to make such an arrangement or agreement as would make the products of the farm in 1884 the property of the executors,—the said Josiah A. being a necessary party on each side of the same.

The court declined so to rule, and submitted to the jury the following question: On or about January 1, 1884, was it arranged and agreed by and between the executors and Josiah A. Brigham, as sole devisee of the farm, that the executors should use, occupy, and

carry on the farm; and that the executors during such use and occupation should take the entire proceeds of the farm, including the hay and cider in suit; and that the same should belong to the estate, and be accounted for as assets thereof?—and did the executors use, occupy, and carry on the same under such agreement and arrangement? To this question the jury answered, "Yes." Questions as to the value of the property were also submitted and answered.

Thereupon the court directed the jury to find a verdict for the plaintiffs for the amount of the value so found, and interest; and a verdict was so rendered.

To said refusals to rule, and to said ruling and directions, the defendant duly excepted. *Messrs. Kent & Dewey*, for defendant.

The plaintiff Josiah A. Brigham, in his personal capacity, at the time of the attachment was the owner of the hay and cider attached which were the product of the farm in 1884 unless they became the property of the executors by virtue of some contract or agreement between said Josiah A. Brigham and the executors, to wit, said Josiah A. and William Curtis. The property attached was the product of the farm after the death of the testator, and the estate has never been sold for payment of debts.

Brooks v. Jackson, 125 Mass. 307, and cases cited; *Almy v. Crapo*, 100 Mass. 218.

There is nothing in the evidence that shows any consideration for the transfer; nor is there any evidence of any delivery, actual or constructive, of the property. The transaction would be nothing more than a gift without delivery, and for want of delivery it would be void for fraud against creditors. If the parties attempted to make a lease of the premises, the contract would be void for want of parties. In the absence of statute provision, like 21 and 22 Vict. chap. 35, § 21, no such transfer could be made. Curtis, the other executor, could not act as the agent of his coexecutor (*Turner v. Hardy*, 9 M. & W. 770); if he could, the same difficulty would arise, that Brigham, through his agent, was contracting with himself in acquiring the property. The cases in this Commonwealth which treat of the rights of parties to the products of real estate of a deceased person, deal only with the subject of the liability of the executor or the administrator, under the peculiar circumstances in which they have received those products, to account for them.

Stearns v. Stearns, 1 Pick. 158; *Newcomb v. Stebbins*, 9 Met. 540; *Palmer v. Palmer*, 13 Gray. 326; *Toule v. Sweeney*, 106 Mass. 107; *Choate v. Arrington*, 116 Mass. 552; *Brooks v. Jackson*, and *Almy v. Crapo*, *supra*; *Choate v. Jacobs*, 136 Mass. 297.

Mr. F. P. Goulding, for plaintiffs:

There was evidence to warrant the finding that it was arranged, or agreed between the plaintiffs and the sole devisee of the farm, that the former should occupy the farm, and account for the rents and profits for the benefit of the estate; and that they did so occupy it through the year 1884, and did keep and render an account, as executors, of rents and profits. The question is whether the executors, with the consent of the party in interest, were occupying

the farm for the benefit of the estate. If so they were chargeable, as executors, with the rents and profits, and, as a consequence, had title to them. A similar relation existed in *Stearns v. Stearns*, 1 Pick. 157, the administrators being two of the heirs at law of the intestate. The statutes assume that the executor or administrator may sometimes, by acquiescence of the heir or devisees, receive the rents and profits of the real estate for the benefit of the estate, and deal with the amount with which he is charged.

Stat. 1789, chap. 11, § 2; Rev. Stat. chap. 67, § 6; Gen. Stat. chap. 98, § 8; Pub. Stat. chap. 144, § 5; *Edwards v. Ela*, 5 Allen, 87; *Adams v. Palmer*, 6 Gray, 338; *Choate v. Arrington*, 116 Mass. 552; *Brooks v. Jackson*, 125 Mass. 307; *Almy v. Crapo*, 100 Mass. 218, 220.

The very case provided for by the statute is made by the facts. The only party in interest, except the executors, was Josiah A. Brigham, the devisee. His filing the account containing the charge for income constituted an assent to it. If the plaintiffs actually occupied the real estate under such an arrangement, the income was their property as against any attaching creditor of the devisee.

W. Allen, J., delivered the opinion of the court:

The jury found that the hay and cider were produced by the plaintiffs from the farm, while they carried it on as executors, under an arrangement with the devisee that they should carry it on, and take the proceeds, and account for them as assets. Income of the real estate of a testator so received by his executors is assets of his estate. Pub. Stat. chap. 144, § 5; *Stearns v. Stearns*, 1 Pick. 157; *Palmer v. Palmer*, 13 Gray, 326; *Choate v. Arrington*, 116 Mass. 552; *Edwards v. Ela*, 5 Allen, 87; *Brooks v. Jackson*, 125 Mass. 307; *Adams v. Palmer*, 6 Gray, 338; *Newcomb v. Stebbins*, 9 Met. 540; *Almy v. Crapo*, 100 Mass. 218; *Toule v. Swasey*, 106 Mass. 100.

The direct question is whether the property in the hay and cider was in the plaintiffs as executors; and that involves two questions: Whether the fact that one of the executors was also the sole devisee of the land prevented the executors from occupying it for the benefit of the estate, with the assent of the devisee, so as to be chargeable with the income; and whether, if they did so occupy the farm, its produce, while it was carried on by the plaintiffs, belonged to them in their representative, and not in their personal, capacity.

1. The presumption that a devisee of land, who enters upon it, enters under his title as devisee, may be overthrown. He may enter under another title, and occupy in another character than that of devisee. If he is also sole executor, it would seem that he would have the power to occupy as executor for the benefit of the estate. What would constitute or prove such an occupancy, so as to make the rents and profits assets, is a very different question from that of the power to so occupy. In *Newcomb v. Stebbins*, *supra*, it was held that taking notes for rent to himself as executor, did not, of itself, make them assets, and estop him to show in what capacity he occupied; but it would seem that charging himself with the rents and profits

in his account would show that he received and held them as assets. The fact that the sole executor and devisee occupied as executor, and not as devisee, may be difficult of proof, but it is not impossible. But when the devisee is also one of two executors, there is no difficulty. Whether the two occupied the real estate, and took the rents and profits, is a question of fact easily susceptible of proof. Whether the devisee assented to their occupancy as executors, for the benefit of their estate, is also a question of fact. The fact that he is the devisee of the land does not take from him his capacity to assent to the occupancy by the executors, or to occupy with his coexecutor. There is no question of contract or of estate in the land. The rents and profits come from the actual occupancy by the executors, and the assent to such occupancy by the devisee prevents him from claiming them, and leaves them assets of the estate. The jury have found that the executors carried on the farm for the purpose of taking the proceeds, and accounting for them as assets. The assent of the devisee is not left to be implied from the fact he was one of the executors who so occupied, but it is found that it was expressly given; the executors are therefore bound to account for income as assets.

2. As Brigham and Curtis carried on the farm jointly, the products in question—hay and cider made by them from the produce of the farm—belonged to both of them, and not to either one alone. To maintain this action they must show that it belonged to the estate of their testator; that is, that it belonged to them in their representative, and not in their personal, capacity. The statute is: "If the real estate has been used or occupied by an executor or administrator, he shall account for the income thereof as ordered by the probate court." Pub. Stat. chap. 144, § 5. Stat. 1789, chap. 2, reads as follows: "When a dispute shall arise respecting the occupancy, use, and improvement of real estate in the hands of the executor or administrator, and the *quantum* he ought to credit in his account therefor," etc., an executor can account for the income of real estate which he has occupied, by charging himself with a proper sum as rents and profits, or by charging himself with the net receipts and products from it, and the statute includes either mode of accounting. An executor may himself use the real estate, living in the house, or carrying on the farm for his own use, as if tenant, in which case he would account for the income by charging himself with the use and occupation; or he may occupy it as if bailiff, collecting rents from tenants, or carrying on the farm for the estate, in which case he would account for the income by charging himself with the rents and products received. In the former case the produce of the farm would belong to him personally, in the latter it would belong to him as executor. Whether a particular occupancy is of the one character or the other is an inference from the particular facts affecting it. In this case it is found, as a fact, that the farm was carried on for the estate of the testator, and with the intent and purpose that the proceeds should belong to the estate. The evidence shows that the particular reason for doing this was to benefit the personal property of the estate,—to increase the value of the stock upon

the farm by keeping it, upon the produce of the farm, for a better market.

It is inconsistent with this to regard the produce of the farm as belonging to the executors personally, to be removed from the farm by them or their creditors at pleasure. The conversion by the defendant was in the month of January; the property converted was products of the farm, remaining upon it, which had been produced and was held by the plaintiffs as executors. If on that day they had vacated their office, and an administrator had been appointed in their place, we cannot doubt that the property in such products of the farm, as well as in the stock upon it, held by them as executors, would have passed to the administrator. They had then rendered no account. It does not appear when or in what form their account was afterwards rendered; but it was to be presumed that their account, when rendered, would conform to the facts, like the accounts in *Edwards v. Ela*, 5 Allen, 87, and would charge them with the specific property as assets of the estate. It does not appear that they have not already done so.

Upon the facts found by the jury, and assumed to be true, the inference of law is that the property converted belonged to the plaintiffs as executors.

Exceptions overruled.

Franklin F. PATCH

v.

City of BOSTON.

The duty of assessing, in the first instance, damages for land taken by the court house commissioners for a new court house in Boston, under the Statute of 1885, chap. 377, belongs to the street commissioners, and not to the court house commissioners.

(Suffolk—Filed January 6, 1888.)

ON petitioner's exceptions. *Overruled.*

This was a petition for a jury to assess damages to the petitioner for the taking of a parcel of his lands by the court house commissioners, for a new court house, under Acts 1885, chap. 377.

Damages had been assessed by both the court house commissioners and the street commissioners, and both assessments were brought before the superior court for review, and heard together. The court ruled that the court house commissioners had no authority to award damages, and that the petition to revise their award could not be maintained; and the damages were assessed under the other petition.* Whereupon petitioner alleged exceptions.

Measrs. Hutchins & Wheeler, for petitioner:

The language of the Court House Act (Acts 1885, chap. 377) seems to indicate that the court house commissioners were the proper parties to assess the value of the land taken. If they purchased the lands, as they were authorized to do, they were the parties to make the

contract, and set the price; and if, instead of purchasing, they took the land, it seems clear that, as the cost of the land would be a large factor in determining what land to take, the same board that took the land should assess its value.

The Act says that the damages shall be ascertained and determined in the manner provided in the case of laying out ways.

In ascertaining and determining the damages to be paid for ways, it is provided that it shall be the duty of the county or street commissioners, on laying out the same, to estimate the damages.

Pub. Stat. chap. 49, §§ 14, 84.

The same tribunal which lays out the way assesses the damages, and the true construction of the provision in the Court House Act, that the damages shall be ascertained in the manner provided for ascertaining damages in the case of ways, does not require the introduction of the street commissioners into a matter with which they have no connection, but the proceedings by the court house commissioners with respect to damages, and the manner of appeal therefrom, shall be the same as in the case of assessment of damages by the street commissioners.

Worcester v. County Comrs. 100 Mass. 103, was a very different case from the present.

Mr. T. M. Babson, for defendant:

Acts 1885, chap. 377, § 2, provides that "the city shall be liable to pay all damages that shall be sustained by any person or persons by reason of the taking" of land for the court house: "such damages to be ascertained and determined in the manner provided for ascertaining and determining damages in case of the laying out, altering, or discontinuing of ways in the city of Boston." Similar provisions contained in Acts 1869, chap. 351, have been before this court for adjudication, and it has been decided that the damages must be estimated by the county commissioners.

Riley v. Lowell, 117 Mass. 77.

In Boston the street commissioners assess damages for laying out, altering, or discontinuing of ways.

Pub. Stat. chap. 49, § 84.

C. Allen, J., delivered the opinion of the court:

This was a petition to the superior court, setting forth that the petitioner was the owner of a parcel of land on Somerset Street in Boston: that the court house commissioners, appointed by the mayor of Boston, had taken said land for a court house, under Stat. 1885, chap. 377: that he had been offered by said commissioners a very much less sum than the damage sustained by him; and praying that his damages might be ascertained by a jury, at the bar of the superior court.

It appeared that the street commissioners also had made an award of damages for the same taking, with which the petitioner was dissatisfied, and accordingly had filed another petition, praying that his damages might be ascertained by a jury at the bar of the superior court.

Both of these petitions came on to be heard together in the superior court, and, after the reading of the petitions and answers, the petitioner declined to elect which petition he would

*See next case.

go to trial on. No objection to the form of proceedings was made by the city in either case; but, in the answer to each petition, the city said that, if any land or property of the petitioner had been taken for any public use of the city of Boston, the city was, and ever since such taking had been, ready and willing to pay all damages caused thereby, for which it was liable. Under these circumstances, the petitioner declining to elect which petition he would go to trial on, the court ruled that the court house commissioners had no authority to award damages for the taking of the petitioner's land, but that the street commissioners of the city of Boston were the persons to award the damages, and therefore that the present petition could not be maintained. The parties went to trial upon the other petition, without any exception being saved by the city, and the petitioner's damages were assessed by the jury.

By Stat. 1885, chap. 877, the board of commissioners, appointed by the mayor, is authorized to take land for a court house, by purchase or otherwise, and the city is to be liable to pay all damages that shall be sustained by any person or persons by reason of the taking of such land; such damages to be ascertained and determined in the manner provided for ascertaining and determining damages in case of the laying out, altering, or discontinuing of ways within the city of Boston. In Boston such damages are determined, in the first instance, by the street commissioners; that is, they have the same power in Boston as county commissioners in other counties, and this includes the estimate of such damages. Pub. Stat. chap. 49, §§ 84, 14. A party aggrieved by the doings of the street commissioners in the estimation of damages may apply for a jury, by petition to the superior court. § 86.

Under a statute somewhat similar to the one now under consideration, viz., the Statute of 1864, chap. 105, authorizing the city of Worcester to supply itself with water, and providing that all damages should be assessed in the manner provided in the general laws in regard to highways, it was held that a claimant should petition, in the first instance, to the county commissioners. *Worcester v. County Comrs.* 100 Mass. 103. To a similar effect is *Riley v. Lowell*, 117 Mass. 76.

Certain differences in matters of detail have been pointed out by the counsel for the petitioner, but the reasons assigned by the court in those cases, in substance, cover the present case. If the Legislature had intended that the court house commissioners, being a special body created for the particular purpose, should make the assessment of damages, they would have been likely to say so in express terms. Usually, we believe that, when any special board or committee is to make the first assessment of damages, the statute plainly so provides. But where the provision in reference to the ascertainment of damages is merely a general one, referring to the mode of ascertaining damages in other cases of frequent occurrence, it is natural and reasonable to suppose that all the incidents of such mode are included, as far as the same are applicable. Especially should this construction be given to the Statute of 1885, chap. 377, which contains no express provision for a jury in any case. If the Legislature had meant

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that the court house commissioners should assess the damages in the first instance, it would have been natural and probable that an express provision for a jury would have been inserted. But if they meant that the street commissioners should assess the damages, there was no occasion for such special provision, as the general provision already referred to would cover it. On the whole, we think it the better construction of the statute to hold that the duty of estimating damages in the first instance belonged to the street commissioners.

Exceptions overruled.

Franklin F. PATCH

v.

City of BOSTON.

1. In assessment of damages for land taken by a city for public use, evidence of the cost of an addition to a building thereon is not admissible as an element of market value of the whole property.
2. The expressed opinion, by the owner and occupant of a house for seventeen years, of its value, is competent evidence against him, without proof of his qualification to judge of its value.
3. Exceptions to evidence, admissible in the discretion of the court, will not be sustained unless manifest error has been committed.
4. The value of lands and buildings so taken may be shown by the price at which similar property in the same vicinity was sold a few months after the taking, where there is no claim of allowance for increased value by reason of the improvement.

(Suffolk—Filed January 9, 1888.)

ON petitioner's exceptions. *Overruled.*
This was a petition to the superior court for a jury to revise an award of the street commissioners of the city of Boston, giving damages to the petitioner for the taking, on August 3, 1885, of a piece of land, with a dwelling-house thereon, on Somerset Street, in Boston, by the commissioners for the erection of a new court house for Suffolk County, under Acts 1885, chap. 877.

At the trial the petitioner testified that about May 1, 1885, three months before the taking, he built an addition to the L of said dwelling-house, making it a story higher, whereby another room was added to the building, and offered to show the cost of said addition; but the court ruled that evidence of the cost of said addition was incompetent, and excluded the same.

On cross-examination the petitioner was asked by the counsel for the respondent whether he had not stated to one Browne, an assessor, in 1884, that his house was worth less than \$22,000, to which he replied that he had not. The respondent afterwards offered to show by Browne that in the first week in May, 1884, Browne and his clerk met Dr. Patch, the peti-

tioner, coming out of his house, and he asked them what his house was taxed for; that they told him that the year before, *i. e.*, 1883, it was taxed for \$22,000, and that the petitioner said: "That is too much, you ought to reduce it; it is more than it will sell for; it is more than it is worth;" that Browne said he could sell it for him for that; and that the petitioner said he did not want to sell, but it was more than it was worth. To this evidence the petitioner objected; but the court ruled that it was admissible, and admitted the same. Except as hereafter stated, there was no evidence that the petitioner was acquainted with the value of the property, or that he was fitted to give an opinion upon it; and he was not asked by either side what his opinion of its value was.

The petitioner owned the estate for about seventeen years, and during that time occupied it as his dwelling-house until a few months before the taking.

The respondent also offered to put in evidence the price at which two other pieces of land, with buildings upon them, on Somerset Street, near the estate of the petitioner, were sold in 1886, a few months after the taking; it appearing that the effect of the taking had been, if any, to increase the value of such property. To this evidence the petitioner objected, but the court found that the estates were situated similarly to that of the petitioner, and admitted the same.

The jury returned a verdict assessing the petitioner's damages.

To all of the above rulings, admitting and excluding evidence, the petitioner duly excepted.

Messrs. Hutchins & Wheeler, for petitioner:

The cost of the addition made just before the taking was clearly competent to have been submitted to the jury as an element tending to assist them in determining the value of the estate at the time of the taking. In an action to recover the value of a canal boat destroyed by the defendant, the plaintiff was allowed to show the fact that, shortly before, he had expended \$300 in repairs upon her.

Dowdall v. Pennsylvania R. Co. 13 Blatchf. 408; *Leonard v. Whitwell*, 19 Fed. Rep. 547.

If the house upon the petitioner's land had been erected three months before the taking, evidence of the cost thereof would have been admissible on the question of the value of the estate.

Even where the article, the value of which is in question, is well known and constantly for sale in the market, the plaintiff, to prove its value, may show in detail the cost of manufacture,—“not as a test, but as one of the elements to aid the jury in determining the fair market value.”

Clement v. British American Assur. Co. 2 New Eng. Rep. 57, 141 Mass. 288.

Declarations made by a party to the suit may be introduced against him, to prove whatever is relevant to the issue; but things irrelevant to the issue are not made competent because they can be proved by declarations of the adverse party.

1 Greenl. Ev. § 203.

The statement in this case was not relevant to a fact in issue, and was not material to the

issue; because the value of land is matter of opinion, and not of fact.

Shaw v. Charlestown, 2 Gray, 107.

It was not shown that the petitioner was familiar with the value of land in that vicinity, so that his opinion could be received. It did appear that he had owned and occupied the estate for some years; and if he had said that he was familiar with the value of the land, his opinion, given under oath, might have been admissible, but without such a statement his opinion was not.

Fowler v. County Comrs. 6 Allen, 92.

As it was inadmissible to prove the opinion by direct evidence, it was also inadmissible to prove it by his declaration.

“The question is not, What estimate does the owner place upon the land?—but, What is its real worth in the judgment of honest, competent, and disinterested men?”

2 Wood, R. R. 926.

A statement of value made by a landowner to an assessor is not admissible against him.

Virginia & T. R. Co. v. Henry, 8 Nev. 165.

That an owner bonded his land at a certain price per acre is not admissible against him as showing the value placed by the petitioner on his own land.

Chapin v. Boston & P. R. Co. 6 Cuah. 423.

In the case at bar, the statement was made fifteen months before the taking, and was an opinion as to the value of the estate at that time, and not at the time of taking. It was therefore too remote in time.

Green v. Fall River, 113 Mass. 262.

It is no reason for the admission of the evidence that the petitioner had denied, on cross-examination, that he had made the statement to the assessor. The statement being immaterial, it was incompetent to contradict the witness.

Hathaway v. Crocker, 7 Met. 262, 264; *Lane v. Bryant*, 9 Gray, 245.

The respondent was allowed to show the price at which neighboring houses were sold soon after the taking, on the ground that they were similarly situated. This was improper, because it multiplied the issues by involving a comparison of the buildings sold with that of the petitioner.

Gouge v. Roberts, 53 N. Y. 619.

Mr. T. M. Babson for defendant.

C. Allen, J., delivered the opinion of the court:

The exceptions in the present case present three questions as to the exclusion and admission of testimony.

1. The first question is as to the exclusion of the testimony offered by the petitioner as to the cost of the addition to the L. As a general rule, the market value of the property is the measure of damages. Ordinarily the cost is not material, and especially the cost of some particular improvement, which, however convenient to the owner, may not correspondingly increase the market value. In the case of goods which are constantly manufactured and sold in the market, evidence of the cost has been received, as having a direct tendency to show the value. *Clement v. British American Assur. Co.* 2 New Eng. Rep. 57, 141 Mass. 801. But the addition of special improvements in

buildings does not fall within the same reason. *Allen v. Boston*, 137 Mass. 321. In the present case, all that was offered in evidence to make the cost admissible was that, three months before the taking, the petitioner built an addition to the L of his dwelling-house, making it a story higher, whereby another room was added to the building. There was nothing to show that the cost of this addition would aid in determining the market value of the whole estate, or that the value of the whole estate would depend closely on the cost in detail of improvements made upon it from time to time. We see no error in the exclusion of the testimony.

2. The objection that an owner and occupant of a house for seventeen years must be shown to be qualified to judge of the value of real estate, before his expressed statement of an opinion of its value can be received in evidence against him, savors of too much refinement for practical purposes, and cannot be adopted. Usually such owner and occupant may be presumed to have a sufficient opinion of the value of his property, to make his admission competent against himself. See *Flint v. Flint*, 6 Allen, 34; *Whitman v. Boston & M. R. Co.* 7 Allen, 313. The other objections to his opinion go rather to the weight and importance, than to the competency, of the statements, and cannot prevail. Much must be left to the discretion of the presiding judge in determining whether the time was too remote, and the condition of the property too dissimilar, to make the evidence of value; and exceptions should not be sustained on such grounds, unless a manifest error has been committed. *Shattuck v. Senneham Branch R. Co.* 6 Allen, 117; *Chandler v. Jamaica Pond Aqueduct Corp.* 122 Mass. 305.

3. The last exception taken by the petitioner was to the admission in evidence of the prices at which two other estates on the same street, and near the petitioner's estate, were sold a few months after the taking. It is admitted that, ordinarily, sales of other similar lands in the vicinity, at or about the time in question, may be shown. *Chandler v. Jamaica Pond Aqueduct Corp. supra.* But it is contended that the rule does not include sales of land with buildings thereon, or sales made so long afterwards, and after there had been a change of value. If it had appeared that the buildings upon the lots which were sold were quite unlike those upon the petitioner's land, there would be force in the objection; but this does not appear. Houses on the same street in a city often correspond closely in style, cost, and value. The mere fact that buildings were upon the land does not of itself have the effect to vary the rule of law that sales of other similar lands may be shown, upon the question of value; but it is in such cases, as in all others, to be determined by the court, on the whole, whether there was such a general similarity that the price obtained on the sale of one estate may fairly tend to show the value of the other. The objection founded on the time when the sales were made has, at first sight, more plausibility; but the aspect of the case at the time the evidence was admitted must be considered. The city did not ask to have any allowance made by reason of an increase of value after the taking, but offered evidence to show that,

even with such increase in value as may have resulted from the taking of land for the court house, estates in the vicinity had been sold at rates lower than the petitioner claimed as the value of his property. It might, indeed, have been different if the defendant had asked the jury to form an opinion as to the rise in value, and to make allowance for that; but the position of the defendant, as we understand the bill of exceptions, was just the reverse; the defendant, in substance, said: "We will offer, as a standard, sales made at a later date, when the effect, if any, had been to increase the value of such property. We will give you the benefit of that; and even then your claim is excessive."

There was nothing to show that, in point of fact, there had been any substantial increase of value, or that it was contended before the jury that there had been. It must now be presumed that the city made no claim on the ground of any such supposed increase of value; and in this aspect the petitioner has no ground of exception.

Exceptions overruled.

Timothy SHEA

v.

Inhabitants of MILFORD.

1. A committee appointed by the town of Milford to consider location, plans, and estimates, and to make recommendation as to the erection of the Memorial Hall authorized to be built by the town, by Stat. 1883, chap. 119, reported to the town meeting, recommending the location on which the hall was afterwards built, and the plans and specifications of a certain architect, and "reported that the price should not exceed \$20,000." Held, that this did not mean that the committee recommended that the town should vote that the cost of the building should not exceed \$20,000, but was simply an expression of opinion that the building could be built for that sum; and that hence the acceptance of such report by the town meeting did not limit the town to the expenditure of \$20,000 for the building.
2. The town meeting voted that the committee should locate and build a memorial hall. The material portion of the report of the committee adopted by the town meeting, in reference to specifications, was as follows: "Specifications of material and labor required in the erection and entire completion of a memorial building, * * * said building to be built in accordance with drawings and other specifications furnished by the architect, and under his superintendence. Conditions: The contract will include all labor and material necessary to carry into entire completion all the work, of every name and nature, shown by drawings, except such parts as the specifications expressly designate to be furnished by the town. * * * No

charge of any kind shall be made for extra work, except said work be ordered in writing by said architect. All orders for extra work, or claims therefor, must be presented to the committee within thirty days from the issue of said order." *Held*, that under this action of the town, the plan and specifications reported by the committee were adopted by the town as a **limitation of the power of the committee**, and the committee was authorized to locate and build only according to the plan and specifications; but that, under the provision regulating claims for **extra work**, the committee had **authority** to add to or to change the specifications, in order to remedy defects in them, and to improve them in minor details, within reasonable limits; that this extra work must be done under particular contracts, and such contracts could be made either with the general contractor or any other person.

3. The town meeting voted that, for the purpose of building a memorial hall, the town should raise by taxation \$3,000, and should borrow \$20,000. The vote did not expressly prohibit the committee from incurring liabilities beyond the amount of the appropriation. *Held*, that a **prohibition against the committee's contracting for extra work** beyond the amount of the said appropriation, if circumstances should justify and require such extra work, was **not implied**.
4. *Held, further*, that the said committee were agents of the town, and not a judicial body or a board of public officers; and that therefore a ruling that the **committee could act only as a body, and not by the agreement of individual members separately obtained**, was erroneous.

(Worcester—Filed January 6, 1888.)

ON plaintiff's exceptions. *Sustained*.

This was an action brought to recover for labor and materials furnished by plaintiff in the erection of the Memorial Hall in Milford.

At the trial, the court directed a verdict to be taken for defendant, and plaintiff alleged exceptions.

The facts are fully stated by the court.

Messrs. W. A. Gile and W. S. B. Hopkins, for plaintiff:

There are two questions raised by the exceptions: (1) as to the competency and manner of proving the action or agreement of the town's committee, and of the agency of Swasey as the agent of the town; and (2) as to the sufficiency of the proof to bind the defendant, either through the action of the committee or the agency of Swasey.

The ruling of the court is a ruling, in effect, that the agents of a town, composed of a committee to build a hall, must act and vote in the presence of each other, and in "session," as the court expressed it.

The committee of the town are its agents, and not a board of public officers.

Deane v. Randolph, 182 Mass. 475.

Their acts can be proved like any other agents', within the scope of their authority. Their declarations, or the declaration of one of them, concerning the matter within the scope of their authority, made to a contractor for a building which said committee is authorized to build, are competent evidence against the town.

Blanchard v. Blackstone, 102 Mass. 843; *Morse v. Connecticut River R. R. Co.* 6 Gray, 450; *Burgess v. Wareham*, 7 Gray, 349.

When a contract was signed by only one of a committee, as is usual where a written contract is made by a committee, it is competent to show that the member signing acted upon the verbal request of other members of the committee.

Haven v. Lowell, 5 Met. 35.

There was evidence in this case competent to show that, by accepting the building with the brown stone in it, the town was bound by implication of law.

Melledge v. Boston Iron Co. 5 Cush. 158, 175, 176; *Canal Bridge v. Gordon*, 1 Pick. 297; *Bank of Columbia v. Patterson*, 11 U. S. 7 Cranch, 299 (8 L. ed. 851); *U. S. Bank v. Dandridge*, 25 U. S. 12 Wheat. 64 (6 L. ed. 552).

Messrs. Thomas G. Kent and George T. Dewey, for defendants:

The town is not responsible for any provisions in the contract not warranted by the vote.

It is wholly immaterial what authority, inconsistent and incompatible with the action of the town, was conferred by the contract on any person. It would not bind the town.

Keyes v. Westford, 17 Pick. 273.

The plaintiff was a subcontractor to do the stone work provided for in the contract with the town. His contract is with the general contractors, and he has no contract with the town. If any extra work was done by him, he might perhaps recover of his employers, but he cannot recover of the town unless the town made a contract with him, express or implied.

At the trial plaintiff neither showed any authority from the town to make any contract for extra work, nor did he show that, under the contract with Mead, Mason, & Co., if applicable to him, he would be entitled to recover in this suit:

The proposition to be proved was that the town owed the plaintiff \$2,500 for brown stone. The oral evidence of Stratton was offered to show that the committee, by their informal action, had authorized Swasey to contract for the brown stone.

If the whole committee acting together could not bind the town to any extra expense, certainly it would be of no consequence what they decided on individually; and the ruling of the court as to the way the committee must act to be binding would not injure the plaintiff, and was of no consequence.

But the ruling was right. It did not appear that the committee ever acted. It was only after the meeting of the committee adjourned that the change to brown stone trimmings was talked over. The matter was never considered in meeting.

Lord v. Lord, 5 E. & B. 404; *Wade v. Dowling*, 4 E. & B. 44; *Peterson v. Ayre*, 15 C. B. 724; *Reed v. Scituate*, 5 Allen, 124; *Haven v. Winnisimmet Co.* 11 Allen, 386.

W. Allen, J., delivered the opinion of the court:

The committee were agents of the town, and not a judicial body or a board of public officers; and the ruling of the court that the committee could act only as a body, and not by the agreement of individual members separately obtained, cannot be sustained. *Haven v. Lowell*, 5 Met. 35.

The defendant contends that the further ruling that there was no evidence sufficient to show agency on the part of Swasey, or action by the committee, was right, for the reasons that the committee had no authority to make, or authorize to be made, the contract under which the plaintiff claims, and that the evidence was not sufficient to prove that contract.

The committee was appointed by the defendant town to build a memorial hall. Mead, Mason, & Co. contracted with the committee to erect the building according to certain specifications. The plaintiff contracted with Mead, Mason, & Co., to do all the stone work according to the specifications. The plaintiff's bill of particulars contains five items for materials and labor, which he claims were not included in his contract with Mead, Mason, & Co., but were furnished under a contract or contracts between him and the defendant, through the committee and Swasey, the supervising architect. The largest of these items, and the only one in reference to which any evidence was given, is \$2,500 for brown stone trimmings for the building. It is not disputed that these trimmings were put in by the plaintiff, and that they were not included in the specifications. The first question is as to the authority of the committee to contract for work outside of the contract with Mead, Mason, & Co.

The Memorial Hall was built under authority of Stat. 1883, chap. 119, which authorized the town to borrow, for the purpose, a sum not exceeding \$20,000, but put no limit upon the amount the town might expend.

In November, 1883, a committee which had been appointed in the April preceding to consider location, plans, estimates, and to make recommendations, reported—to quote the words of the exceptions—"recommending the location on which the hall was afterwards built, and the plan and specifications of Fred. R. Swasey, architect; and reported that the price should not exceed \$20,000." We would say here that we do not understand by this that the committee recommended that the town should vote that the cost of the building should not exceed \$20,000, but that they expressed the opinion that it would not,—meaning the same as if they had said "ought not" or "would not." In the absence of the language of the report, and upon the mere statement of its substance, the plaintiff ought not to be bound by a meaning that is not clear; and the fact that this is not among the things recommended in the report, and the action of the town at the same and at a subsequent meeting, indicate that the committee intended, and was understood to express their opinion, that it could be built for that sum. The report was accepted and placed on file, and the committee instructed to receive proposals for a building.

At a town meeting in March, 1884, the following votes were passed

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"Voted that the report and plans of the Memorial Hall committee be adopted. Amended. Also location adopted. Also that the same committee locate and build the same.

"Voted that, for the purpose of building a memorial hall, we raise by taxation the sum of \$3,000 and that the town borrow the sum of \$20,000, payable in equal installments of \$5,000, in one, two, three, and four years."

The specifications reported by the committee in November, 1883, so far as material, were as follows:

"Specifications of material and labor required in the erection and entire completion of a memorial building for the town of Milford, said building to be erected on the corner of Spruce and School streets in said Milford, and to be built in accordance with drawings and these specifications, furnished by Fred. Swasey, architect, of said Milford, and under his superintendence. Conditions: The contract will include all labor and material necessary to carry into entire completion all the work, of every name and nature, shown by drawings, except such parts as the specifications expressly designate to be furnished by the town. * * * No charge of any kind shall be made for extra work, except said work be ordered in writing by said architect. All orders for extra work, or claims therefor, must be presented to the committee within thirty days from the issue of said order."

The first question which arises under this action of the town is whether the plan and specifications reported by the committee were adopted by the town as a limitation upon the powers of the committee. We think that they were, and that the committee was authorized to locate and build only according to the plan and specifications. This would require the committee to make one contract for the completion of the building. They could not materially change the location or the specifications for the building. The town had voted to build according to the specifications, and under one contract for the completion of the building, and had authorized the committee to build. While it was the duty of the committee to make a contract for the completion of the building in substantial accordance with the specifications, they had authority to add to or to change the specifications, in order to remedy defects in them, and to improve them in minor details, within reasonable limits. This authority would be implied, and it was recognized in the specifications themselves in the provision regulating claims for extra work. Of course extra work—work not included in the general contract—must be done under particular contracts; and such contracts could be made with the general contractor or with any other person. We cannot say that the committee did not have authority to contract for the extra work which the plaintiff says he performed. This question does not appear to have been raised at the trial, and the evidence is not stated with reference to it. The principal item of the plaintiff's account is for brown stone trimmings. It does not appear what the specifications were which were changed; nor what, if any, the increased cost was; nor how important the change was.

The other items are all for extra labor, and vary in amount from \$200 to \$1,000. No evi-

dence whatever was offered in regard to them; and we cannot say that the committee had not authority to make contracts for the labor described.

After the votes of the town, the committee made the contract with Mead, Mason, & Co., by which the price to be paid for the building was \$20,324.40. The defendant contends that the committee was limited to an expenditure of \$20,000, and that, having contracted for more than that amount, they had no authority to make a contract which involved any further payment. We have already said that we do not regard the vote adopting the report of the committee as a vote that the expenditure should be limited to \$20,000.

It is further argued that the committee could not make any contract which involved an expenditure in excess of the whole amount appropriated by the town,—\$22,000. The vote does not expressly prohibit the committee from incurring liabilities beyond the amount of the appropriation, and we do not think that such prohibition can be implied. While it was probably intended to make an appropriation large enough to cover the contract price and such "extra work" as would be likely to be required, there seems to be no prohibition against contracting for extra work, beyond the amount of the appropriation, if circumstances should justify and require it. Under what circumstances such a contract would be valid we need not consider, because it is not material to the decision of the question before us. It does not appear that the contract in question involved an expenditure beyond the amount appropriated. There was \$1,675 left of the appropriation after the payments provided for by the contract with Mead, Mason, & Co. It is probable that some of this was used, but that does not appear in evidence. The plaintiff appears to have sued for the entire cost of the brown stone trimmings, on the ground that the contract for them was made directly with him. There would presumably be an allowance made by the plaintiff to Mead, Mason, & Co., and by them to the defendant, for corresponding items in the specifications of which these took the place. How much that would be does not appear, though there is some evidence that it was supposed by the committee that the expense would not be increased by the substitution. It may be that the reduction from the contract price would equal the amount of the plaintiff's charge. The other items of the plaintiff's account are for labor, and no two of them exceed the amount of the appropriation apparently remaining not used; it may be that all the extra work done by the plaintiff would not exceed that. These matters were rendered immaterial by the ruling of the court, and no evidence was offered in regard to them.

The course of the trial is apparent from the exceptions. The plaintiff put in documentary evidence, to prove the authority given to the committee by the defendant. He then proceeded to prove that authority was given by the committee to Swasey, and that Swasey ordered the work done; and called one Stratton, a member of the committee, and offered to prove by him that three members of the committee, including Swasey, who was a member of the committee as well as the architect, stated to him

that they agreed to the change; and that he agreed to it; and that Swasey, in the presence of the witness, told the plaintiff that he had seen the committee, or a majority of the committee, and they had agreed to have the brown stone trimmings. The testimony of this witness was objected to, and was heard *de bene* by the court; and, at its conclusion,—on the statement by the counsel for the plaintiff that he relied upon no other or different kind of evidence, to prove authority in Swasey, than the documentary evidence, and the statement of members of the committee, such as those testified to by Stratton,—the ruling was made by the court. The ruling, as we understand it, was to the effect that any evidence of the action of the committee, except when it was in session as an organized body, was not competent; that the evidence offered by the plaintiff should be excluded; and the corollary from that, that there was no evidence in the case, sufficient to show authority in Swasey to make the contracts with the plaintiff. Under this ruling, evidence that all the members of the committee agreed to authorize Swasey to order the change; that Swasey did in fact order it in writing; that the plaintiff's claim was duly presented to the committee; or that any of these things had been in any way dispensed with or waived,—became immaterial and incompetent.

The ruling of the court that the evidence was not sufficient could not have been on the ground that the plaintiff did not insist upon putting in evidence that the members of the committee agreed to the change, or that Swasey ordered it, after he had stated the character of the evidence that he had to offer, and the court had ruled that it was not competent. But if the ruling that the evidence was not sufficient can be separated from the ruling that the evidence of agency was incompetent, and taken as an independent ruling upon evidence in the case, we think that it cannot be sustained. Swasey was the architect having superintendence of the whole work, and through whom orders for extra work must pass, and was also a member of the committee. The testimony of Stratton was sufficient to show that, after there had been conversations among members of the committee, and between members and the plaintiff, in regard to having brown stone trimmings, Swasey told the plaintiff that the committee, or a majority of the committee, had agreed to have it done; and that the plaintiff went on and did the work with the knowledge and approval of the committee; and that the work was accepted by the committee. This was some evidence of agency in Swasey, and of action by the committee, to authorize additional work; that is, the substitution of brown stone trimmings for the corresponding specifications. The words, "at additional expense," in the ruling, are immaterial,—as applied to the item for brown stone trimmings, at least,—because it does not appear that any additional expense was involved. The record does not show it; the item does not purport to be for extra work, as the others do. The evidence only tends to show a contract with the plaintiff to furnish the trimmings, as a substitute for a contract with Mead, Mason, & Co. to furnish some other trimmings; but there is no presumption or evidence that it was

to be at expense additional to the appropriation, or even to the contract price. The action of the plaintiff is to recover the full worth of the trimmings, which he furnished under a contract between him and the defendant, through Swasey, thereto authorized by the committee. If a valid contract was made, and he performed it, he is entitled to recover according to its terms. If one of its terms was that it should not increase the cost of the building over the contract price, then the plaintiff can recover only so much as the contract price was reduced by his contract. It is not matter of law, nor a fact in the case, that the contract price has been paid in full; nor that it has not been reduced, on account of the plaintiff's contract, by more than enough to pay his claim.

We think, however, that the ruling must be taken to be a ruling that the evidence offered was not competent to prove any action of the committee, and that the plaintiff had, for that reason, failed to prove his case; and not as a ruling as to the sufficiency, to prove every part of the plaintiff's case, of evidence offered only to prove one part, and held to be incompetent for that.

Exceptions sustained.

Timothy SHEA

Town of MILFORD *et al.*

In a suit against a town, by a subcontractor for the erection of a public building, for conversion of sheds, engine-house, engine, lime, cement, etc., where the town had notified the plaintiff to remove the property from one place to another on its own land, and, upon his refusal, it had, in assertion of its right in the land, made such removal, recognizing the right of property in the chattels to be in the plaintiff, there can be no recovery for the value of the property.

(Worcester—Filed January 6, 1888.)

ON plaintiff's exceptions. Overruled.

This was an action of tort for conversion of certain personal property owned by the plaintiff, and used by him as a subcontractor in doing the stone work for the construction of Memorial Hall of Milford.

Evidence was introduced tending to show that the town of Milford, one of defendants, contracted with the firm of Mead, Mason, & Co. for the construction of a granite-stone building for a memorial hall in Milford, and that Mead, Mason, & Co. sublet the stone work to the plaintiff, and that defendant Swasey was the agent and architect for the town, and as such had the supervision of the building for said town under a contract with Mead, Mason, & Co.; that the time for building said hall, by the contract with Mead, Mason, & Co., was from the making of the contract in March, 1884, until April 1, 1885; that the contract with Shea was until August 15, 1884; that Shea did not complete his part of the work by August 15, but that he was requested by the contractors

and the town's agent, Swasey, to perform work included in the contract by its terms after said time had expired. Evidence was also introduced to show that the defendants' agent, Swasey, requested the plaintiff to perform certain work upon the walls of said building after the alleged conversion of said property, which alleged conversion took place by the direction of Swasey, acting for the town, in April, 1885. The property alleged to have been converted was the plaintiff's sheds, engine-house and engine, plank, staging, lime, cement, and other like personal property used by plaintiff in the construction of said building, and which the plaintiff had placed upon the property of the defendant town under the license implied or conferred, as he alleged, in the contract for building said hall; and which property was removed by defendants to another part of the same lot upon which it had stood.

Judgment for defendants, and plaintiff alleged exceptions.

Further facts appear from the opinion.

Mr. W. A. Gilo, for plaintiff:

All licenses coupled with an interest, and implied from or conferred by a contract, while the contract is in force from which the license is conferred or implied, are irrevocable.

Nettleton v. Sikes, 8 Met. 34.

So long as the obligation under plaintiff's contract was unperformed, and the defendants required him to perform it as part of the contract, the implied license to use the necessary land, and to have his tools, implements, and staging in the most convenient and serviceable place on the land of the defendants, was implied; and this right was inseparably coupled with the duty and obligation under the contract.

The right thus acquired is something more than a mere revocable license, it is in the nature of a grant, as it is part of the grant by implication.

2 Bouv. Inst. 568; *Wood v. Ledbetter*, 13 M. & W. 838.

It is not essential that the interest of the licensee should be in the thing to which the right given relates, or on which it is to be exercised. All that is necessary is that the licensee should possess some right which depends on the continuance of the license to enable him to enjoy.

Boults v. Mitchell, 15 Pa. 371.

Messrs. Thomas G. Kent and George T. Dewey, for defendants:

If the plaintiff had any right to use any portion of the land for the purpose claimed, he did not have the exclusive right; but the town also had a right of occupation as owner, and the plaintiff could not have maintained trespass.

Tappan v. Burnham, 8 Allen, 70.

The removal of the property from one place on the town's lot to another, under the circumstances disclosed, did not amount to conversion.

Furnessworth v. Lowery, 184 Mass. 512, 519, and cases; *McParland v. Read*, 11 Allen, 281; *Heald v. Carey*, 11 C. B. 977.

If the plaintiff was in the occupation of certain land of the town, under a license for the performance of a contract which had not been executed, the town had a right to revoke the license unless the license was a necessary part of the contract.

Drake v. Wells, 11 Allen, 141.

W. Allen, J., delivered the opinion of the court:

The property of the plaintiff alleged to have been converted by the defendants was on land belonging to and occupied by the defendant town. The town requested the plaintiff to remove the property to another place on the same parcel of land, and the plaintiff refused to do so, whereupon the defendants removed it to the place assigned by the town. The instruction that, if the plaintiff unreasonably neglected to remove the property, and the defendants removed it to another part of the lot, doing no unnecessary damage, the plaintiff could not recover, was sufficiently favorable to the plaintiff, even if he occupied under a license which had not been revoked. The evidence negatived a conversion of the property by the defendants, and showed that they claimed no title to it, assumed no dominion over it, and did nothing in derogation of the plaintiff's title to it; and that all that was claimed by the defendants was the right to remove the goods from one place to another on their own land. All that was done was in assertion of their right in the land, and in recognition of the plaintiff's right of property in the chattels. If the plaintiff had the right to occupy the land which he claimed, the act of the defendants was wrongful, and they would be liable to the plaintiff for damages for breach of contract, or for the trespass, but not for the value of property converted to their own use. *Farnsworth v. Louery*, 184 Mass. 512; *Fouldes v. Willoughby*, 8 M. & W. 540; *Heald v. Carey*, 11 C. B. 977.

It is immaterial whether the plaintiff had an unrevoked license to occupy the land, and we express no opinion upon that question.

Exceptions overruled.

William W. BROOKS, *Libellant*,

v.

Mattie BROOKS, *Libellee*.

In libel for divorce, evidence of sexual intercourse a short time before the marriage, had by the libellee with the same person with whom she is charged in the libel with acts of adultery after marriage, is admissible.

(Norfolk—Filed January 6, 1888.)

ON libellee's exceptions. *Overruled.*

This was a libel for divorce, charging that the libellant and libellee were married at Boston in the county of Suffolk, on the 15th day of June, 1886, and thereafter lived together as husband and wife within the Commonwealth of Massachusetts; that said libellant had always been faithful to his marriage obligations, but that the said libellee, being wholly regardless of the same, did on or about the said 15th day of June, 1886, at Boston, aforesaid, commit the crime of adultery with a person to libellant unknown, but by information of the name of Charles R. Percival; and that on divers other days and times between the said marriage and the date of the libel, at said Boston, and at other places to libellant unknown, the libellee

committed adultery with said Percival and with certain other persons whose names are unknown to libellant, and prayed that absolute divorce might be decreed.

The libellant offered evidence that sexual intercourse was had by the libellee with one Percival, at a hotel in Boston, in the forenoon of the day of the marriage, and before the marriage, which was on June 15, 1886, and also offered evidence of certain familiarities with said Percival, consisting of visits by said libellee to the room of said Percival in said hotel, within a short time preceding said marriage. To this evidence the libellee, by her counsel, objected, and the court admitted the same solely on the ground that it tended to prove sexual intimacy with the same person who was charged in the libel with acts of adultery with the libellee after marriage, and to support which other evidence was offered and received without objection. The court found, as a fact, that the libellee was guilty of adultery with Percival after marriage, but did not find that she was guilty of adultery with any other person. To the admission of this testimony the libellee excepted.

Mr. H. Dunham, for libellee:

In the cases of *Commonwealth v. Merriam*, 14 Pick. 518; *Commonwealth v. Pierce*, 11 Gray, 447; and *Commonwealth v. Thraasher*, Id. 450, the court stated the rule that "evidence of another distinct offense is inadmissible to raise an inference as to guilt," but varied as to the application of exceptions to that rule.

In *Thayer v. Thayer*, 101 Mass. 111, the court again stated the rule; but ruled that evidence of other acts of adultery were admissible, whether occurring before or after the act charged, for the purpose of showing an adulterous disposition.

See also *Pond v. Pond*, 132 Mass. 224.

But it is submitted that evidence of antenuptial incontinence does not come within the scope of the decision in *Thayer v. Thayer*, *supra*, nor should in any event.

"The wife could not avail herself of antenuptial incontinence of the husband to substantiate an original charge," says Dr. Lushington in *Graves v. Graves*, 3 Curt. Eccl. 238.

See also *Perrin v. Perrin*, 1 Add. Eccl. 3; *Sullivan v. Sullivan*, 2 Add. Eccl. 290; *Reeves v. Reeves*, 2 Phillim. 127.

And in the present case it was admitted to prove sexual intimacy. Marriage is a pardon to all prior mistakes, and draws oblivion over the past. Such is the tendency of the law (Pub. Stat. chap. 125, § 5), and to admit evidence of antenuptial errors to prove conjugal infidelity would open wide the door to fraud.

Dr. Lushington, in *Weatherley v. Weatherley*, 1 Spinks, 193, with great caution, admitted proof of antenuptial incontinence; but in that case the parties continued along in the same house, and, if the expression may be used, it was laid with a *continuando*; and in the present case the parties did not continue under the same roof, and the offenses are stated with Percival at different places; and the doctrine of that case has never been extended. Again, the libellee is called to answer distinct and different offenses to those charged.

And, as the court has held that evidence that

a woman is in a room with a man, the door being closed, is *prima facie* evidence of sexual intercourse, every married woman who has been "courted" (to use a common expression) could easily be got rid of by a jealous or worn-out husband, by means of the divorce court, by simply bringing his wife into the society of a former wooer.

See *Commonwealth v. Clifford*, 5 New Eng. Rep. 121, 145 Mass. 97.

In the case of *Weatherley v. Weatherley*, 1 Spinks, 193, defendant was a pauper, and even Mr. Bishop is uncertain, upon that case, how to class the revived offense,—as a condonation or what; and it is submitted marriage is something else than a pardon with a "ticket of leave" attached.

2 Bish. Mar. & Div. § 685.

Wm. W. Gaston and T. E. Grover, for libellant:

The evidence objected to cannot be excluded because it is insignificant, or because the time to which it refers is too remote; and even in those cases its exclusion or admission would be within the discretion of the justice who tried the case, and not subject to exceptions. Is the evidence, then, inadmissible for other reasons?

The precise question here raised has been passed upon by other courts:

Weatherley v. Weatherley, 1 Spinks, 193.

So in *Van Epps v. Van Epps*, 6 Barb. 820, similar evidence was admitted.

See also *Simmons v. Simmons*, 11 Jur. 880, cited without reference in *Weatherley v. Weatherley*, *supra*; *Graves v. Graves*, 8 Curt. Eccl. 238; *Bray v. Bray*, 6 N. J. Eq. 628; *Ciocci v. Ciocci*, 1 Spinks, 129.

The evidence was admitted, not to prove a fact which, unsupported by other evidence, would entitle the libellant to a decree, but only to show sexual intimacy; and when evidence of subsequent adultery was introduced, evidence of previous misconduct became competent, because it had a natural tendency to establish the truth of the fact in controversy, and to corroborate other direct evidence put in the case. It showed an adulterous disposition, and thus gave force to the evidence showing subsequent misconduct.

Thayer v. Thayer, 101 Mass. 118; *Commonwealth v. Merriam*, 14 Pick. 521; *Cole v. Manning*, L. R. 2 Q. B. D. 611; *Caldwell v. State*, 17 Conn. 467; *Thayer v. Davis*, 38 Vt. 163; *Commonwealth v. Durfee*, 100 Mass. 146; *Commonwealth v. Nichols*, 114 Mass. 285.

If the libellee's position is correct it could not be shown that she had ever seen or spoken to Percival before her marriage. Her marriage would exclude the very evidence that might protect her if she was guiltless of the offense charged against her.

Evidence of adultery after condonation makes evidence of a previous adultery admissible. "In principle, after a condonation or marriage, there is a presumed abandonment of unlawful connections. But if there is new and independent evidence pointing to a connection at a time subsequent to the period of condonation or marriage,—not merely living in the same house, but pertinent evidence directly pointing,—then the former connection may be shown as

giving force to the inference of subsequent misconduct."

2 Bish. Mar. & Div. 6th ed. §§ 685, 686; *Cumming v. Cumming*, 135 Mass. 390; *Smith v. Smith*, 4 Paige, 482; *Turton v. Turton*, 3 Hagg. Eccl. 350.

If the libellee claims that, under the authority of *Weatherley v. Weatherley*, *supra*, the competency of evidence to prove antenuptial incontinence must depend in any case upon the special circumstances of that particular case, then the evidence was rightly admitted, as its admission was within the discretion of the justice who heard the facts.

Holmes, J., delivered the opinion of the court:

It is settled that evidence of indecent familiarities with the person with whom adultery is charged, and even of sexual intercourse with him at other times after marriage, is admissible to explain the character of ambiguous conduct relied on as evidence of the act of adultery in issue. *Thayer v. Thayer*, 101 Mass. 111; *Commonwealth v. Nichols*, 114 Mass. 285; *Commonwealth v. Merriam*, 14 Pick. 518.

There can be no doubt that evidence of sexual intercourse on the morning of the marriage, and acts of familiarity shortly before, tends in like manner to explain doubtful conduct shortly after it. The objections based on the general rules of evidence are answered by *Thayer v. Thayer*, *supra*.

It is said that marriage operates as an oblivion of all that is passed. But there is no reason for making of this rule a veil of fiction which prevents the facts from throwing their natural light on subsequent events. See *Weatherley v. Weatherley*, 1 Spinks, 193, 196; *Van Epps v. Van Epps*, 6 Barb. 820.

Exceptions overruled.

Calvert HANDY

c.

Le Grand C. TIBBETTS.

Where the record of the trial justice does not show any deposit with him, or any offer to make a deposit, and the copy of a bond approved by the justice, with the same condition as is required in a recognizance, is among the papers produced in the superior court, it is not competent for the defendant to show compliance with the statute provisions under the exceptions in Pub. Stat. chap. 155, §§ 29-32, by parol evidence that he offered to recognize, or that he offered to deposit with the trial justice, and tendered to him, a sufficient sum in lieu of a recognizance,—which recognizance and deposit the justice refused to accept. If the defendant, without fault, failed to perfect his appeal, he has his remedy, not by treating the appeal as perfected, but by proceedings in review.

(Nantucket—Filed January 6, 1888.)

ON petitioner's exceptions. *Overruled.*
Petition by Le Grand C. Tibbetts for leave to enter an appeal. Hearing in the su-

perior court before Thompson, J., who dismissed the petition, and the petitioner alleged exceptions.

The facts sufficiently appear in the opinion.

Mr. J. Brown, for defendant, petitioner:

If the defendant had, as required by the trial justice, given the written bond, the appeal would have been dismissed by the superior court for want of a proper recognizance or deposit of money, as required, upon an appeal from a trial justice in a civil action, by Pub. Stat. chap. 155, §§ 29, 30.

Santom v. Ballard, 138 Mass. 464; *Putnam v. Boyer*, 1 New Eng. Rep. 527, 140 Mass. 285; *Parker v. Snow*, 3 New Eng. Rep. 418, 143 Mass. 423.

The question is, Can the appellate court grant relief to the party aggrieved, who has done all in his power before the magistrate, and has been guilty of no laches? It is hardly just and equitable to leave him to the trouble and expense of a writ of review, which he no doubt could maintain, as in *Keene v. White*, 136 Mass. 23.

Even if there are errors, if a party acts in good faith and all rights are preserved, the court protects.

Wheeler & W. Mfg. Co. v. Burlingham, 137 Mass. 531.

"If by reason of accident or mistake an appeal to the superior court is not duly entered therein, or if for a like reason a complaint founded on an omission to enter an appeal has not been entered by the appellee, the court, upon petition, may allow said appeal or complaint to be entered."

Pub. Stat. chap. 152, § 16; *Noyes v. Sherburne*, 117 Mass. 279; *Leyden v. Sweeney*, 118 Mass. 418.

Mr. H. B. Worth, for plaintiff:

The appeal which the defendant asks leave to enter in the superior court is from a trial justice. Because there was no recognizance as required by Pub. Stat. chap. 155, § 29, the superior court had no jurisdiction to enter the appeal or deal therewith (*Wheeler & W. Mfg. Co. v. Burlingham*, 137 Mass. 531; *Santom v. Ballard*, 138 Mass. 464; *Keene v. White*, 136 Mass. 23; *Putnam v. Boyer*, 1 New Eng. Rep. 527, 140 Mass. 285; *Henderson v. Benson*, 1 New Eng. Rep. 533, 141 Mass. 218), unless the offer to make a deposit with the trial justice was a compliance with Pub. Stat. chap. 155, § 30.

The validity of an appeal presented to the superior court for entry must be determined by the record of the court from which the appeal is taken.

Bowditch Mut. Ins. Co. v. Winslow, 3 Gray, 415.

Parol evidence is not admissible to contradict, alter, or add to the record of the trial justice.

Wells v. Stevens, 2 Gray, 115.

There is no record of a deposit according to Pub. Stat. chap. 155, § 30.

But if the superior court could receive facts outside the record of the trial justice, "an offer to make a deposit" is not sufficient compliance with Pub. Stat. chap. 155, § 30.

The defendant's remedy is by a review of the judgment of the trial justice.

Keene v. White, and *Bowditch Ins. Co. v. Winslow*, *supra*; *Hutchinson v. Gurley*, 8 Allen, 28; *Fuller v. Storer*, 111 Mass. 281.

W. Allen, J., delivered the opinion of the court:

It must be taken to be settled law that an appeal under Pub. Stat. chap. 155, § 28, cannot be allowed (except under the exceptions in § 29) unless the party appealing recognize according to the provisions of § 29, although he may not be in fault, and may be ready and may offer to recognize. *Parker v. Snow*, 3 New Eng. Rep. 418, 143 Mass. 423; *Henderson v. Benson*, 1 New Eng. Rep. 533, 141 Mass. 218, and cases cited. The same rule must be applied to the provisions of §§ 30-32, which constitute the exceptions in § 29. They authorize, in lieu of the recognizance, a deposit by the appellant, with the trial justice, of a reasonable sum, to be fixed by the justice, a certificate of which shall be issued by him to the depositor; and provide that the trial justice shall transmit the sum deposited to the clerk of the superior court, with the papers, and that the clerk shall hold such sum until the final disposition of the case, when he shall pay it as the court may order.

The record of the trial justice does not show any deposit with the justice, or any offer to make a deposit. On the contrary, a copy of a bond approved by the justice, with the same condition as is required in a recognizance, is among the papers produced in the superior court. We think that the ruling of the court was right, and that it was not competent for the defendant to show compliance with the statute provisions, by parol evidence that he offered to recognize, or that he offered to deposit with the trial justice, and tendered to him, a sufficient sum in lieu of a recognizance,—which recognizance and deposit the justice refused to accept. If the defendant, without fault, failed to perfect his appeal, he has his remedy, not by treating the appeal as perfected, but by proceedings in review. *Keene v. White*, 136 Mass. 23.

Exceptions overruled.

GRANITE NATIONAL BANK

v.

Robert G. FITCH *et al.*

1. Part payment of a note by the guarantors thereof, upon agreement with the holders that it should not be deemed payment for or on account of those primarily liable thereon, but should be kept alive for the benefit of the guarantors, does not discharge the makers *pro tanto*.
2. The making and delivery of a note, by the makers of a former note, for the balance unpaid thereon, is not payment, unless accepted in discharge of the original note.

(Suffolk—Filed January 6, 1868.)

ON defendant's exceptions. *Overruled.*
This is an action of contract brought by the plaintiff bank against R. G. Fitch, A. P. Moore, and J. E. Moore, to recover the balance due

upon a promissory note of the following tenor and form:

\$5,000. Boston, Sept. 5, 1884.
Ninety days after date I promise to pay to be order of the Granite National Bank \$5,000, payable at Granite National Bank. Value received.
R. G. Fitch,
A. P. Moore,
J. E. Moore.
(Indorsed) We guarantee the payment of his note.
D. Allen,
J. W. Bradbury.
Two thousand dollars paid December 6, 1884.

Fitch alone defended.

At the trial by the court it appeared, from the defendant Fitch's interrogatories to the president and cashier of the plaintiff bank, and their answers thereto, that, after the reported failure of A. P. and J. E. Moore, two of the signers of said note, and the payment of the \$2,000 indorsed thereon, the guarantors of the note paid to the plaintiff bank the principal part thereof, leaving due a balance of \$217.50, upon the agreement that the bank was to hold the note as security to the guarantors for the amount paid by them, as well as for the balance remaining due to itself.

Subsequently the defendants A. P. and J. E. Moore sent to the plaintiff bank their note for said balance of \$217.50, the amount that remained due at that time on the original note,—which note so sent has never been discounted or paid, in whole or in part, nor accepted by the bank in discharge of the original note.

Upon this evidence the defendant Fitch requested the court to rule as follows: (1) that the payment made by the guarantors on the note in suit to the plaintiff bank, as set forth in the answers to the defendant's interrogatories to the plaintiff, discharged and released the defendant Fitch from his liability on such note to the amount of said payment, and the plaintiff cannot have its action against said Fitch for such amount, notwithstanding the arrangement said to be made with the guarantors; (2) that the giving of the note to the plaintiff bank by the two Moores, party defendants in this action, for the balance remaining due after the payment by the guarantors, as set forth in said answers to interrogatories, extinguished the remainder of the cause of action against the defendant Fitch; and the plaintiff can recover nothing against him in this action.

But the court declined so to rule, and ruled that the aforesaid facts constituted no defense on the part of the defendant Fitch to this action, or any part thereof, and found for the plaintiff for the full amount of its claim, and interest thereon.

To all of which rulings, and refusals to rule, the defendant Fitch duly excepts.

Mr. Z. S. Arnold, for defendant Fitch:

This defendant submits that the court below erred in refusing the first ruling prayed for, because the payment by the guarantors to the plaintiff bank extinguished the note *pro tanto*, and the plaintiff ought not to maintain its action thereon.

This is expressly laid down in—

Edw. Bills, § 724. See also *Pray v. Maine*, 7 Cush, 253; *Hopkins v. Farwell*, 82 N. H. 425. 2 MASS.

The status of the guarantor of a promissory note, so far as his right to demand and notice is concerned, is defined in *Oxford Bank v. Haynes*, 8 Pick. 423; but in other respects, although there is considerable diversity in the decisions on the subject, he seems to be more in the position of a joint promisor or surety, only differing from the latter in that the surety may be sued without demand and notice.

Luqueer v. Prosser, 1 Hill, 256; *Hunt v. Adams*, 5 Mass. 358; *White v. Howland*, 9 Mass. 314; *Hough v. Gray*, 19 Wend. 202; *Douglass v. Howland*, 24 Wend. 35; *Walton v. Mascal*, 13 M. & W. 453; *Gage v. Mechanics Nat. Bank*, 76 Ill. 62; *Belcher v. Smith*, 7 Cush. 482.

The only proper way for the guarantors of a note to assert their rights against the makers is to pay the note, and then bring an action for money paid against the primary debtors.

Edw. Bills, § 724; *Frye v. Barker*, 4 Pick. 382; *Pray v. Maine*, *supra*.

And there is something more than a merely technical objection to the course which the plaintiff claims the right to take. In a suit by the guarantors to recover the amount paid by them, from this defendant, it would be open to him to show equities, which he is debarred from showing in this present action.

Whatever the nominal status of the various parties whose names are on a note as maker, indorser, surety, or guarantor, as between themselves they may show their actual relations, and thus the indorser may be the one primarily liable, and the nominal maker simply a lender of his name for the accommodation of others. And thus with a surety or guarantor.

Appar v. Hiler, 24 N. J. L. 812; *Hendrickson v. Hutchinson*, 29 N. J. L. 180; *Randolph*, Com. Paper, § 908, and cases cited.

And the defendant also submits that it would be going too far in any event to allow this plaintiff to maintain this action in two pieces,—in part for itself and in part as trustee for these guarantors.

As to the second point raised by the exceptions, it seems to involve only a narrow question of law, which is pretty well settled in our Commonwealth and in Maine, where the contract in suit was to be performed. *Prima facie*, the giving and retention of the note for the smaller amount, signed by the two other defendants, was an extinguishment of the remaining cause of action.

Chapman v. Durant, 10 Mass. 47; *Strang v. Hirst*, 61 Me. 9.

To be sure, the plaintiff says that it never accepted the note as payment; but it retained the same; and it appears from the pleadings in the cause that it has discontinued this action as against the other defendants.

Messrs. R. D. Smith and M. M. Weston, for plaintiff:

The first ruling requested was properly refused. The liability of the guarantors of a promissory note is a secondary liability.

Oxford Bank v. Haynes, 8 Pick. 423; *Commonwealth Nat. Bank v. Law*, 127 Mass. 72.

Therefore the payment made by them did not extinguish the note *pro tanto* against the makers; but it was competent for them to make with the plaintiff the precise arrangement disclosed by the bill of exceptions; or they might have had the note indorsed over to themselves.

and brought an action on it against the makers in their own names.

Pinney v. McGregory, 102 Mass. 186, 193; *McGregory v. McGregory*, 107 Mass. 543; Byles, Bills, 10 Eng. ed. 220, and notes.

The second request required the court to find, as a fact, that the note for \$217.50 was taken by the plaintiff in payment. This the court declined to do; and, so far as its ruling involves an inference of fact, this is not open to exception.

The note in suit is a joint and several note.

Hemmenway v. Stone, 7 Mass. 58.

And the rule of law did not require the court to find, upon the evidence, that the \$217.50 was taken in payment.

Melledge v. Boston Iron Co. 5 Cush. 169, 170; *Taft v. Boyd*, 13 Allen, 86; *Green v. Russell*, 132 Mass. 536, 538; *Page v. Hubbard*, 1 Sprague, 335.

C. Allen, J., delivered the opinion of the court:

The guarantors made a partial payment upon the note in suit, but it is found by the court that the payment was made upon the agreement that the payee and holder of the note should hold it as security to the guarantors for the amount paid by them, as well as for the balance remaining due to the payee. This was equivalent to an agreement that the sum paid by the guarantors should not be deemed a payment for, or on account of, the parties primarily liable to pay the note; but that the note should be kept alive, in order to be put in suit for the benefit of the guarantors. If they had paid the whole amount of the note, there is no doubt that they might have taken an indorsement to themselves, and brought suit upon it in their own names. It is not necessary to determine whether, in the absence of any express understanding, a payment in whole or in part by guarantors will have the effect to extinguish the note, wholly or *pro tanto*, though this doctrine is often broadly stated. See Story, Prom. Notes, § 400; Byles, Bills, 7th Am. ed. 173, 224, 225. But clearly, where there is an agreement that the note shall be kept alive, such payment does not discharge the makers. *Pinney v. McGregory*, 102 Mass. 186; *McGregory v. McGregory*, 107 Mass. 543; *Pacific Bank v. Mitchell*, 9 Met. 297, 302; *Williams v. James*, 15 Q. B. 498; *Jones v. Broadhurst*, 9 C. B. 178; *Thornton v. Maynard*, L. R. 10 C. P. 695.

As to the subsequent transaction by which two of the makers sent to the holder of the note their new note for the balance remaining due beyond the amount paid by the guarantors, it is expressly found that the holder did not accept such new note in discharge of the original note; and under such circumstances, according to the well-settled doctrine, the new note is not to be treated as payment. *Cotton v. Atlas Nat. Bank*, 4 New Eng. Rep. 859, 145 Mass. 48, 45.

Exceptions overruled.

Henry G. TOWNE

v.

SPRINGFIELD FIRE & MARINE INS. CO.

1. **Overestimates of value in a proof of loss, which are not fraudulently made, will not avoid a fire insurance**

policy under a clause which provides that the policy shall be void "if the insured shall make any attempt to defraud the company either before or after the loss."

2. Nor will such overestimates render proof of loss insufficient to satisfy condition precedent of the policy, that the insured shall render a statement of his loss in writing before the company shall be liable to pay the insurance.
3. The neglect or refusal of the insured to furnish a detailed statement of loss showing quantities and value, under a Massachusetts standard fire policy, will not of itself defeat the claim or render the proof of loss insufficient; at most, it would only be evidence of an attempt to defraud the company.
4. A provision of the policy, requiring the proof of loss to set forth "all other insurance in detail," is satisfied by setting out in the proof of loss a copy of the description of the property insured by another policy as stated in such policy.
5. When goods in two separate buildings are covered by one policy, and are made distinct subjects of insurance at different amounts, a proof of loss calling for a statement of the parties by whom, and the purpose for which, "the building insured, or containing the property destroyed or damaged," was occupied, should contain a statement of the amount of damage to the goods in each building, and a proof of loss which refers to only one of the buildings is insufficient.

(Hampden—Filed January 7, 1888.)

ON defendant's appeal. *Judgment reversed.*
This was an action to recover the amount of a policy of fire insurance.

Defendant based its defense on two grounds: (1) that technically no proper proof of loss was submitted by plaintiff; (2) that plaintiff willfully swore falsely in his proof of loss, thereby avoiding his claims.

The following is a copy of the proof of loss submitted to the company:

No. of Policy, 336. Amount, \$2,100.
To the Springfield Insurance Co. of Springfield, Mass.

By your policy of insurance, No. 336, dated April 28, 1888, issued at your agency at Barre, subagency at Furnace, expiring April 28, 1894, you insured Henry G. Towne against loss and damage by fire, as more fully appears by the printed portions and conditions of said policy, the written portion being as follows, viz.:

"Amount insured, \$2,100. Premium, \$21.

\$1,800 on his stock in trade, consisting of dry goods, groceries, boots and shoes, flour and produce, crockery, glass and hardware, paints, oils, drugs, and medicines, contained in his two-story and basement frame dwelling and store building, situate in centre of Hardwick; \$100 on his store furniture and fixtures therein; \$200 on his goods stored in old store, situate 5 feet

2 MAR.

orth of new store; with permission to keep gunpowder for sale, not to exceed 5 lbs.; with permission to keep kerosene oil for sale, not to exceed 5 bbls. Other insurance permitted."

Also, there was other insurance on said property to the amount of \$2,100, and no more, as follows, copies of which policies and indorsements are hereunto annexed.

Holyoke Insurance Company of Salem, Mass.

Henry G. Towne. No. 129,849. Amount insured, \$2,100.

\$2,000 on his stock in trade, consisting of dry goods, groceries, boots, shoes, hardware, crockery, and plated ware, and the usual variety of a country store; \$100 on his store furniture and fixtures, whole contained in frame building, occupied as store and dwelling, situate in centre of Hardwick.

Dated April 15. Expires April 15, 1884.

A fire occurred on the 6th day of August, 1883, at about the hour of two o'clock A.M., and originated as follows, viz.:

Cause unknown.

The actual cash value of each specific subject thus situated and insured under the aforesaid policies at the time of loss, and the actual loss and damage by said fire on the same, and for which claim is hereby made, was as follows, viz.:

	Sound Value.	Loss or Damage on Same.	Total Insurance on Same.
Total sound value, and total loss or damage and insurance	5876 57	5862 92	4200 00
	\$5876 57	\$5862 92	\$4200 00

For a more particular statement of same, see "Schedule A," annexed.

Amount claimed of the Springfield Insurance Co. of Springfield, \$2,100.

The property insured belonged exclusively to Henry G. Towne, and no other person or persons had any interest therein.

The building insured, or containing the property destroyed or damaged, was occupied in its several parts by the parties hereinafter named, and for the following purposes, to wit: By Henry G. Towne, for store and dwelling.

The said fire did not originate by any act, design, or procurement on my part, or in consequence of any fraud or evil practice done or suffered by me; that nothing has been done, by or with my privity or consent, to violate the conditions of the policy or render it void; and that no articles are mentioned herein but such as were in the building damaged or destroyed, and belonging to, and were in the possession of, the said assured at the time of said fire; that no property saved has been in any manner concealed; and that no attempt to deceive the said insurance company as to the extent of said loss has in any manner been made.

Any other information that may be required will be furnished on call, and considered a portion of these proofs.

Witness my hand at Warren, this 30th day of August, 1883.

Henry G. Towne,
Assured.

Personally appeared Henry G. Towne, signer of the foregoing statement of loss, and made solemn oath to the truth of the same, and that

no material fact is withheld that the said insurance company should be advised of. Before me, this 30th day of August, 1883.

William H. Kelley,

Justice of the Peace.

State of Massachusetts, }
County of Worcester, } ss.

The cause was submitted to a referee, who admitted the above proof of loss, against defendant's objections, and found for the plaintiff, which finding was affirmed by the court, and defendant appealed.

Other facts appear in the opinion.

Mr. Charles A. Birnie, for defendant:

The plaintiff has never submitted to defendant such a statement or proof of his alleged loss as is required by law.

The referee erred in admitting the pretended proof of loss offered in evidence by plaintiff, and also in ruling that it was a sufficient compliance with the policy, as a condition precedent to plaintiff's right of action.

The statutes of Massachusetts and the standard form of policy require a proof of loss, and that, after such proof has been served, the company shall have sixty days within which to make its election, and either pay to the insured in money the amount of loss or damage, or replace the property injured or destroyed with other property of the same kind and goodness.

Pub. Stat. p. 714.

The doing of these things is a condition precedent, and indispensable to a right of action.

Eastern R. Co. v. Relief F. Ins. Co. 98 Mass. 420; *Jones v. Mechanics F. Ins. Co.* 36 N. J. L. 29; *Lycoming County Ins. Co. v. Updegraff*, 40 Pa. 311.

The essentials of a proof of loss are well recognized and known, and it is not to be assumed that the Legislature intended to abrogate the recognized law, or to abridge the just rights of the insurers in this regard.

See *Callin v. Springfield F. Ins. Co.* 1 Sumn. 434-438.

Mr. C. L. Gardner, for plaintiff:

All that the law requires in the "proof of loss" is a statement in writing, signed and sworn to by the insured, setting forth (1) the value of the property insured; (2) the interest of the insured therein; (3) all other insurance thereon, in detail; (4) the purpose for which and the person by whom the building containing the property insured was used; and (5) the time at which, and the manner in which, the fire originated, so far as known to the insured.

Gen. Stat. chap. 119, § 139.

The statement furnished by the plaintiff fully meets all the requirements of law. The fact that no mention is made of the undertaker who occupied the upper part of "the old store building" is not material,—especially as the defendant is not shown to have been prejudiced by the omission, and the same was not due to any fraudulent purpose on the part of the plaintiff.

Fowle v. Springfield F. & M. Ins. Co. 122 Mass. 191; *Hinckley v. Germania F. Ins. Co.* 140 Mass. 88.

The plaintiff's loss was practically a total one, and he was under no obligation to "give any quantities or items in detail."

Clement v. British American Assur. Co. 2 New Eng. Rep. 57, 141 Mass. 298.

Field, J., delivered the opinion of the court:

The referee overruled the objections of the defendant to the admission of the proof of loss as evidence, having found that the "plaintiff did not willfully swear falsely in his said proof," and ruled that it "was sufficient;" and this is the question of law raised by this appeal. The plaintiff inserted, at the end of the proof of loss, that "any other information that may be required will be furnished on call, and considered a portion of these proofs," but it does not distinctly appear that any other information was called for. The proof of loss contains the provisions of the policy, describing the subject of the insurance and the corresponding provisions of another policy taken out by the plaintiff in another company,—other insurance being permitted,—and it purports to give the "actual cash value of each specific subject thus situated and insured under the aforesaid policies at the time of loss, and the actual loss and damage by said fire on the same, and for which claim is hereby made," by which it appears that, except articles of the estimated value of \$13.66, the claim was for a total loss. For a more particular statement the proof refers to "Schedule A," annexed. "Schedule A" contains in the first clause "stock and fixtures in Hardwick store, as per account taken, \$6,185;" and then follow a few small items of goods bought and sold, and of goods saved, making the whole loss \$5,862.92. The referee has found that the goods were totally consumed by fire, "excepting about \$13.66 worth."

The objections taken to this proof are that it was fraudulently false in the amount stated; did not specify in which of the two buildings mentioned in the policy the goods insured were, or the amounts destroyed in either; and did not give any quantities or items in detail; and that, as there was other insurance on the property, not concurrent, the extent of the claim on the defendant did not appear by the proof.

The referee has found, as a fact, that the proof was not fraudulently false in the amount stated; and this disposes of the first objection.

The policy provides that it shall be void "if the insured shall make any attempt to defraud the company, either before or after the loss;" but overestimates of value in the proof of loss, which are not fraudulently made, do not avoid the policy, or make a proof of loss insufficient to satisfy the condition precedent of the policy that the insured shall render a statement of his loss in writing before the company shall be liable to pay the amount insured. *Little v. Phoenix Ins. Co. 123 Mass. 380, 385.*

The policy was the Massachusetts standard policy, and it provided that, "in case of loss or damage under this policy, a statement in writing, signed and sworn to by the insured, shall be forthwith rendered to the company, setting forth the value of the property insured; the interest of the insured therein; all other insurance thereon in detail; the purposes for which, and the persons by whom, the building insured, or containing the property insured, was used; and the time at which, and the manner in which, the fire originated, so far as known to the insured. The company may also

examine the books of account and vouchers of the insured, and make extracts from the same."

The defendants insured \$1,800 on plaintiff's stock of goods "in two-story frame dwelling and store building;" "\$100 on his furniture and fixtures therein;" and "\$200 on his goods stored in his old store, situated five feet north of new store." The referee finds that the principal building was wholly occupied by the plaintiff as a store and dwelling, and that 10 feet from this building "was an old store building, formerly used by the plaintiff as a store, the upper part of which was occupied by an undertaker, but in the basement of which, as the plaintiff testified, was 'about \$300 worth of the plaintiff's goods,' which were totally consumed. The proof of loss states that 'the building insured, or containing the property destroyed or damaged, was occupied in its several parts' " by Henry G. Towne, for store and dwelling." The policy does not in terms require a statement of the value of the property insured in detail, or a particular statement of the value of the property; and if it be conceded that, from the nature of insurance, and from the provision that the company "shall either pay the amount for which it shall be liable, or replace the property with other of the same kind and goodness," the company could properly require a statement in detail of a stock of goods, if the plaintiff could reasonably furnish such a statement, still, a neglect or refusal to furnish a detailed statement would not of itself defeat the plaintiff's claim, or make the proof of loss insufficient; at most, it would only be evidence of an attempt to defraud the company. It is not found that the plaintiff refused to permit an examination of his books and vouchers; or that his books and vouchers were not all consumed by the fire; or that the plaintiff could have submitted a more specific statement of his loss; or that the plaintiff fraudulently withheld any information or attempted to defraud the company. The objection that the proof does not give quantities or values in detail cannot avail the defendant. *Clement v. British American Assur. Co. 2 New Eng. Rep. 57, 141 Mass. 298, 301; Wyman v. People's Equity Ins. Co. 1 Allen, 303; Harkins v. Quincy Mut. F. Ins. Co. 16 Gray, 591; Fowle v. Springfield F. & M. Ins. Co. 122 Mass. 191, 196; Burnstead v. Dividend Mut. Ins. Co. 13 N. Y. 81; Catlin v. Springfield F. Ins. Co. 1 Sumn. 484; McLaughlin v. Washington County Mut. Ins. Co. 23 Wend. 525; Norton v. Rensselaer & S. Ins. Co. 7 Cow. 645; O'Conner v. Hartford F. Ins. Co. 31 Wis. 160.*

As the plaintiff set out in his proof an exact copy of the description of the property insured by the other policy which he had obtained, he complied with the requirement that the statement of loss would set forth "all other insurance thereon in detail." If there was any difficulty in applying the two policies to the loss, it was occasioned by the want of particularity in describing the goods lost, and the buildings in which they were when the fire occurred.

The most formidable objection is that the proof of loss did not distinguish between the goods in the principal store and the goods in the "old store." From the statement in the

proof of loss, with the schedule annexed, it appears with reasonable certainty that the plaintiff made claim for a loss of his whole stock and fixtures in Hardwick store, excepting goods saved of the value of \$13.66, and that these were situated and insured as expressed in the policy; and, from the policy, it appears that the old store was used as a place of storage for goods belonging to the stock, which was kept for sale in the new store. But, in the description which is contained in the proof of loss of the building "containing the property insured," there is no reference to the old store; and the statement of "the purposes for which and the persons by whom" the building was used indicates that the plaintiff had in mind only the new store. As the award is for \$1,924.22, with interest from November 1, 1883, it is plain that the referee must have awarded something for the loss of goods in the old store, because the insurance on property situated elsewhere amounts to only \$1,900, and the date of November 1 is probably taken as the time when interest would begin to run, being about sixty days from the time when the proof of loss was submitted.

By the policy, the goods in the old store were made a distinct subject of insurance, and these goods were not covered by the other insurance. The defendant therefore had an interest in knowing the amount of the damage to the goods in the old store. We think that the old store must be considered as a building distinct from the new store; and that the proof of loss should have contained a statement of the amount of the damage to the goods in the old store, and the purposes for which, and the persons by whom, this building was used; and that this has not been done. This particular defect concerns only the insurance upon the goods in the old store, and may not have been seasonably called to the attention of the plaintiff; and the defendant's conduct may have been such as to constitute a waiver, or may estop it from making this objection; but there are no facts found by the referee from which such inferences can be drawn as matter of law, and the referee has found generally that the defendant has not waived its right to have such a proof of loss as is required by law. For this reason the judgment must be reversed, and the report recommended to the referee. See *Cum-berland v. North Yarmouth*, 4 Me. 459.

So ordered.

Charles H. NORTH *et al.*
v.

Carrie S. DEARBORN.

1. If the mortgagor in a mortgage covering several parcels of land conveys his equity in all the different parcels to different grantees by several conveyances, some or all of which are, or are claimed by his creditors to be, voidable, the levy of an execution against him may be made by a sale separately of his equities in the different parcels conveyed to the different grantees.

2. Hence, where, in the case of a mortgage made by a husband and wife covering two parcels of land originally owned by

the husband, one parcel had been conveyed to the wife before the execution of the mortgage, and the equity in the other parcel was conveyed to a third party after the execution of the mortgage, and creditors of the husband claimed that such conveyances were void as to them,—*Held*, that an execution against the husband was properly enforced by a levy upon and sale of his equity of redemption in the two parcels separately.

(Middlesex—Filed January 7, 1888.)

ON demandants' exceptions. *Sustained.*
Writ of entry to recover possession of two parcels of land in Woburn.

The facts are sufficiently stated by the court.

Mr. L. R. Wentworth, for demandants:

The circumstances of this case are such as render legal the officer's sale. They warranted him in making sale as he did.

The owner of a right to redeem several parcels of land subject to one mortgage may convey it in separate tracts or lots, and thereby vest a title in each of his grantees to the parcel or lot conveyed to him, subject to the payment of the whole mortgage debt.

Webster v. Foster, 15 Gray, 85. See *Lambert v. De Santos*, 10 La. Ann. 725; *Forrest v. Phillips*, 2 Met. (Ky.) 196; *Mansfield v. Dyer*, 183 Mass. 874.

Fraud was a controverted fact at the trial, and the court had no right to assume that both lots were fraudulently conveyed.

Clough v. Whitcomb, 105 Mass. 482.

If it should be found that one lot was not fraudulently conveyed, the sale, as to the other one, would be good, for then Charles T. Dearborn's interest would be an equity in this other lot, and could be taken and sold on execution.

Pub. Stat. chap. 172, §§ 1, 27.

The demandants had a right to discontinue as to either lot, if, after the evidence was presented, they were convinced they could not maintain their action therefor.

Somes v. Skinner, 16 Mass. 348; 1 Saund. 207, note 2.

As the tenant claimed title to the first parcel under deed from Charles T. Dearborn to Benjamin F. Fish, which marked out the exact portion of estate which the officer sold, she is not injured by such sale, and cannot object thereto.

Buffum v. Deane, 8 Cush. 39; *Fletcher v. Stone*, 8 Pick. 250.

The officer's sale, if bad, is only voidable, and voidable only by Charles T. Dearborn, his heirs and assigns.

Fletcher v. Stone, *supra*; *Wildes v. Vantoorhis*, 15 Gray, 139.

The tenant's objection to the sale necessarily admits the fraudulency of the conveyance of the second parcel to her, and of the first one to Fish; therefore she cannot avoid the officer's sale.

Buffum v. Deane, and *Fletcher v. Stone*, *supra*; *Thomas v. Le Baron*, 10 Met. 408.

Therefore, under her plea, she could not raise this objection. The tenant has no more rights under her deeds than her grantor had. If he could not object to the officer's sale, the tenant could not.

Mr. Thomas F. Maguire, for respondent:

The officer should have sold both parcels of land at one time, to one person, and for one sum. As he sold them separately, the sale was void.

Woodward v. Sarthwell, 129 Mass. 213; Pub. Stat. chap. 172.

A separate sale on execution of two parcels of land, both subject to one mortgage, although situated in different counties, passes no title, and will not support a bill in equity to redeem the land so sold from the mortgage.

Webster v. Foster, 15 Gray, 31; *Cochran v. Goodell*, 131 Mass. 464; *Manafield v. Dyer*, 133 Mass. 374.

A sale and conveyance of an undivided half of land covered by a mortgage passes no title to the purchaser.

Torrey v. Cook, 116 Mass. 163.

According to Pub. Stat. chap. 172, and all the decisions of this Commonwealth touching the matter, the two sales by an officer were clearly invalid, and the deeds given by him thereafter of no effect.

Field, J., delivered the opinion of the court:

It appears that the first parcel described in the writ was conveyed by one Thompson to Charles T. Dearborn, the husband of Carrie S. Dearborn, the tenant in this action, by deed recorded on April 7, 1884, and that the second parcel was conveyed by said Thompson, to said Charles T. Dearborn by deed recorded on November 11, 1881. The wife and her husband mortgaged the second parcel (which, in some manner, had been conveyed to the wife) to the Woburn Five Cent Savings Bank, by deed recorded on December 18, 1884; and they mortgaged both parcels to said bank by deed recorded on April 30, 1885. When this last mortgage was given, the title to the equity in the second parcel remained in the wife, and the title to the equity in the first parcel remained in the husband.

These demandants brought suit against the husband on July 27, 1885, and attached his interest in all this real estate, making a special attachment of his interest in the first parcel, the record title to which then stood in the name of Benjamin F. Fish; and they obtained judgment in the suit, and execution issued, and was levied upon the equity of redemption in the first parcel, as it stood at the time of the attachment, and upon the equity of redemption in the second parcel, the record title to which still stood in the name of the wife; and the officer sold at public auction, under this levy, separately, the equity of redemption in the two parcels to the demandants, who paid the price bid for each, and received deeds of both, which were duly recorded. Thereupon they brought this action against the wife. The objection of the tenant is that, "it appearing that both parcels demanded were included in said mortgage, recorded April 30, 1885, the officer should have sold both parcels for one bid to one person, and for one sum; that, as they were sold separately, the sale was void." The court sustained this objection and directed a verdict for the tenant.

The demandants' claim necessarily is that

the conveyance to the wife of the second parcel is void as to them, and that the equity in this parcel was liable to be taken on execution by the judgment creditors of her husband. A similar claim must be made as to the first parcel, although it does not appear that Fish has conveyed this to the wife, or what claim, if any, she makes to it, except that both parcels are demanded in the writ, and she has pleaded *nil disseisin* as to both.

When a mortgagor retains the equity of redemption in all the parcels of land included in an existing mortgage, or when, by one conveyance, he has conveyed this equity to another person, who remains the assignee of the whole interest of the mortgagor in all the parcels subject to the mortgage, this equity must be levied upon and sold as one single and entire *res*; and separate sales of the right to redeem each parcel are void. *Webster v. Foster*, 15 Gray, 31; *Cochran v. Goodell*, 131 Mass. 464; *Plimpton v. Goodell*, 3 New Eng. Rep. 679, 143 Mass. 367.

When, however, the mortgagor has conveyed his equity in some of the parcels, but retains it in others, all of which are included in one mortgage, the levy of an execution issued upon a judgment against him must be upon only his right to redeem the parcels of land of which he retains the equity, if his conveyances are recognized as valid by the judgment creditor. If the mortgagor has conveyed his equity in all the different parcels to different grantees by several conveyances, some or all of which are, or are claimed to be, voidable by his creditors, the levy of an execution against him may be made by a sale separately of the equities in the different parcels which had been conveyed to the different grantees. The mortgagee is not injured by this, as the mortgage debt must be fully paid before he can be compelled to release any parcel from the mortgage. The mortgagor is not aggrieved because he has severed his interest in the equity of the different parcels, by his conveyances. The purchasers at the sale on execution must bring separate suits against the different persons who hold the record titles, to recover possession; and it may happen that some of the titles will prove to be good and some void as against creditors of the grantor, and this may render separate sales desirable. *Manafield v. Dyer*, 133 Mass. 374.

We need not decide whether, in the last case supposed, there must be separate sales, or consider what rule, if any, there should be, of contribution toward the payment of the mortgage debt, or of exoneration therefrom, between the purchasers of the equities in the different parcels. In the present suit the second parcel was conveyed to the wife before the execution of either of the mortgages. The equity in the first parcel was conveyed to Fish after the execution of the second mortgage. Both these conveyances must have come, mediately or immediately, from the husband. The tenant's plea put the demandants' title to each parcel in issue, and the demandants might recover one parcel, and not the other.

We are of opinion that the husband had so far severed his interest in the parcels that the equities could be levied upon and sold separately under an execution against him.

Exceptions sustained.

Alexander McKENZIE, Exr.,

v.

Mariah ASHLEY et al.

By the will of her deceased husband, a widow was entitled to the income for life of the residue of his estate, after payment of two legacies to herself, and also to so much of the principal as should be necessary for her comfortable support. On the widow's death, \$100 of what might be left was given to a certain person, and the residue to a third person. By consent of such residuary legatee, the widow received \$2,500 from the principal of the estate, and, adding thereto some money of her own, she purchased a dwelling-house for her use, taking the title in fee in her own name. At that time the income of the remainder of the estate was sufficient for her support, but some sixteen years afterwards it proved insufficient, and on her behalf the executor applied to the court for leave to make her a further payment out of the principal. The residuary legatee was then dead, and his next of kin resisted the application. Held, that, under the circumstances, an additional payment from the principal should be allowed to the widow, without compelling her to first dispose of said house and apply to her support the portion of the proceeds thereof which should represent the amount of the principal which was used in purchasing the house.

(Hampden—Filed January 7, 1888.)

ON report. Decree authorizing payment to widow of sums necessary for her support.

Bill brought by the executor of the will of Josiah D. Ashley for instructions on the question whether or not the widow of the testator is entitled to have a portion of the principal applied to her support.

The following are the material portions of the will:

"To my beloved wife, Mariah Ashley, I give and bequeath all my household furniture and wearing apparel. I further give and bequeath to my beloved wife, Mariah, the sum of \$700. To my beloved wife, Mariah, I further give and bequeath the use of all the rest and residue of my estate during her natural life, but, should the use of my estate not be sufficient to give her a good and comfortable support, then it is my will that she use so much of the principal as shall be necessary to give her a good and comfortable living during her lifetime; this in lieu of dower; subject, however, to the payment of my just debts and funeral expenses. I give and bequeath \$100 to Frederic Alderman, son of Nelson Alderman, out of that part of my estate made subject to my wife's use, to be paid after her decease. I give and bequeath to Joseph B. Hascall all of that portion of my estate not before disposed of, made subject to my wife's use, that shall remain unexpended at her decease."

The residuary legatee executed the following paper:

2 MASS.

I, J. B. Hascall, residuary legatee and devisee under the last will of Josiah D. Ashley, late of Westfield, Hampden County, Mass., deceased, do hereby consent, without application to the probate court, that Alexander McKenzie and Mariah Ashley, executors of the last will of said deceased, may appropriate from the principal to which I may be entitled as such residuary legatee, for the comfort and the comfortable support of Mariah Ashley, the widow of said deceased, the sum of \$2,500; and this paper, filed in the probate office of said county, shall be full and complete authority to said executors for such appropriation, and a discharge, *pro tanto*, from all liability in their final accounting with me and said probate court.

Witness my hand, at Westfield aforesaid, this 20th day of May, A. D. 1871.

J. B. Hascall.

Upon request of the parties the case was reported for the consideration of the full court.

Further facts appear in the opinion.

Mr. Arthur S. Knell, for petitioner.

Mr. H. B. Stevens, for respondent Mariah Ashley:

This bill for instructions is maintainable by the executor.

"When the testator by will, either in express terms or by legal implication, has given the income of a sum of money to one for life, and then the principal to another, and has not in terms placed it in trust with any trustee other than the executor, it is the province and duty of the executor as such to hold and invest the fund," etc.

Dorr v. Wainwright, 18 Pick. 328.

The principal requisites for maintaining such bill are: (1) the fiduciary possession of a fund of which some disposition is required to be made presently; (2) conflicting claims, or the probability that such may arise; (3) no adequate means of determining them otherwise, so as effectually to protect the trustee from the risks of future liability or controversy.

Putnam v. Collamore, 109 Mass. 509.

The exigency contemplated and provided for in the will, for application of the principal for benefit of Mariah Ashley, has arisen, unless the payment of the \$2,500 renders it improper that such application of the principal be made until said \$2,500 shall have been further applied or exhausted.

The intent of the parties as to the use to be made of said \$2,500 was that it should be used in the purchase of a house—a home—for Mrs. Ashley.

The evidence that "Hascall intended that the widow should purchase a house, and expressed his approval of this purchase in a conversation before the instrument was made by him," was admissible. It is not offered for the purpose of varying or enlarging any of the terms of the written document, but to explain what Hascall meant by the words "comfort" and "comfortable support," words of some uncertainty and ambiguity.

Stoops v. Smith, 100 Mass. 68, 66, and cases cited.

Messrs. Maynard & Spellman, for respondents Elizabeth P. Cooley, S. E. Hascall, and M. Ellen Hascall, next of kin of Joseph B. Hascall, deceased:

The only legal perplexity or doubt of plaintiff is, Has the \$2,500, authorized by Hascall, the remainderman, to be appropriated for the "comfort and comfortable support" of the widow, been exhausted, within the true intent and meaning of the order authorizing the same?

If it has not, then there are funds in his hands, so that he has no need to call upon the remaining principal. If they have been so exhausted, then his instructions given in the will are a full and plain guide. The only perplexity or difficulty to the executor is, How much of the principal will be necessary to even up the income to the standard fixed by the will? A decree of this court can be of no benefit or guide to him in this respect, as no decree of today would be of any service for the varying exigency of to-morrow.

The investing of the \$2,500 in real estate by the widow, in her own name, was not a using of the same for the "comfort and comfortable support" of the widow, within the fair meaning of the written authority to appropriate. The word "comfort" must be construed reasonably. If she might use it to buy a house, because she thought the ownership of a house would add to her comfort, the same reasoning would allow her to keep it intact in her pocket or in the savings bank, or to make a present of it to her friends, if she should happen to think either method would add to her comfort. The evidence contained in the conversation in regard to the purchase of a house was inadmissible, and cannot be used to modify the terms or explain the meaning of the written authority.

Knowlton, J., delivered the opinion of the court:

The respondent Mariah Ashley was entitled, under the will of her husband, to the income for life of the residue of his estate, after the payment of two legacies to herself, and also to so much of the principal as should be necessary to give her a good and comfortable support. After her death Frederic Alderman, one of the respondents, is to be paid \$100 from what is left, and the remainder is to be given to the representatives of Joseph B. Hascall, a legatee who has deceased since the death of the testator. The income is now insufficient for the support of Mariah Ashley, and the petitioner should provide for her from the principal, unless the whole, or a part of \$2,500 paid her in 1871, is first to be used for that purpose. With this sum paid her, and with \$1,100 of her own money, she bought at that time a house for her home, and has occupied it ever since. The only question in the case is, whether she must dispose of that house, or of some interest in it, and use the proceeds, before she can receive anything more from the principal of her husband's estate.

The words "a good and comfortable support," and "good and comfortable living," in the will, are to be construed liberally. She is the testator's widow, and this provision is in lieu of dower. Moreover, the facts that no one else was to receive anything under the will until after her death, and that the entire estate was set apart by the testator for her use, if she should need it, indicate an intention on his part that she should be well supported. The house which she bought was of the same class

that she had previously lived in with her husband, and would rent for \$15 or \$16 per month. She was well advanced in years, and had always been accustomed to living in a house of her own. When the payment of \$2,500 was made, the income of the fund was sufficient for her support, and continued to be for some years afterward. This payment was accounted for and allowed in the probate court with full knowledge, on the part of those interested, of the use to which it was put; and it has apparently never been objected to. Indeed, Joseph B. Hascall, who, as residuary legatee, was the only person interested against it,—except in the remote contingency of the funds being so far consumed as to affect the legacy of \$100 to Frederic Alderman,—consented in writing to the payment, well knowing that the money was to be used in the purchase of this house. In the light of these facts, we cannot doubt that the procurement of a house to be used as a home for Mariah Ashley, was reasonably necessary, and that the cost of it was properly chargeable to the fund for her support.

If the \$2,500 had been exhausted in procuring such a home for her lifetime, the case would be free from difficulty. But she obtained an estate in fee; and after her death this house will pass under her will or descend to her heirs. To have kept strictly within the purpose for which the money was to be appropriated under the will, she should have applied it to the purchase of an estate for her personal occupation during her life; and if it became necessary to acquire the whole title, the remainder should have been held for the benefit of the fund. Instead of making a strict appropriation of the payment with a view to the preservation of the legal rights of all parties, she put \$1,100 of her own money with it, and bought the house, and took an estate in fee to herself. The property has diminished in value and is now worth but \$1,800. Eleven thirty-sixths of that sum represent a payment from her own money; and twenty-five thirty-sixths a payment from the principal of the fund. The use, too, of the contribution from her own property has apparently gone in diminution of the sum which the fund would otherwise have been required to supply. Does her holding a title in fee, instead of for life, in this share, preclude her from claiming support until she shall have disposed of the remainder and consumed the proceeds? Her purchase was made at a time when it was not expected that this question could ever arise. The income was then ample for her wants, and continued to be for several years. It is fair to suppose that she acted in good faith, and that all parties interested consented to her action. The payment having been made to her absolutely, as needed for her support, with the consent of the only one interested, she might apply it as she chose, without accounting for any part of it, if the income should continue to be sufficient for her wants. It was only in the unexpected event of her needing more of the principal that her disposition of it would become material. Moreover, there may have been practical objections to complicating the title with a division of it into different estates. There is nothing to indicate that anyone suggested taking the title

differently at the time of the purchase. On the contrary, the approval of the account in the probate court and the payment to her of portions of the principal from time to time afterward, all of which have been accounted for and allowed, indicate that all parties interested have treated this purchase as a final disposition of the \$2,500 in accordance with the provisions of the will. If the money had been paid her for her support, and she had lost it, it would hardly have been contended that she could not afterwards, if needy, have resorted to the fund for relief. All she received was used more than sixteen years ago. Most of it was properly applied to a use contemplated by the will,—the procurement for her of a home for life. The remaining part, which represents the excess of value of the estate after her death, above the contribution from her money, was so paid out and used in connection with the first as to be difficult of separation from it. And this was done, as we infer, under an implied agreement of all parties to consider it a payment authorized by the will. We do not think, under the circumstances of this case, that Mariah Ashley's ownership of an estate in the house which will extend beyond her lifetime is such a possession of property received from the petitioner as to require her to dispose of it and apply the proceeds to her support, or render it necessary that a transaction so long assented to should be now disturbed. The petitioner may therefore properly pay her under the will such sums, in addition to the income, as she may need for her comfortable support.

Decree accordingly.

Lydia A. PORTER

Annie B. WAKEFIELD and Trustee.

Where a husband advanced money to his wife at her request, and she delivered to him certain chattels (her separate property), to be held by him as security for payment of the money so advanced, and they were thereafter divorced, and trustee process was subsequently issued against such former husband in an action against the former wife, directed against such chattels in his possession,—Held, that if a contract of pledge was made between the parties when husband and wife, it was void as against the wife's creditors; that as the chattels were not property which came to the husband by reason of the marriage, and no decree in the divorce proceeding was necessary to vest the title thereto in the former wife, the holder thereof was chargeable under trustee process; and that it was not necessary to decide whether the trustee process could have been maintained while the relation of husband and wife existed.

(Suffolk—Filed January 7, 1888.)

This action was brought by Lydia A. Porter against Annie B. Wakefield, and Cyrus Wakefield was summoned, as trustee, to answer for certain property of defendant, alleged to be in his possession.

Wakefield appeared and answered that, at the time of the service of the plaintiff's writ upon him, he had in his possession certain jewelry of the defendant; to wit, one pair of earrings and one cross, of the value, as said trustee was informed and believed, and therefore averred, in all, of \$660; that at said time of service he held the same in his possession to secure the payment to him, by said defendant, of the sum of \$1,836.88, then due and owing from said defendant to said alleged trustee, no part whereof had been paid; and otherwise than aforesaid had not at said time of service any goods, effects, or credits of said defendant in his hands or possession.

Interrogatories were submitted to Wakefield, the answers to which established substantially the same facts as were alleged in his answer to the summons. He was asked if anything was said to him by defendant, on or about the time that the property came into his hands, regarding her indebtedness to plaintiff. This question he declined to answer, because whatever might have been said at that time was not said in the presence of any third person, but was a private conversation between husband and wife.

After the answers to the interrogatories had been filed, plaintiff moved that Wakefield be charged as trustee as to the property of the principal defendant in his possession and disclosed by his answers, which motion was allowed, and Wakefield appealed.

Mr. L. S. Dabney, for the alleged trustee:

The only property in possession of the trustee when summoned, by reason of which it could be contended that he can be charged, was then held by him as security for the payment of a debt owed to him by the defendant. This distinguishes the case from those in which it is held that a creditor who has the mere possession of chattels of his debtor, without any specific title to hold or apply them for the satisfaction of his claim, is chargeable in trustee process in respect of such chattels, notwithstanding the debt.

The claim of the plaintiff is that, by reason of the relation of husband and wife existing at the time of the transactions, no debt from the wife to the husband ever came into existence, for the recovery of which he could maintain an action. This is true. The plaintiff claims, therefore, that there is no debt for which the trustee can hold security. But it is not necessary that the claim of an alleged trustee against a principal defendant, in order to make it a bar to charging him, should be one on which he can maintain an action.

Commonwealth v. Parker, 2 Cush. 212, 225; *Hitchcock v. Lanco*, 127 Mass. 514.

The principal defendant can maintain no action against the trustee for the recovery of the said jewelry in his possession, or for its value. It is personal property of the wife coming to the possession of the husband during marriage. Upon the dissolution of the marriage by divorce, the only remedy of the wife, for the recovery of the property or of its value, is that

A PPEAL from a judgment charging appellant as trustee of the principal defendant.

Affirmed.

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given by Pub. Stat. chap. 146, § 24, and is a decree of the court granting the divorce.

Mr. Edmund M. Parker, for plaintiff:

To sustain this appeal, the appellant must establish that an error of law must have been made by the court below in rendering the decision appealed from.

Dorr v. Richardson, 114 Mass. 346; Pub. Stat. chap. 152, § 10.

No question of fact, or decision involving drawing of inferences of fact, will be reviewed on such an appeal.

Keegan v. Cox, 116 Mass. 289.

At the time of the service of the plaintiff's writ the trustee had in his possession property of the defendant subject to attachment.

A trustee is not entitled to retain, as against the plaintiff's attachment, property of the principal defendant in the possession of the trustee, by reason simply of the fact that the principal defendant is indebted to the trustee; but, in order to have such a right of retainer, the trustee must show that, by reason of some contract, express or implied, he has a lien on the goods in his possession.

Allen v. Meguire, 15 Mass. 490; *Brewer v. Pitkin*, 11 Pick. 298; *Allen v. Hall*, 5 Met. 263, 267.

To the existence of the right of retainer claimed by the trustee in this case, two things are necessary, and both must concur: 1. There must be an indebtedness of the principal defendant to the trustee. 2. There must be a lien given the trustee on the property in his possession. And the burden is on the trustee to establish the existence of such lien or incumbrance.

Ripley v. Severance, 6 Pick. 474, 477; *Graves v. Walker*, 21 Pick. 160, 162.

Do these facts appear from the trustee's answers?

The trustee and principal defendant were married in this State January 17, 1871, and were divorced November 10, 1886. From January 17, 1871, to November 10, 1886, this trustee and the principal defendant were husband and wife.

Cook v. Cook, 3 New Eng. Rep. 745, 144 Mass. 163.

In February, March, April, and December, 1885, and January, February, and March, 1886, while they were husband and wife, he advanced or paid for her use certain sums of money.

Contracts between husband and wife, of money lent and money paid at request, are absolute nullities.

Bassett v. Bassett, 112 Mass. 99; *Roby v. Phelon*, 118 Mass. 541; *Kneil v. Eggleston*, 1 New Eng. Rep. 455, 140 Mass. 202; *Woodward v. Spurr*, 2 New Eng. Rep. 232, 141 Mass. 283.

No case has so far been found in which anyone has contended that a sale of the old, worn-out house furniture, by a wife, and her expenditure of the proceeds, was a tort toward the husband, rendering her indebted to him in the amount of the proceeds of sale. The supposed tort is as fictitious as the alleged contract.

Rex v. Smyth, per Tenterden, *Ch. J.*, 1 Mood. & R. 155, 157; *Phillips v. Barnet*, per Blackburn & Lush, *JJ.*, L. R. 1 Q. B. D. 436; *Abbott v. Abbott*, 67 Me. 304, 307.

There is not a word in any answer to show any lien on this property.

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See *Jarvis v. Rogers*, 15 Mass. 2.

The relation of husband and wife between the trustee and the defendant would affect the bringing of this plea.

It could have been brought, and charged as trustee of his wife for the property of hers in his possession, even if the existence of the marital relation had been terminated, and no obstacle existed by defendant, against this trustee, of this property, on his refusal to deliver it on demand.

See *Legg v. Legg*, 8 Mass. 99; *Dunham*, 128 Mass. 34.

Field, J., delivered the opinion.

We need not consider whether chap. 169, § 18, cl. 1, providing that husband nor wife shall be allowed to private conversations with each other, applies to the answers of a trustee in this case, or whether, if it does, a trustee is bound by an agreement made with him in the presence of no other person, when asked on interrogatories, or before a court, to state, what the conversations, which were the subject of the agreement, were. Taking the case as presented, we find that the trustee most favorably for himself, advanced "advanced" money to his wife out money for her, at her request, and delivered to him the jewelry which she had in her possession, as her separate property, to him as security for the payment of the debt, and that afterwards he obtained a decree of absolute divorce from the bonds of matrimony. Our statutes do not authorize the trustee to take property from the wife to the husband. Stat. chap. 147, § 3; Stat. 1884, c. 124, § 1. A husband, as trustee of the separate property of his wife, may take a pledge of a chattel by her, as security for the payment of money lent to her, or paid for her, or for the purchase of a trust. The statutes now in force do not give a husband a gift of certain kinds of property, of any amount, by the husband to the wife, made in fraud of his creditors; but the aid of the statute, gifts by the husband to the wife, if the wife retains possession after his death, been upheld, so that the right of his creditors to have the property applied to the payment of their debts is not impaired. The gift is required for that purpose; and gift to the husband would perhaps be a nullity in such cases, subject to a similar right of the wife's creditors. *Marshall v. Jaques*, 138.

With these exceptions, our transfers of property and contracts between husband and wife are valid, though property can be conveyed other through the intervention of a third person. *Motte v. Alger*, 15 Gray, 33; *Whalan*, 106 Mass. 307; *Stetson v. Allen*, 321; *Butler v. Ives*, 138; *Roby v. Phelon*, 118 Mass. 541; *Bunk v. Taverner*, 130 Mass. 407; *Rey*, 135 Mass. 87; *Kneil v. Eggleston*, 1 New Eng. Rep. 455, 140 Mass. 202; *Spurr*, 2 New Eng. Rep. 232, 141 Mass. 283.

If a contract of pledge was made

husband and wife in this case, it was void as against her creditors. Whether the trustee process could have been maintained while the relation of husband and wife existed need not be decided. See *Robinson v. Trofitter*, 109 Mass. 478. There is no reason why it should not be maintained after this relation has been dissolved by a divorce. See *Dunham v. Dunham*, 128 Mass. 84. This was not property which came to the husband by reason of the marriage, and no decree of the court in the libel for divorce was necessary to vest the title in her. Pub. Stat. chap. 146, § 24.

Judgment charging trustee affirmed.

George EVERETT

v.

Edwin P. HENDERSON *et al.*

1. The willful falsity of the plaintiff's affidavit, upon which process for the arrest of the defendant was obtained, is not available as a defense to an action on a poor debtor's recognizance, given to obtain release from arrest upon such process,—the process being in due form and having been issued by an officer having jurisdiction, upon the return of an execution against the defendant unsatisfied.
2. The defendant's remedy in such a case of arrest upon process founded on a false affidavit is to obtain, under the statute, an early hearing of the matters alleged against him, or, after the case is ended in his favor, he may bring his action for a malicious prosecution.

(Suffolk—Filed January 10, 1888.)

ON plaintiff's exceptions. *Sustained.*

This was an action of contract on a poor debtor's recognizance, entered into by Edwin P. Henderson as principal, and Peter H. Henderson as surety.

Plaintiff recovered judgment against Edwin P. in a suit on a mortgage note, on May 29, 1884, and execution was duly issued and returned in no part satisfied and without service. On September 3, 1884, an alias execution issued, and afterwards, on September 8, 1884, plaintiff made an affidavit, in due form of law, before Edward J. Jones, Esq., Master in Chancery for Suffolk County,—said Edwin P. at the times mentioned having his usual place of business in Boston,—and thereupon Jones, upon an *ex parte* hearing, granted a certificate in due form of law, authorizing Edwin P. Henderson's arrest.

On November 1, 1884, by virtue of the alias execution, with said affidavit and certificate thereto annexed, Edwin P. was arrested in Boston, by an officer duly qualified to make the arrest and serve the execution, and carried before Edward J. Jenkins, Esq., Commissioner of Insolvency for Suffolk County, before whom he gave the usual recognizance that he would appear within thirty days, etc., on which recognizance this suit is brought.

On March 7, 1885, plaintiff filed five charges
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of fraud, among which was one sworn to in the affidavit, and hearings were had as to said charges of fraud and the proof thereof. While said hearings as to the charges of fraud were going on, viz., on March 26, 1885, Edwin P. obtained his discharge in insolvency under proceedings commenced on September 9, 1884. The hearings as to the charges of fraud were continued from time to time, and finally to April 18, 1885, at 1 P. M., at which time the creditor and debtor appeared and remained during the whole hour, and after the lapse of the hour the creditor, before the appearance of the magistrate, departed; but the magistrate, Bragg, was not in attendance within said hour, and did not appear and attend until quarter past two o'clock, nor did any other magistrate attend in his place; and there were no further adjournments or proceedings had.

Defendant opened the case to the jury, and claimed that the affidavit aforesaid was made by the plaintiff falsely, fraudulently, and without probable cause, and that the plaintiff did not, at the time he made it, believe, or have good reason to believe, the affidavit to be true. Plaintiff, before any evidence was offered by defendant, asked the court to rule that no evidence could be offered or introduced in this action to control or affect the affidavit, or to show that it was false, fraudulent, or made without probable cause, or that the plaintiff did not believe, or had no good reason to believe, that said affidavit was true; but the court refused so to rule, and admitted evidence to show that said affidavit was false and fraudulent and made without probable cause, and that plaintiff did not believe, and had no good reason to believe, said affidavit to be true at the time of making; to which the plaintiff duly excepted.

The judge instructed the jury that if defendants proved that the affidavit was in fact corrupt, and that the magistrate's certificate authorizing the arrest was obtained by fraud and perjury of the plaintiff, the plaintiff could not avail himself of the arrest thus obtained as the foundation of his cause of action; but as between the plaintiff and these defendants the arrest and recognizance would be void, and their verdict should be for the defendants; but that, if the defendants had not sustained the burden of proof and established willful fraud and perjury on the part of plaintiff, their verdict should be for plaintiff. The jury found for defendants, and plaintiff alleged exceptions.

Mr. E. M. Bigelow, for plaintiff:

The affidavit and certificate were correct in point of form and substance, and annexed by a magistrate having jurisdiction to inquire into the matter.

Pub. Stat. chap. 162, § 17; *Way v. Brigham*, 188 Mass. 384; *Macaig's Case*, 187 Mass. 487; *Frost's Case*, 127 Mass. 550.

Neither the proceedings in insolvency, nor the discharge in insolvency, affected the trial of the charges of fraud, whether the discharge exonerated the debtor from his debt or not.

Stockwell v. Silloway, 105 Mass. 517, 518; *Morse v. Dayton*, 125 Mass. 47, 49; *Stockwell v. Silloway*, 100 Mass. 287, 298.

There was a breach of the condition of the recognizance.

Hills v. Jones, 122 Mass. 412, and cases; *God-*

frey v. Munyan, 120 Mass. 240-243, and cases; *Morrill v. Norton*, 116 Mass. 487, and cases; *Thacher v. Williams*, 14 Gray, 324.

One of the charges of fraud pending at the time of the default was the charge contained in the affidavit and alleged to have been false. But by the statute the magistrate before whom it was pending had the exclusive original jurisdiction to try its truth or falsity, and it cannot now be known which way he would have decided it.

Pub. Stat. chap. 162, § 49; *O'Brien v. Barry*, 106 Mass. 300, 303, 304; *Cardinal v. Smith*, 109 Mass. 158; Bull. N. P. 12; *Hamilburgh v. Shepard*, 119 Mass. 30; 3 Bl. Com. 126, note 14, and cases.

If he had convicted the debtor, it would have been conclusive evidence of probable cause, even if his judgment were reversed on appeal.

Whitney v. Peckham, 15 Mass. 243; *Cloon v. Gerry*, 13 Gray, 201; *Parker v. Huntington*, 7 Gray, 36; S. C. 2 Gray, 124; 10 Cush. 279.

If he had convicted him and no appeal was taken, or if he was convicted on appeal by the jury or by the court, if trial by jury was waived, the question would have become *res adjudicata* and conclusive in all other proceedings.

Stockwell v. Silloway, 113 Mass. 384, and cases; *Dennis's Case*, 110 Mass. 18, 19; *Money's Case*, 112 Mass. 394, 399.

And the charge being that the debt was contracted with intention not to pay it, such conviction would have been conclusive that the debt was "created by the fraud of the debtor," and so not discharged by the discharge in insolvency.

Pub. Stat. chap. 157, § 84; *Dow v. Sanborn*, 3 Allen, 181; *Donaldson v. Faricell*, 93 U. S. 631, 633 (23 L. ed. 993), and cases; *Wilmot v. Mudge*, 103 U. S. 217 (26 L. ed. 536), affirming S. C. 124 Mass. 493; *Kellogg v. Kimball*, 138 Mass. 441.

And in such case the discharge in insolvency would be no bar to an action upon the recognizance, even if no charges of fraud had been made or filed, or were pending.

Smith v. Randall, 1 Allen, 456.

If, instead of forfeiting his recognizance, the debtor had defended the charges to a successful termination, and been acquitted, it is certain that his only remedy would have been an action upon the case for malicious arrest and prosecution.

Marks v. Townsend, 97 N. Y. 590, and cases reviewed; *Hayden v. Shed*, 11 Mass. 500; *Coupal v. Ward*, 106 Mass. 289; *Mullen v. Brown*, 138 Mass. 114; *Cassier v. Fales*, 139 Mass. 461, and cases.

It will hardly be contended that, by forfeiting his recognizance, the debtor has placed himself in a better position than if the trial had proceeded and he had been acquitted. If he can maintain an action for a malicious arrest and prosecution, he has an adequate remedy for the damage he has sustained. If he cannot, it is because of his own default.

It was the plain intent of the Legislature that, after charges of fraud are filed, the debtor should stand a trial until he is either acquitted or convicted, "or pay to the creditor the whole amount of the original judgment against him."

Pub. Stat. chap. 162, § 51; *Mowry's Case*,

112 Mass. 400; *Tracy v. Preble*, 11 Mass. 43; *Moore v. Loring*, 106 Mass. 455, 457.

Pub. Stat. chap. 162, § 51, reserves to him the right he has had to remove the whole foundation of findings by payment of the amount in thus escape punishment.

Such payment in money removes the action, and extinguishes the judgment, as if it were reversed on a writ of review.

Holmes v. Day, 108 Mass. 563, actional Sec. Bank v. Hunnewell, 12 Allen, 473; *Whitton v. Bicknell*, 3 Allen, 473.

When the recognizance is forfeited, the action is *functus officio*, and no appeal is maintained upon the judgment; the remedy is by an action upon the recognizance brought within one year after the judgment.

Pub. Stat. chap. 162, § 64; *Coburn v. Mer*, 10 Cush. 273; *Kennedy v. Gray*, 65; *Whitton v. Bicknell*, 3 Allen, 473; *Brown v. Kendall*, 8 Allen, 210; *Roulstone*, 14 Allen, 511, 514; *Mosley*, 2 New Eng. Rep. 515, 142 Mass.

The epithets or elements of "willful perjury," etc., add nothing to the case. *Phelps v. Stearns*, 4 Gray, 105; *Huntington*, 7 Gray, 36.

The court erred in refusing to let the plaintiff state all his reasons for believing true.

Bacon v. Towne, 4 Cush. 217, 231; *Messrs. Ely, Gates, & Keyes* and others v. *the Commonwealth*, 105 Mass. 160.

Where the arrest is illegal, the action is void; and the illegality of the arrest is waived by the debtor appearing and consenting to an examination before the magistrate.

McGregor v. Crane, 98 Mass. 530; *Akron Seicer Pipe Co.*, 129 Mass. 453; *Bean*, 130 Mass. 298; *Larnard v. Mass.*, 160.

The facts disclosed by this case show a malicious prosecution, or a wanton abuse of legal process, on the part of the plaintiff, and would clearly sustain an action of P. Henderson against the plaintiff.

Legallee v. Blaisdell, 134 Mass. 453; *Dexter*, 135 Mass. 23; *Savage v. Breckinridge*, 11 Mass. 500; *Hayden v. Shed*, 11 Mass. 500; *Baird*, 6 Mass. 506.

But the remedy in such cases is by an action of tort for a malicious prosecution. *Crocker v. Atwood*, 4 New Eng. Rep. 144 Mass. 588.

The certificate of the magistrate that the affidavit, made solely *ex parte*, was true, and that he gave no notice to the debtor, E. P. Henderson, is not a judgment; but even if it were, it is not conclusive, and can be impeached by allegation and proof that it was false, and especially by proof of fraud and perjury, and especially by proof on the recognizance.

Baker v. Moffat, 7 Cush. 259; *Henderson v. Morton*, 4 Cush. 20; *Pick. 53*; *Vose v. Fuller*, 2 Met. 135; *Laffin v. Farrar*, 116 Mass. 221; *Robinson v. Mass.*, 222; *Edson v. Elson*, 108 Mass. 222.

The defendant E. P. Henderson

have availed himself, before the magistrate, of the defense now set up. He could not have relieved himself from the arrest, by proving that he did not contract the debt with an intention of not paying it. He could relieve himself from the arrest only by taking the oath for the relief of poor debtors, or on habeas corpus. "A party is not to be concluded by a judgment in a prior suit or prosecution, where, from the nature or course of the proceeding, he could not avail himself of the same means of defense, or of redress, which are open to him in the second suit."

Frost's Case, 127 Mass. 550; *Macaig's Case*, 137 Mass. 467; *Blake's Case*, 106 Mass. 501; *Mowry's Case*, 112 Mass. 394; 1 Greenl. Ev. § 524.

Neither defendant was a party to the fraud and perjury of the plaintiff; and the court will not lend its aid to one who founds his cause of action upon such an immoral and illegal act as that disclosed by this case. The maxims, *ex dolo malo non oritur actio*; *ex turpi causa non oritur actio*; and *nemo ex delicto consequi potest actionem*, prevent the plaintiff recovering in this case.

Cranson v. Goss, 107 Mass. 440; *Nickerson v. Wheeler*, 118 Mass. 299; *Lowell v. Boston & L. R. Co.* 23 Pick. 32.

Knowlton, J., delivered the opinion of the court:

The defendant contends that the recognizance declared on cannot be enforced, because the proceedings in which it was taken were founded upon a willfully false affidavit of the plaintiff. The act imputed to the plaintiff involves such moral turpitude that we cannot permit him to even temporarily profit by it, unless upon principle, as well as authority, our duty is clear.

The wrong complained of, so far as it affects the question before us, was like an ordinary malicious prosecution of a groundless suit. The proceedings for the arrest of the defendant were in the nature of a new prosecution. They were for the purpose of obtaining a remedy which was not available without them. The statute provides that they "shall be considered in the nature of a suit at law." Pub. Stat. chap. 162, § 49. They were founded upon allegations of fact, heard at first *ex parte*, which, if issue was taken upon the arrest, were afterwards to be regularly tried between the parties with a view to an adjudication which should give or withhold the remedy sought.

It is admitted that the affidavit was proper in form and substance; that the magistrate had jurisdiction to act upon it; that he judicially found the facts alleged in it to be true, and signed a certificate authorizing the arrest. The arrest was regularly made by a proper officer, and the defendant was taken before a magistrate, and there entered into the recognizance in suit. The proceedings being conceded to have been in all other respects legal and proper, it is contended that the known falsity of the plaintiff's allegations in his affidavit rendered the arrest, as to him, illegal, and the recognizance void.

It is familiar law that an officer called upon to serve a process needs only to see that it is good upon its face; and it is not suggested that

the conduct of the officer, or of the magistrate, in relation to this arrest, can be called in question. But there are cases in which an officer is protected in making an arrest, when the person who caused it, or set the proceedings in motion, is liable. If the arrest in this case was legal as to the plaintiff as well as the officer, the recognizance founded upon it was legal also, and can be enforced in this action. If it was illegal as to the plaintiff, he can be sued in trespass for causing it. The process as to him is no justification, and the recognizance is tainted with illegality and is void. We are brought therefore to the inquiry, Under what circumstances is an arrest under process illegal as to the party causing it to be made?

There is no doubt that one who obtains a process and causes it to be served assumes the duty of seeing that it is well founded. He should know that it rests upon a good record or other proper preliminary proceedings; but so far as the matter depends upon an adjudication by a court or magistrate having jurisdiction, he may rely upon that. Processes good on their face may be absolutely void for want of jurisdiction in the court or magistrate that issues them, or they may be voidable for error, or they may be voidable for irregularity in obtaining them. A void process gives no protection to the party who obtains it. Processes voidable for error do not subject the person who directs their use to any liability, even after they are set aside. But processes irregularly obtained may be set aside, and then, as against those who obtain them, acts done under them are deemed to have been done illegally. *Cassier v. Fales*, 139 Mass. 461; *McGregor v. Crane*, 98 Mass. 580; *Barker v. Braham*, 3 Wils. 368; *Tarleton v. Fisher*, 2 Doug. 671; *Belk v. Broadbent*, 3 T. R. 183; *Bates v. Pilling*, 6 B. & C. 38; *West v. Smallwood*, 3 M. & W. 419; *Collett v. Foster*, 2 Hurlst. & N. 361; *Chapman v. Dyett*, 11 Wend. 81; *Deyo v. Van Valkenburgh*, 5 Hill, 242; *Lovier v. Gilpin*, 6 Dana, 321.

In cases of error, the judicial action in which the error is found is a justification for all who have acted in reliance upon it. In *Marks v. Townsend*, 97 N. Y. 590, where a process for arrest was set aside for error, it was held that the person who obtained it was not liable; and it was said in the opinion that, if he had known facts which made the arrest improper, and, concealing them, had maliciously made the affidavit and caused the arrest, he would not have been liable for false imprisonment, but only for malicious prosecution. The affidavit seems to have been of matters other than those to be tried in the proceeding then instituted. And against this *dictum* there are conflicting *dicta* in other cases. Some judges have intimated that action like that supposed would constitute irregularity for which the process might be set aside, even if there was error also, and that the affiant would then be liable in trespass for false imprisonment. *Williams v. Smith*, 14 C. B. N. S. 594; *Smith v. Sydney*, L. R. 5 Q. B. 203; *Daniels v. Fielding*, 16 M. & W. 200.

The cases of irregularity cover a variety of defects in the record or in other preliminary proceedings. Irregularities do not result from wrong adjudications, and in that respect they differ from errors. But irregularities, whether we include in the term those fundamental de-

facts which go to the jurisdiction and render the process void, or limit it by a stricter definition which will comprise only those upon which the proceedings may be set aside, do not include false allegations of fact made as a foundation for a suit in which the allegations are to be proved or disproved. And this is equally true whether they are falsely made by mistake or by design. The remedy for causing an arrest by maliciously bringing a suit upon false charges, or maliciously making a false affidavit, is by an action on the case for a malicious prosecution. *Legallee v. Blaisdell*, 134 Mass. 473; *Luce v. Dexter*, 135 Mass. 23; *Baron v. Sleigh*, 2 Cro. Eliz. 628; *Daniels v. Fielding*, 16 M. & W. 207; *De Medina v. Grove*, 10 Q. B. 151, 175; *Sheldon v. Carpenter*, 4 N. Y. 579.

These authorities imply the negative, that an action of trespass for the arrest or for false imprisonment will not lie. And this point has been directly adjudicated. *Coupal v. Ward*, 106 Mass. 289; *Mullen v. Brown*, 138 Mass. 114; *Langford v. Boston & A. R. Co.* 4 New Eng. Rep. 209, 144 Mass. 431; *Wood v. Graves*, 4 New Eng. Rep. 246, 144 Mass. 365; *Daniels v. Fielding*, 16 M. & W. 200; *Barber v. Rollinson*, 1 Crompt. & M. Exch. 331.

In each of the first three cases the arrest was upon a criminal prosecution, and the complainant did not cause it in the same sense as one causes an arrest who sues out a *capias* for his own purposes, and gives it to an officer with directions to serve it. One who makes a criminal complaint does not commonly direct the service of the precept, but from the beginning the control of the prosecution is with the officers of the law.

In *Wood v. Graves*, *supra*, in which the arrest was under a criminal warrant, it was held that the defendants were not liable for false imprisonment on account of abusing the process by procuring it to be issued for an improper purpose, and that the only abuse which would render them liable was an improper use of it after it had been served.

In *Cassier v. Fales*, 139 Mass. 461, it is said that "it is difficult to see how any person can be guilty of a trespass in serving or causing to be served a valid writ or other process of a court."

Lovier v. Gilpin, 6 Dana, 321, was an action of trespass against the plaintiff in a civil suit, for causing an attachment of property, and assisting the officer in making it. There was an offer to show that the process was maliciously obtained; and, in an elaborate opinion, reviewing the cases and holding that the action could not be maintained, Marshall, J., said: "We have found no case in which a party who institutes a groundless proceeding has been held liable as a trespasser for what is done by his direction, or with his aid, in the regular course of that proceeding, unless the process under which the act complained of was done be void, or unless, if voidable only, the process itself, or the proceeding on which it rests, has been set aside or annulled before the action of trespass is brought."

The doctrine that the validity of proceedings in a suit at law cannot be called in question on the ground that it is not well founded in fact, rests upon important considerations of public policy. Every suit involves allegations of fact

upon which a claim is founded. If it is resisted, the truth or falsity of the allegations is to be ascertained by a trial of the suit itself. The bringing of the suit is the part of the plaintiff to prove, and the action in the case proceeds upon the ground that the plaintiff is ready to maintain it, and that he may or may not succeed in establishing it. Every step in the suit is taken to the purpose for which it is pressed, and that of determining whether the allegations are true, and obtaining judgment if they are proved. Provisions are made for serving the rights of both parties, and the court recognizes that the existence of a claim is in dispute, and is to be determined by the trial, and is finally passed upon by the jury. Whatever the law prescribes as the course of the proceeding, whether the security of the plaintiff by way of bail, or the arrest, or for the protection of the interests of either party, may be legal, it is an ultimate decision that the plaintiff's claim is taken or willfully false in the statement of his cause of action, should be held invalid, and this because there are many incidental acts, oftentimes of great variety, in the litigation of a dispute. And it is necessary that these acts, should be fixed and stated by the plaintiff, nor anyone else connected with the suit, should be called upon by the defendant to try collaterally the question of the validity of the suit. If, while the suit is pending, the defendant attempted to separate the question of the action from that of the plaintiff's claim, in regard to the merits of it, it would be practically impossible to do it. The result would be that an action for malicious prosecution would be maintained until the original question had been determined in favor of the plaintiff. So long as anything is pending for trial upon the plaintiff's allegations, it will be deemed to have been brought. When it has been decided in favor of the defendant, he may show, if it was brought maliciously and without probable cause, and recover damages for the wrong done him.

There is no want of jurisdiction or error to affect any of the proceedings brought, in due form, on a statement of a claim. The only element in it relates to that which is certain in every case,—the validity of the plaintiff's claim, and his belief in it. When the uncertainty as to whether the plaintiff's claim is right is eliminated at the trial for the defendant, or the case is ended in his favor, and an action of trespass or prosecution is brought, the former cannot be set aside, and are not void.

In an action for malicious prosecution, damages may be recovered for all the wrongs resulting directly from bringing the suit, and from the measures regularly adopted in conducting it. It would be an anomaly if a plaintiff could recover in such an action, for an arrest regularly made as a part of a prosecution; or if an attachment or any other incidental act from

resulted, could be made a separate cause of action, on the ground that it was illegal as against the original plaintiff, who caused it; much more if, before the determination of the original suit, one who as receptor had contracted with an officer to return attached property on demand could answer the officer's suit for the goods by alleging that the attachment was illegal, as against the original plaintiff, because the suit was maliciously brought; or if the officer himself could make a similar answer to a suit by the plaintiff for negligence in the performance of his duty in relation to an attachment.

If, in the case at bar, the arrest was not illegal as against the plaintiff, there was no defect in the recognizance. It was for a good consideration, and was entered into in due form, in accordance with the statute, before a magistrate having jurisdiction. Moreover, under our law, it became the only security of the plaintiff, and stood in place of the judgment and execution. *Brown v. Kendall*, 8 Allen, 210; *Morgan v. Curley*, 2 New Eng. Rep. 515, 142 Mass. 107. It was perfect, unless tainted with illegality. But the same considerations that show the arrest to have been regular and legal apply to this also. Indeed, this having been entered into voluntarily by the defendant, the only illegality to affect it must be sought for in the arrest which preceded it. And it cannot be truly said that the reasoning applicable to arrests or attachments upon ordinary suits maliciously brought is applicable to this arrest upon execution; for the affidavit was a statement of matters which, if true, entitled the plaintiff to prosecute and maintain his suit in this way. The charge of fraud was the foundation of the new proceeding. It was a charge upon which the defendant could plead not guilty, and demand a trial which would determine the ultimate rights of the parties. That trial could be had quickly, and the statute contemplated that both parties should proceed regularly, in the mode prescribed, to ascertain the truth or falsity of the facts alleged, as they are required to do in any suit at law. The fact that an issue in relation to the pecuniary condition of the defendant was also triable is immaterial. Every reason why arrests and attachments made in suits upon maliciously false declarations should be held legal can be urged in support of the legality of the arrest in this case.

This case does not fall within the principle of numerous cases in which it is held that one shall not be permitted to take advantage of his own wrong. It is true that an arrest which is accomplished by means of an unlawful act, like breaking a dwelling-house, is void. But in these cases there is illegal action which precedes or accompanies the use of process, and is outside of it, and which leads directly to the arrest, and enters as an element into it. In the case at bar the arrest was not directly caused by an unlawful act. The plaintiff had no connection with it, except through the process which he ordered served according to its precept. He made a statement under oath, which showed a proper case for an arrest, and a trial in the manner prescribed by law. The magistrate in a preliminary hearing acted judicially upon it, and gave his certificate of authority. Making a statement in such a case is in itself a

lawful act; and a process regularly issued upon it, under which the statement may be further passed upon, is a lawful process. Illegality and fraud taint the statement, but not the process. That is good in law, whether the statement be true or false.

So, where unlawful acts have been done in obtaining an attachment of property,—like taking possession of it on Sunday, or fraudulently inducing the owner to bring it from a State where it cannot be attached to one where it can,—there has been an element of wrong other than in the cause of action upon which the writ was procured. *Parsons v. Dickinson*, 11 Pick. 852; *Usley v. Nichols*, 12 Pick. 270; *Deyo v. Jennison*, 10 Allen, 410.

In each of the cases cited there was fraud or misconduct in regard to the property, before it was taken under the writ, which made it unlawful for the plaintiff to attach it. The writ of replevin referred to in *Pine v. Morrison*, 121 Mass. 296, was not between the parties to that suit, and did not present for trial the issue presented in that. In *Crocker v. Atwood*, 4 New Eng. Rep. 628, 144 Mass. 588, the fraud was not solely in stating a fictitious claim. The attachment of a particular article of personal property does not ordinarily follow from merely suing out a writ of attachment. Besides obtaining the writ, the plaintiff, in the original case to, which *Crocker v. Atwood* relates, "caused the property to be taken on the attachment." And this he did with a fraudulent purpose to deprive the defendant of his rights in it. The case merely holds that other fraud may be taken advantage of, notwithstanding that there was a malicious prosecution.

A distinction has sometimes been suggested between illegality as a ground for a suit, and illegality which can be availed of in defense against the claim of another. But no such distinction exists in cases like that at bar. If the arrest was illegal as against the plaintiff, it was so as well for the purpose of sustaining a suit against him for his wrong, as for defeating an action brought upon the recognizance. In *Ammidon v. Smith*, 14 U. S. 1 Wheat. 447 (4 L. ed. 182), it was held that the fraudulent taking of an oath by a person under arrest on a civil process, and obtaining a release thereby, did not constitute an escape, nor charge the sureties in a suit upon his bond for the prison limits, even though they participated in the fraud. That, too, was a case in which the oath taken was not the foundation of proceedings for the purpose of trying the allegations contained therein. See also *Smith v. Quinton*, Bray. (Vt.) 200.

If the validity of legal proceedings could be tried collaterally before the termination of the suit, on the ground that a false cause of action was maliciously stated, or a false affidavit for arrest was maliciously made, a defendant whose property had been taken might sue for an injunction against the attaching officer. A defendant arrested, instead of trying the facts charged in the affidavit in the manner prescribed by law, might apply for release upon *habeas corpus*, or, after a trial upon the charges before a magistrate, and at any time before final judgment in the superior court, if he saw he was likely to be convicted, he might make default, and set up, as the defendant has done in this

case, the falsity of the affidavit in defense to the supplemental suit upon the recognizance. With such a rule there could be no regularity in procedure, and no certainty as to the value of any security. In a case of this kind there is no hardship in leaving a party to existing remedies. He may, first, obtain under the statute an early hearing of the matters alleged against him; and secondly, after the case is ended, he may, if the facts will warrant it, bring his action for a malicious prosecution. If this remedy is not now available to the defendant, it is because of neglect or misfortune, for which he is legally responsible. It was his duty to have a magistrate present to hear or continue the case at the time to which the hearing was adjourned. His neglect of that duty was a breach of his recognizance. Whether, with such a termination of the proceeding, he can now bring a suit for malicious arrest or prosecution, is a question which is not before us. In *Fortman v. Rottier*, 8 Ohio St. 548, it was held, by a majority of the court, that an action for malicious prosecution could be maintained for procuring an attachment upon a false affidavit, without first getting the proceeding set aside; and in *Bump v. Betts*, 19 Wend. 421, a similar decision was made, where property was attached and a judgment *in rem* obtained upon a false and malicious affidavit that the defendant had absconded. But, in both of these cases, it seems that the affidavits were not of matters which were to be tried in the regular course of proceedings instituted by them; and in that respect they differed from that in the case at bar.

Inasmuch as the jury were permitted to find for the defendant upon a defense which was not properly open to him, the entry must be—

Exceptions sustained.

COMMONWEALTH of Massachusetts

v.

Davis LOCKE.

1. On the trial of a complaint charging the **maintaining of a liquor nuisance**, it is competent to prove circumstances attending discovery of gin and whiskey in defendant's bar-room.
2. **From the presence of the liquor in defendant's bar-room, and the attempt to conceal it, jury might infer that it was kept there for unlawful sale.**
3. **If liquor was kept in defendant's bar-room for sale by his barkeeper, jury might infer that it was so kept with defendant's consent.**

(Middlesex—Filed January 2, 1888.)

ON defendant's exceptions. *Overruled.*
The complaint charged defendant with maintaining a liquor nuisance at Cambridge.

At the trial in the Third District Court of Eastern Middlesex, before Orcutt, J., defendant was found guilty, and thereupon appealed to the Superior Court, where, at the trial before Barker, J., the government introduced evidence that on Tuesday, May 24, 1887, sev-

eral police officers of Cambridge, warrant, visited Porter's Hotel, at which the defendant was the proprietor, and searched the hotel for liquors. Coulter, one of the officers, immediately entered the bar-room. The present in the bar-room but Locke, the defendant, was at the office desk, away from the bar-room. He testified that on entering the bar-room he immediately proceeded around the bar, and the barkeeper had in his hands a measure of which he attempted to pour into the sink. The officer attempted to seize the measure, and in the struggle the contents of which he attempted to pour into the sink. The officer testified that gin was spilled on the floor, and a small quantity of whiskey was spilled under the bar. Defendant testified to the introduction of this evidence of the barkeeper in the absence of the defendant, but he knew and consented to them; but the justice ruled that as part of the evidence should be admitted in evidence, and was duly excepted to the admission of the same.

The other officers, entering the bar-room subsequently, testified to substantial facts as to the finding the smell of gin on the floor, and a small quantity of liquor in one of the measures.

A large quantity of liquors was seized in a storeroom in the third hotel. Defendant testified that in 1887, he had been licensed; that the storeroom had been carried over to the expiration of his license, and was for sale in the bar-room for beer and tonics; and that nothing had been, to his knowledge, sold there since the expiration of his license.

The jury returned a verdict for the defendant, and the court set aside the verdict on the ground of alleged exceptions.

Mr. George F. Piper, for the defendant, submitted in support of his principal is liable, criminal or civilly, only for the authorized acts of the principal. (Com. v. *Nichols*, 10 Met. 259); and the principal to the act must be proved by his knowledge of it is (Com. v. *Putnam*, 4 Gray, 16).

If, then, the acts of the barkeeper shown to be authorized by the defendant, it ought not to have been introduced as in anyway affecting the defendant's charge of the complaint that he maintained a tenement used for the sale and illegal keeping of intoxicating liquors. The introduction of the evidence of the strong tendency to prejudice the defendant.

Mr. Andrew J. Waterman, for the Commonwealth:

The evidence objected to was competent for the purpose for which it was introduced. (Com. v. *Kahlmeyer*, 124 Mass. 388; *Intoxicating Liquors*, 116 Mass. 27; *Dearborn*, 109 Mass. 368.)

Holmes, J., delivered the opinion of the court:

It was competent to prove the sale of gin and whiskey in the defendant's bar-room. (Com. v. *Kahlmeyer*, 124 Mass. 388; *Intoxicating Liquors*, 116 Mass. 27.)

was competent to prove the circumstances of the discovery. But, further, evidence of the barkeeper's conduct was admissible, in connection with the other facts, as tending to show that the defendant was guilty. If liquor was kept for sale in the defendant's bar-room by the defendant's barkeeper, the jury might think it unlikely, as matter of common experience, that it would be kept for sale there without the defendant's consent, and might infer his consent on that ground. *Com. v. Briant*, 3 New Eng. Rep. 33, 142 Mass. 463, 465; *Com. v. Holmes*, 119 Mass. 195; *Com. v. Edds*, 14 Gray, 406, 409; *Com. v. Nichols*, 10 Met. 259. And they might infer that the liquor was kept there for the purpose of unlawful sale, from its presence and the attempt to conceal it.

Exceptions overruled.

Lydia J. ABBOTT

v.

Town of NORTH ANDOVER.

The vote of a town in 1879 authorizing the town treasurer "to hire money for the use of the town when necessary, upon the approval of the selectmen," does not authorize the renewing of existing notes, although the original notes were given for a valuable and legal consideration; nor will such a renewal note prevent the running of the Statute of Limitations against the original indebtedness.

(Essex—Filed January 4, 1888.)

ON plaintiff's exceptions. *Overruled.*

This was an action of contract brought to recover certain sums of money alleged to have been loaned to defendants.

The declaration contained three counts. The first was upon the following note:

\$5,400. North Andover, May 8, 1879.

One year after date, for value received, the town of North Andover, in the county of Essex, and Commonwealth of Massachusetts, by their treasurer duly authorized, promise to pay to the order of Mrs. Lydia J. Abbott, the sum of fifty-four hundred dollars, with interest at the rate of 7 per cent per annum.

Andrew Smith, Treasurer.

The second count was for money had and received by defendant to plaintiff's use, and contained an itemized statement of the various loans made by plaintiff to defendant, the last of which was made November 1, 1876.

The third count was upon interest due upon the sums mentioned in the second count.

The answer denied the authority of Smith to sign the note on behalf of the town, and set up the Statute of Limitations against the second and third counts.

Plaintiff contended that the note was given by Smith, within the apparent scope of his authority, in consideration of the surrender of notes given for the various loans, and that Smith represented that he had authority to issue the note; and that since the town had had the use of the money it was estopped to deny

the validity of the note. Also that if Smith had no authority to issue the note, then, because of his fraudulent representations, the action upon the loans was not barred by the Statute of Limitations.

The court directed a verdict for defendant, and plaintiff alleged exceptions.

Messrs. J. C. Sanborn, W. S. Knox, and J. R. Poor, for plaintiff:

Defendant between 1872 and 1875 had a legal right to borrow money under such votes as passed in this case; and Andrew Smith, as its treasurer, under said votes had authority to borrow money for the town, and give the town's note for the same.

Pub. Stat. chap. 27, § 9; *Whitney v. Stow*, 111 Mass. 368; *Smith v. Cheshire*, 18 Gray, 318; 1 Dill. Mun. Corp. §§ 119, 120.

The votes of the defendant, authorizing the treasurer to borrow money under the direction of the selectmen, constituted him their agent for that purpose. Though he was at the time a public officer of the town, yet, so far as borrowing money under said votes, he was their agent. And the maxim *respondet superior* applies, and the defendant is responsible for all his acts and declarations within the scope of his authority.

Woodcock v. Calais, 66 Me. 234; 2 Dill. Mun. Corp. 974.

That the selectmen gave directions to their treasurer to borrow money of the plaintiff at various times is a question of fact for the jury, and may be implied from all the facts and circumstances of the case.

Johnson v. Jones, 4 Barb. 369; 1 Dill. Mun. Corp. 445; *Davies v. New York*, 93 N. Y. 250. See also *Odiorne v. Matley*, 15 Mass. 39; *Kelley v. Lindsey*, 7 Gray, 287; *Glidden v. Unity*, 33 N. H. 571; *Cheever v. Perley*, 11 Allen, 584; *Gifford v. White Plains*, 25 Hun, 589; *De Voss v. Richmond*, 18 Gratt. 338.

The town had power, under the vote of 1876, to incur debts necessary and convenient for the exercise of their corporate duties.

Pub. Stat. chap. 27, § 9; chap. 20, § 16; *Smith v. Dedham*, 4 New Eng. Rep. 55, 144 Mass. 177.

The note of May 8, 1879, was a legal note, at least to the amount of its consideration, borrowed before the Statute of 1875, chap. 209. The note was given in payment or substitution of other notes for money legally borrowed by the town. The treasurer had a right at their maturity to take them up, or pay them, by giving another note in their places. Or, at most, on taking up the notes at their maturity without paying money, he had the incidental power to give some written promise of the town to the lender, with a reasonable interest. The town did not increase or incur a new debt by the vote of 1879.

Whitney v. Stow, 111 Mass. 368; *Powell v. Madison*, 5 West. Rep. 307, 107 Ind. 106.

But if the note of May 8 was invalid, then it would not operate as payment of the sums previously borrowed on notes prior, or for sums set forth in the count annexed, and plaintiff could recover such sums unless barred by the Statute of Limitations, and she was not barred by reason of the fraudulent concealment of her cause of action by the defendant's agent.

The acts and declarations of Smith, by which

he concealed from the plaintiff her cause of action, were within the scope of his authority, under the votes of the town, and the acts or negligences of the selectmen, and were for the jury.

Story, Ag. § 808.

As between the plaintiff and defendant, the defendant is estopped to deny the validity of the note of May 3, 1879. Whether the defendant is estopped, by its acts and the acts of its agent, to deny the legality of said note, is for the jury, upon all the facts and circumstances of the case.

Bigelow, Est. 4th ed. pp. 535, 536, 577, 578; *Dickerson v. Colgrove*, 100 U. S. 578 (25 L. ed. 618); *Quick v. Milligan*, 6 West. Rep. 888, 108 Ind. 419.

Having borrowed the money by means of corporate votes, and having actually appropriated the same beneficially for the town in its corporate capacity, the defendants are liable for the same, either on the notes or for money had and received to the plaintiff's use.

Dill v. Wareham, 7 Met. 488; *White v. Franklin Bank*, 22 Pick. 181; 1 Dill. Mun. Corp. § 460; 2 Dill. Mun. Corp. § 988; *Argenti v. San Francisco*, 16 Cal. 255, 282; *Thomas v. Port Huron*, 27 Mich. 320.

Whether the money was so received and was actually and beneficially appropriated by the town in its corporate capacity, is for the jury, on all the facts and circumstances of the case.

Messrs. E. T. Burley, N. P. Frye, and Charles U. Bell, for defendant:

A town is a *quasi* corporation, of which all the inhabitants are members. It is created by statute, and has only the powers which are expressly conferred upon it by statute or are incidentally necessary in conducting its municipal affairs.

Dill. Mun. Corp. §§ 9, 18-30; *Rumford School Dist. v. Wood*, 13 Mass. 198; *Hill v. Boston*, 122 Mass. 349.

The power of towns to borrow money, since June 13, 1875, has been governed by Stat. 1875, chap. 209, which is now found in Pub. Stat. chap. 29. Since that time, up to and including 1879, no vote of the town was taken under or in compliance with this statute. Such vote could only be proved by the record.

Andrews v. Boylston, 110 Mass. 214.

It follows that the note in suit, dated May 3, 1879, is void.

Agawam Nat. Bank v. South Hadley, 128 Mass. 503.

Section 10 of the statute does not include debts for borrowed money, but applies to debts contracted in the ordinary administration of the affairs of the town.

Smith v. Dedham, 4 New Eng. Rep. 55, 144 Mass. 177.

In order to recover, the plaintiff must rely upon his allegation of loans made to the treasurer during the years 1872, 1873, 1875, and 1876, of which, with interest, he says the note in suit was made up. But if the treasurer was not authorized by the town to borrow money, he could not bind the town by his unauthorized act in taking money from the plaintiff.

Lowell Sav. Bank v. Winchester, 8 Allen, 109; *Benoit v. Conway*, 10 Allen, 528; *Dickinson v. Conway*, 12 Allen, 487; *Railroad Nat. Bank v. Lowell*, 109 Mass. 214; *Agawam Nat. Bank v.*

South Hadley, 128 Mass. 506; *Charter Oak Bank*, 121 U. S. 1923).

But these loans were unauthorized and consequently void at their inception. The treasurer had no authority *virtute officii*.

Lowell Sav. Bank v. Winchester. The burden was on the plaintiff to show that this particular loan was approved by the selectmen. Any general statement that any had been proven, would be insufficient.

Benoit v. Conway, 10 Allen, 528; *Conway*, 12 Allen, 487.

The fact that the money might have been paid into the town treasury is immaterial.

Benoit v. Conway, 10 Allen, 528; *Nat. Bank v. Lowell*, 109 Mass. 503; *Nat. Bank v. South Hadley*, 128 Mass. 506.

The Statute of Limitations is a bar to any recovery on the original loan, more than six years had elapsed since the action accrued, and the bar is not removed. The town could not be chargeable with unauthorized fraud of its treasurer, committed, not in the business of the town, but in carrying out schemes of its officers to fraud the town.

See *Manufacturers Nat. Bank v. New Eng. Rep.* 927, 144 Mass. 349.

C. Allen, J. delivered the opinion of the court:

The note of May 3, 1879, is reported as a valid indebtedness of the town. Stat. 1875, chap. 209, which is now found in Pub. Stat. chap. 29, provided that no debts should be incurred by any town, except temporary loans in anticipation of the year in which such debts are incurred, the year next ensuing, and expressible therefrom by vote of the said town. (1) debts incurred by a vote of the legal voters present, and voted at a meeting; (2) debts contracted for the year next ensuing, and expressible therefrom by vote of the said town; (3) debts contracted for the year next ensuing, and expressible therefrom by vote of the said town, which towns may lawfully extend the term of such debts. The present note did not fall within these classes. It was given in payment of notes held by the plaintiff in the town from 1872 to 1876, inclusive. The plaintiff contends that the greater part of the notes were given for money borrowed by the town prior to the passage of the Statute of 1875, on legal votes of the town, and that the last of these notes, given in 1876, and that, being legal obligations of the town, these formed a good consideration for the note; and that the town treasurer, at their maturity, to take them, by giving another note in payment, or in some form to continue the liability of the town to pay them, assuming the premises, the difficulty of the argument is that the new note was an independent contract. It is not a contract founded on a good consideration, but founded on good considerations, and is prohibited by the statute. It is how the town itself could give a new note, or renew of an old one, for borrowed money, without a two-thirds vote. But it goes so far as that. Clearly a *virtute officii*, has no right to give the place of old ones. This aut

the town springs only from legal votes of the town; and he cannot enlarge his actual authority by assurances, whether fraudulent or in good faith, as to the extent of it, or by any custom or usage to act without authority. *Agucam Nat. Bank v. South Hadley*, 128 Mass. 506, and cases there cited.

A new note is a new contract, and, if valid, creates a new liability. It is not merely an admission of an existing debt, but it is the creation of a new liability. It has been often held or declared that this is beyond a partner's power after dissolution. *Bell v. Morrison*, 26 U. S. 1 Pet. 357, 878 (7 L. ed. 174); *Hall v. Lanning*, 91 U. S. 160, 170 (23 L. ed. 273); 1 Lindl. Partn. 408-412, Story, Partn. 7th ed. § 322, and note; *Lumbermans Bank v. Pratt*, 51 Me. 563.

However this may be, a town treasurer has no such authority. *Lowell Sav. Bank v. Winchester*, 8 Allen, 109.

The nature of his agency does not enable him to enter into contracts for his principal unless specially authorized. The vote of the town in 1879 authorized him "to hire money for the use of the town when necessary, upon the approval of the selectmen." This had no reference to renewing existing notes. There is no aspect in which the note of May 3, 1879, can be upheld as valid.

This being so, all earlier indebtedness, if ever valid, is barred by the Statute of Limitations. There was no fraudulent concealment of the plaintiff's cause of action, by the defendant. Upon this point, it is sufficient to say that the town was not responsible for the fraud of its treasurer.

Exceptions overruled.

MANUFACTURERS FIRE & MARINE INSURANCE CO.

v.

WESTERN ASSURANCE CO.

1. Although the assured was not the owner of the property at risk, and had no relation to it except as insurer under the original policy, in that relation it had an insurable interest, and could enter into any proper contract for the protection of that interest.
2. Whenever words are found in a contract which can have no proper application to the subject to which it relates, they cannot be regarded.
3. Where, in a contract to reinsure half of the risk held, the policy has been prepared upon a printed blank intended for an ordinary insurance risk, and includes provisions not applicable to a policy of reinsurance, and the instrument contained a stipulation: "This policy to be subject to the same risks, conditions, valuations, and indorsements, privileges, assignments, and mode of settlement as are or may be assumed or adopted by the Manufacturers Insurance Company (the company reinsured), and the loss, if any, and expense of adjustment, payable *pro rata*,

2 Mass.

at the same time and in the same manner as by said company; other insurance permitted,"—by this language the defendant bound itself by what had been, and by what might be, assumed and adopted by the plaintiff, properly pertaining to the risk which it was re-assuring. This agreement rendered nugatory many printed portions of the policy in which it was inserted. This was special and peculiar, pertaining directly to the subject-matter of the contract, and it controlled those parts of the policy which were inconsistent with it. It assumed knowledge, on the part of the defendant, of all the terms and conditions of the policy, and it implied that the plaintiff, as the original insurer, might properly "assume or adopt risks, conditions, valuations, indorsements, privileges, assignments, and mode of settlement," without materially changing the nature of the liability created by the original policy. It did not authorize the plaintiff to charge the defendant by the assumption of a new risk of a different character, or to materially enlarge the existing one. But it covered whatever an insurance company, in accordance with the general usage of such companies in like cases, would do, in the proper performance of its duty, for the continuance of the same risk, having due regard to the rights and interests of both the insurer and insured.

4. Where it was provided by the original policy of insurance that a change of title not assented to in writing by the company should render the policy void, the company reinsuring was bound, by the assent in writing, to this change, and also to an assignment of the policy, where the trustee of the mortgage bondholders, to whom the policy was payable, took measures to foreclose his mortgage, and the property was bought under a judicial sale by an agent of these bondholders.

(Suffolk—Filed January 3, 1888.)

APPEAL by defendant from a judgment of the Superior Court for Suffolk County in favor of plaintiff in an action to recover under an insurance policy. *Affirmed.*

On the 27th of October, 1884, the plaintiff made and issued its policy No. 264,895, for \$5,000, on property of the Indianapolis Cotton Manufacturing Company, payable to George B. Yandes, trustee.

On the said 27th of October, 1884, the defendant made and issued to the plaintiff its policy of reinsurance No. 409,045, for \$2,500 on said risk of the plaintiff, payable to the plaintiff.

The property insured by the plaintiff's policy No. 264,895 was, at the date of the issuing of said policy, the property of the Indianapolis Cotton Manufacturing Company. It was mortgaged for over \$40,000 to George B. Yandes, trustee, as security for certain negotiable bonds.

The plaintiff's policy was taken out by said cotton manufacturing company in accordance with a covenant in said bonds to insure the property mortgaged for the benefit of the mortgagee, but this was never communicated to the defendant company, and the premiums were paid by said cotton manufacturing company. Prior to the 6th day of December, 1884, a suit was brought to foreclose said mortgage; and, in pursuance of a decree made in said suit, a foreclosure sale of said property was made on the 6th day of December, 1884. At this sale the property was bid in by Henry Schnull, trustee, on behalf of the holders of the mortgage bonds aforesaid. The sum bid was less than the amount due under the mortgage. By the laws then in force in the State of Indiana, the purchase by Schnull vested the title to the property in him, subject to a right on the part of the Indianapolis Cotton Manufacturing Company to redeem the property mortgaged by paying the amount due upon the mortgage, with interest, within one year after the date of the sale. Upon the 6th day of December the policy issued by the plaintiff was assigned by the manufacturing company, with the consent of Yandes, to said Schnull, trustee; and said assignment of the policy, and the change in the title and possession of the property insured stated above, were both duly consented to, in writing, by the plaintiff company, the written consent being indorsed on the back of plaintiff's policy, but were not known or consented to by the defendant company.

Late in the night of Saturday, the 27th day of December, 1884, the property insured was damaged by fire, originating from an unknown cause, under such circumstances as to create a liability on the part of the plaintiff company under its policy mentioned above. Notice of the loss was given by the assured to the plaintiff company on Monday, December, 29, 1884, and a statement in writing in regard to the loss, in the form required by the plaintiff's policy, and sworn to by the insured, was rendered to the company on the 6th day of January, 1885, and said Schnull did all things necessary to entitle him to the payment, by the plaintiff company, of the loss under said policy. The total amount of insurance on said property, including the plaintiff's policy, was \$30,000. The plaintiff company duly adjusted with said Schnull the amount of damage to the property insured at the sum of \$24,000; and it is agreed that the immediate loss and damage to the property insured, estimated according to the actual cash value of the property at the time of the loss, was \$24,000. The plaintiff's portion of the total loss—to wit, \$4,000—was, on the 9th day of January, 1885, paid by the plaintiff to said Schnull, trustee. The plaintiff incurred expenses, in the adjustment of said loss, amounting to \$17.50, and these expenses were reasonable and proper under the circumstances.

Notice of said fire and loss was given by the plaintiff to the defendant on Monday the 29th day of December, 1885, the same day on which the notice was given to the plaintiff by Schnull, the assured; and proofs of loss as required by the defendant's policy No. 409,045, above referred to, were duly rendered by the plaintiff, and received by the defendant, at the Indianapolis office, on the 10th day of January, 1885.

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The plaintiff retained, at its cost, an amount equal to the defendant's 409,045. The plaintiff demanded judgment, on said 10th day of January, of \$2,000, its proportion of the property insured, and \$8.75, being the amount of the expenses incurred by the plaintiff.

Judgment for the plaintiff upon the above was entered, and the defendant appeals.

Mr. Henry D. Hyde, for the defendant. Under the forfeiture clause of the policy, the entering of the decree of foreclosure, and the sale thereunder, of title and possession, would render the defendant company from all liability unless its assent was obtained.

Oakes v. Manufacturers F. & M. Ins. Co., 164; *Duiley v. Westchester F. Ins. Co.*, 178; *Foot v. Hartford F. Ins. Co.*, 259, and case cited; *Young v. Eagle F. Ins. Co.*, 14 Gray, 150; *Dadmun Mfg. Co. v. Mut. F. Ins. Co.*, 11 Met. 429; *Norwich F. Ins. Co.*, 102 Mass. 23.

Mr. William Caleb Loring, for the plaintiff. The proviso in question applies to the title to the property insured, and not to the policy. The policy is directly insured by the plaintiff, and has no application to the case of the defendant, where the thing insured is not property of the defendant, and the liability of another as insurer under the policy issued by that other. In the proviso is to be entirely disregarded.

Jackson v. St. Paul F. & M. Ins. Co., 124; *Pearson v. Goschen, 1 F. & M. Ins. Co.*, 352.

However it might have been, but no rider pasted to the blank, the rider used by the Western Assurance Company, make it plain that the proviso must be entirely disregarded.

Consolidated R. E. & F. Ins. Co. v. Flanders, 41 Md. 59.

In case of a discrepancy or conflict between the written and printed contract, the former will prevail over the latter for the reason that there is more authority for the printed part, supposing that the printed part was modified to conform to the written through inadvertence, than for the special written provisions, the intention of the parties was more fully expressed, and were adopted without consideration of the intention of the parties.

Robertson v. French, 4 East, 323; *Flanders*, 120 Mass. 322, 323.

By this policy the appellants have insured their property for \$5,000, and the defendant company, the Fulton F. & Co., by their policies No. 2,779, and to be subject to the special written provisions, the intention of the parties was more fully expressed, and were adopted without consideration of the intention of the parties.

Consolidated R. E. & F. Ins. Co. v. Flanders, 41 Md. 77. And see 3 Kent, Com. 1, Ev. 14th ed. § 278; 2 Taylor, Ev. 1, 2.

The decree of foreclosure, and

sequent thereon, were not a breach of the proviso.

It was held in *Judge v. Connecticut F. Ins. Co.* 132 Mass. 521, that, under a similar proviso, the making of a mortgage was not a breach. *A fortiori*, limiting the time for the redemption of a mortgage in existence when the policy was issued, is not a breach. And see—

Strong v. Manufacturers Ins. Co. 10 Pick. 40; *Loy v. Home Ins. Co.* 24 Minn. 315.

Knowlton, J., delivered the opinion of the court:

The contract entered into by the defendant with the plaintiff differed materially from an ordinary contract to insure a general owner against damage to his property by fire. While, in a sense, it was an insurance upon property, it was strictly a contract of indemnity against risk under another contract which had been entered into by the assured. The assured was not the owner of the property at risk, and had no relation to it, except as insurer under the original policy. In that relation it had an insurable interest in it, and could enter into any proper contract for the protection of that interest. *Eastern R. Co. v. Relief F. Ins. Co.* 98 Mass. 430.

But, manifestly, many provisions appropriate to an ordinary agreement with the owner of property for the insurance of it could have no proper application to the agreement made by these parties.

The defense relied on is that there was a change of title to the buildings and machinery referred to in the defendant's policy, and an assignment of the policy issued by the plaintiff upon them, and an assent by the plaintiff to that assignment,—all without the consent of the defendant.

It appears, upon inspection of the defendant's policy, and is agreed by the parties, that it was prepared upon a printed blank, commonly used in writing policies to insure against loss upon property by the owners of it. This blank contained stipulations making void the policy if, without the written consent of the company, the subject of the insurance should be sold or transferred, or any change should take place in title or possession, or the policy should be assigned before loss; and these stipulations appear in the policy declared on.

It is often doubtful how far provisions which relate to conduct of an assured person as general owner of that which is the subject of the contract should be given effect, in a policy to indemnify against a risk which the assured has taken upon the property of another. That can only be determined in a given case by a careful scrutiny of the different parts of the writing, to ascertain its meaning. Whenever words are found in a contract which can have no proper application to the subject to which it relates, they cannot be regarded; and, not infrequently, the careless use of printed blanks compels recognition of this rule. The policy in this case contained many provisions which were originally intended to regulate the conduct of an owner, in relation to his property, before and after a possible fire. The nature of the risk against which it insured, if there were no special stipulation pertaining to it, would suggest troublesome questions with reference to the applica-

bility of these provisions to this peculiar kind of insurance, some of which it might be necessary to decide. But, in connection with the statement of the risk, the following sentence was inserted, which relieves the case of this difficulty: "This policy to be subject to the same risks, conditions, valuations, indorsements, privileges, assignments, and mode of settlement as are or may be assumed or adopted by the Manufacturers Insurance Company, and the loss, if any, and expense of adjustment, payable *pro rata*, at the same time and in the same manner as by said company; other insurance permitted."

By this language the defendant bound itself by what had been, and by what might be, assumed and adopted by the plaintiff, properly pertaining to the risk which it was reinsuring. This agreement rendered nugatory many printed portions of the policy in which it was inserted. This was special and peculiar, pertaining directly to the subject-matter of the contract, and it controlled those parts of the policy which were inconsistent with it. It assumed knowledge, on the part of the defendant, of all the terms and conditions of the plaintiff's policy, and it implied that the plaintiff, as the original insurer, might properly "assume or adopt risks, conditions, valuations, indorsements, privileges, assignments, and modes of settlement," without materially changing the nature of the liability created by the original policy. It did not authorize the plaintiff to charge the defendant by the assumption of a new risk of a different character, or to materially enlarge the existing one. But it covered whatever an insurance company, in accordance with the general usage of such companies in like cases, would do in the proper performance of its duty, for the continuation of the same risk, having due regard to the rights and interests of both insurer and insured.

The plaintiff consented to that which continued its liability under the policy which it had issued. When the trustee of the mortgage bondholders, to whom the policy was payable, took measures to foreclose his mortgage, and the property was bought under a judicial sale by an agent of these bondholders, there was a change of title, although the mortgagor, under the law of Indiana, still had a year in which to redeem, by paying the mortgage debt. It was provided in the policy issued by the plaintiff that a change of title not assented to in writing by the company should render the policy void. Thereupon, to continue the insurance, the plaintiff assented in writing to this change, and also to an assignment of the policy, made by the mortgagor to the purchaser at the judicial sale, who represented the bondholders, and who afterward held the policy in the same interest as the mortgagor had done, to whom it was at first made payable.

The only change which occurred was hardly more than a technical transfer of the legal estate. The validity of the policy was preserved by the plaintiff's indorsement of consent upon it. The defendant, in the sentence which we have quoted, expressly agreed that its policy should be subject to "indorsements" and "assignments," upon the plaintiff's policy, to be afterward "assumed or adopted" by the plaintiff. The language chosen was apt to cover

what the plaintiff did, and fully justified it. The defendant, therefore, cannot now be relieved from liability on the ground that a change in ownership which did not affect the risk was assented to by the plaintiff, to prevent a forfeiture.

This conclusion not only results from a proper construction of the language of the parties touching this subject, but is consistent with the manifest purpose and spirit of their contract. The defendant agreed to assume half the risk of the plaintiff upon the buildings and machinery insured. It was expressly agreed that the plaintiff should retain, at its own risk, an equal amount under its own policy. Both parties understood that an insurance company, to do a successful business, must deal equitably with its patrons, and hold itself in readiness to consent to changes in the situation and ownership of subjects of insurance which do not affect the risk, and which the necessities or convenience of policy-holders require. Contracts for reinsurance are properly made with reference to this recognized principle. And it is not immaterial that discretionary power should be given the original underwriter, with reference to modifications of the contract which are commonly made, and which do not change its character. A partial guaranty for the proper exercise of that discretion may be obtained, as was done in this case, by requiring the reinsured company to continue to carry, on its own account, a part of the risk reinsured. The interests of all parties may be served, and their rights protected, by inserting in the contract a liberal provision, like that in the policy before us.

Courts of New York, and also of Maryland, in dealing with somewhat different questions under policies of reinsurance, have reached conclusions not unlike our own. *Jackson v. St. Paul F. & M. Ins. Co.* 99 N.Y. 124; *Consolidated R. E. & F. Ins. Co. v. Cashow*, 41 Md. 59. *Judgment affirmed.*

John P. WOODBURY
v.
MARBLEHEAD WATER CO.

1. A corporation authorized to acquire the waters of a certain brook in the town of Marblehead, and "other water sources," and to take and hold lands and easements necessary for holding and conveying the same into said town, or "other town or city," may purchase water sources outside of said town.
2. Stat. 1883, chap. 163, is not void for want of adequate provisions for compensation to owners of lands taken thereunder.
3. A description filed, of lands sought to be taken under the statute, which does not set out the width of the lot, and is vague as to the termini, is not sufficiently accurate.
4. The filing, within time, of a second description and plan of lands sought to be taken, in aid of the first, is sufficient if it identifies the land.

(Essex—Filed January 5,

ON report. *Bill retained for the damages.*

This was a bill in equity brought by the defendant from maintaining its plaintiff's land. The defendant filed a return to the bill, and the registry of deeds of Essex County, on the days of the time it entered upon plaintiff's land, of which the following is a paper, of which the following is a

Know all men by these presents, that the Marblehead Water Company, duly organized by law under and by virtue of chap. 163, 1883, of the Acts of the Commonwealth of Massachusetts, does hereby hold for the uses of the said Marblehead Water Company, for the purposes of its incorporation, the lot of land in Lynn, Massachusetts, commencing at the southerly end of Nahant Street, in the city of Lynn, and approximating the crest of the crest of said beach, through lands belonging to J. P. Woodbury and Edward Heffernan, to Beach Street, in said Lynn, is for the purpose of holding, preserving, and conveying the waters of the said corporation through pipes laid under said lands for the said purpose of holding, preserving, and conveying the waters of the said corporation through pipes laid under said lands for the said purpose of holding, and in accord with a vote of the Marblehead Water Company, passed on the 1st day of June, 1885, of which the following is a true and correct copy:

Voted that the Marblehead Water Company, under Acts 1883, chap. 163, of the Acts of the Commonwealth of Massachusetts, do take and hold the described lot of land in Lynn, Massachusetts, and described as follows: commencing at the southerly line of Nahant Street, in the city of Lynn, at a point approximating the crest of the crest of said beach, thence in a southerly direction on the said crest of said beach, through lands supposed to belong to J. P. Woodbury and Edward Heffernan, to Beach Street, in said Lynn. This taking and holding of said land is for the purpose of holding, preserving, and conveying the waters of the said corporation through pipes laid under said lands for the said purpose of holding, preserving, and conveying said waters. Witness my hand and seal, this 1st day of June, 1885.

Attest: W. B. Brainerd, Secretary.

In witness whereof the said Marblehead Water Company has caused its seal to be hereto affixed, and these presents to be signed by its president, the 1st day of June, A. D. 1885.

Marblehead Water Company
By Thos. Appleton, President.

After the suit was begun, defendant made another entry on plaintiff's land, and the registry a new description of the lands, the facts of the former one.

Questions of law arising were referred to the consideration of the whole court. *Messrs. George O. Shattuck and John P. Woodbury*, for plaintiff:

By the well-established principle of law, the words "may purchase water sources," must be limited to water sources within the town of Marblehead, or any other town or city.

ited to such town or city as can be supplied from those sources; and the proceedings of the defendants in taking water in Swampscott and carrying it to Lynn and Nahant are unauthorized.

If the words "may purchase other water sources," and supply "any other town or city," are to be taken literally, without regard to the context or other clauses in the Act, they would authorize the purchase of water sources anywhere in Massachusetts, and the supplying therefrom any town or city in the Commonwealth. Such a reading not only leads to a result which could not have been contemplated, but also violates the rule of construction, that every clause and word of a statute shall be presumed to have been intended to have some force and effect.

Opinion of Justices, 22 Pick. 578; *Com. v. McCaughey*, 9 Gray, 296.

As the Act authorizes the town of Marblehead to purchase, at any time, the franchise, corporate property, and all the rights and privileges of this corporation, and to tax its citizens to pay for them and the expenses of operating the waterworks (§§ 9-12), it is clear no such broad construction of these words was contemplated. It would be an attempt to authorize the town of Marblehead to carry on a private water business anywhere in the Commonwealth, and entirely outside of the town itself. Taxation for this purpose would be unconstitutional.

Lowell v. Boston, 111 Mass. 454.

If it were intended to authorize this corporation to supply any town or city from any water source, the specific authority to supply Marblehead, which forms the principal subject-matter in the wording of the Act, would be superfluous and meaningless.

Com. v. McCaughey, *supra*.

The construction contended for by the plaintiff is consonant with the real intention of the Legislature, and the only one by which the entire provisions of the Act can be made useful and pertinent. It is supported by the general policy of legislation *in pari materia*, and with the well-settled principles of construction.

Com. v. Cambridge, 20 Pick. 287; *Cleveland v. Norton*, 6 Cush. 380; *Holbrook v. Holbrook*, 1 Pick. 248.

The authority is to acquire the water of Putnam's Brook, in the town of Marblehead, and other water sources. This case is within the rule that, when general words follow particular words, the meaning of the general words is to be determined by the principle of *noscitur a sociis*.

Potter's Dwar. Stat. p. 236; *Bishop*, Written L. §§ 245, 246; *Sandiman v. Breach*, 7 B. & C. 96; *People v. New York & M. B. R. Co.* 84 N. Y. 565; *Green v. Boston & L. R. Co.* 128 Mass. 221; *Ree v. Whitnash*, 7 B. & C. 596; *Reg. v. Reed*, 28 Eng. L. & Eq. 188; *East Oakland v. Skinner*, 94 U. S. 255 (24 L. ed. 125); *Campbell v. Paris & D. R. Co.* 71 Ill. 611; *Casher v. Holmes*, 2 B. & A. 592.

Those portions of chap. 163 which authorize the taking of lands otherwise than by purchase are void, because adequate provision is not made therein for compensation to the owner. Prepayment is not regarded as necessary in Massachusetts in cases where provision for security is made by an appropriate remedy upon an adequate fund.

curity is made by an appropriate remedy upon an adequate fund.

Haverhill Bridge v. County Comrs. 108 Mass. 120, 124; *Thacher v. Dartmouth Bridge Co.* 18 Pick. 501, 508; *Connecticut River R. Co. v. County Comrs.* 127 Mass. 50, 53.

It is enough if a mode of ascertaining the damages, and such remedies for obtaining them, are provided that there is a reasonable certainty that they will be paid.

Brickett v. Haverhill Aqueduct Co. 3 New Eng. Rep. 818, 142 Mass. 394.

But the Act in question does not provide therefor with such reasonable certainty as is required. There must be reasonable certainty of recovering full compensation.

Boston & L. R. Co. v. Salem & L. R. Co. 2 Gray 1, 37.

The defendant has not complied with § 3 of chap. 163.

The plaintiff cannot justify the acts complained of, unless, at the time of the filing of this bill, defendant had properly taken the lands of the plaintiff.

Glover v. Boston, 14 Gray, 282, 288. See *Wilson v. Lynn*, 119 Mass. 174; *Warren v. Spencer Water Co.* 3 New Eng. Rep. 111, 143 Mass. 9.

The second entry of the defendant upon these lands, and filing of a new description, as set up in the supplemental answer, have no bearing upon the merits of the bill. The plaintiff is entitled, at least, to a formal decree, and to damages suffered before the last entry, for which the Act provides no remedy.

Creely v. Bay State Brick Co. 103 Mass. 514; *Tucker v. Howard*, 128 Mass. 361.

Messrs. J. P. Farley, Jr., and J. F. Wheeler, for defendant:

Adequate provision is made in Acts 1883, chap. 163, for compensation to owner.

Brickett v. Haverhill Aqueduct Co. 3 New Eng. Rep. 818, 142 Mass. 397.

The presumption is in favor of the validity of the statute.

Talbot v. Hudson, 16 Gray, 422.

Even had the defendant failed to comply with § 3 of said chap. 163, the plaintiff has a complete remedy by an action or tort for trespass.

Kenney v. Consumer's Gas Co. 2 New Eng. Rep. 816, 142 Mass. 418; *Kenison v. Arlington*, 4 New Eng. Rep. 340, 144 Mass. 456, and cases cited.

Especially should plaintiff be left to this remedy here, where the act complained of consists in the construction of a pipe-line through the land, which construction has been completed.

Deere v. Guest, 1 M. & C. 516; *Lind v. Isle of Wight Ferry Co.* 7 L. T. N. S. 416.

The public inconvenience to the town of Nahant should be considered.

Wood v. Charing Cross R. Co. 33 Beav. 290.

There is, in chapter 163, no limit to the time within which the power to take land by eminent domain must be exercised, and an injunction should not issue against the exercise of a statute power, nor should it issue when liable to be defeated by such exercise. Some open act is always considered a taking, like diversion of water, or entry upon land. The entry on the land is the taking, and the filing of the proper description is the condition subsequent.

needful to vest the title in the company. If such conditions subsequent be not carried out, the title reverts at the end of sixty days, and the company is then liable in an action of tort, but of course the land is then liable to a new taking, by entry and filing of new description.

Moore v. Boston, 8 Cush. 274; *Northborough v. County Comrs.* 138 Mass. 265.

The first taking of the land is complete in itself, being, on its face, a description of land taken by the company, under authority of vote of directors, passed June 23, 1883, showing right of way for pipe-line, 10 inches wide; it is drawn to a scale of 50 feet to 1 inch, and so shows on its face. It shows the land in Lynn, the line of division between Lynn and Nahant, and that part of the pipe-line in Nahant. It shows fixed monuments in Tudor Street, Nahant Street, and Beach Street, and, in line of post fence, and by reference to scale, may be identified and applied to land.

See *Warren v. Spencer Water Co.* 3 New Eng. Rep. 111, 143 Mass. 9; *Wilson v. Lynn*, 119 Mass. 174.

The defendant had not, by its first taking, exhausted its power under chapter 163, but might resort to a second taking.

Northborough v. County Comrs. 138 Mass. 267; *Wamesit Power Co. v. Allen*, 120 Mass. 355; *Sudbury Meadows v. Middlesex Canal*, 23 Pick. 53; *Stamps v. Birmingham, W. & S. V. R. Co.* 2 Phill. 673.

The paper filed within sixty days of second taking contains sufficient description, in itself, to identify the land by reference to a stone monument, and streets, which are monuments, and by reference to a plan, also duly filed, which shows plainly the land taken, and can be open to no objection.

Holmes, J., delivered the opinion of the court:

This is a bill in equity to restrain the defendant from maintaining its pipes in the plaintiff's land, and from entering upon or using the same. The defendant justifies under Stat. 1883, chap. 163. It has bought land in Swampscott, has sunk wells there about three miles from the Marblehead boundary, and has laid pipes from them in Lynn, in an opposite direction from Marblehead, through the plaintiff's land.

The plaintiff's first contention is that the defendant is not authorized to purchase water sources outside the town of Marblehead, arguing from the name given to the defendant; from the special power in § 2, to take the waters of Putnam's Brook in that town, preceding the general words used; from the power given to Marblehead to purchase the franchise, etc.; from the unlimited extent of the powers conferred upon any other construction; and from the general scope of the Act. We certainly are much impressed with the force of these considerations, but we cannot escape from the plain effect of the language used.

The first section creates a corporation "for the purpose of furnishing the inhabitants of the town of Marblehead, or any other town or city, with water."

By § 2 the corporation may take "the water of 'Putnam's Brook,' so called, in the town of Marblehead, and the water-rights connected

therewith; and may purchase sources;" and may take and hold easements necessary for holding a such water, and for conveying to said town, "or other town or city construct and lay down pipes, over "any lands," etc., "or public ways, and along any archways," under the direction of the board of the town, or the mayor and aldermen in which any such ways are enter upon and dig up any such See Stat. 1886, chap. 343.

In § 3 is the usual provision that days after the taking of any lands, water rights, water sources, or aforesaid, otherwise than by a corporation shall "file and cause in the registry of deeds for the which such lands or other proper a description thereof," etc.

By § 5 the corporation may contracts with Marblehead, "or a city, * * * or with any incorporation, to supply water," etc.

Finally, by § 13, "The county for the county within which any or water rights taken under this ted," shall require security for application of the owner. It see if we should say that the defend take water is confined to the wa head, we should be yielding to o the scope of the powers conferred construing words according to t and plain meaning.

The plaintiff next objects that provision is made for compensation of lands taken otherwise chase. But § 13, to which we l makes substantially the same pro made, in respect of railroads, b chap. 112, § 97, the sufficiency believe, has never been doubted. *River R. v. County Comrs.* 127 *Abbott v. N. Y. & N. E. R. Co.* 1

Although the injunction pro § 104 is not mentioned, doubtless granted if the defendant underto land contrary to the terms of the *ett v. Haverhill Aqueduct Co.* 3 N 818, 142 Mass. 394, 397.

We agree with the plaintiff, th scription filed was not "sufficie for identification," as required by *v. Lynn*, 119 Mass. 174; *Warr Water Co.* 3 New Eng. Rep. 111.

The vote to take "the follow lot of land in Lynn," which t scription incorporates, and to w subsequently filed within the six does not set out the width of t vague as to the termini. A part tif's land, too, is in Nahant. T scription is equally vague. The p to be used either in aid of the an independent description, apa objections, only cures the latter vote, if it can be cured.

But, since the bringing of the been a new vote, a new entry, a scription filed, accurate in itself, to an accurate plan. The only

with this description is that it does not set forth the names of the owners. But it identifies the land, which is all that the statute or justice to the owners requires. It was not argued for the plaintiff that the power to take could not be exercised from time to time, or that it was exhausted as to this particular land by an ineffectual attempt to exercise it. See *Sudbury Meadows v. Middlesex Canal*, 23 Pick. 36, 52; *Nampa v. Birmingham, W. & S. V. R. Co.* 2 Phill. 673.

It follows that no injunction can be granted. But whether or not the plaintiff would have obtained an injunction on the merits of his case as it stood at the time when the bill was filed, he must be taken to have had a case within the equitable jurisdiction of the court, in the absence of a demurrer, and for damages as an incident of the cause, until after the original pleadings were complete. *Creely v. Bay State Brick Co.* 103 Mass. 514; *Winslow v. Noyson*, 113 Mass. 411.

The bill, therefore, may be retained for the assessment of damages, if any, in respect of the entry before the lawful taking, if it be desired. See, further, *Milkman v. Ordway*, 103 Mass. 232.

Ordered accordingly.

Emma F. CLEAVES

v.

PIGEON HILL GRANITE CO.

In an action for injury to the plaintiff while crossing a tramway track, where there was evidence that it was unusual for cars to pass at that hour, and that the plaintiff had no reason to expect one; and the proof was that she was looking in the direction from which the car was coming; and there was no evidence that the car could be seen by her until she herself came upon the track; while there was evidence that her horse could be seen from the car before she or her carriage reached the track; and, as the car was moving slowly and was easily controlled, in these respects resembling an ordinary carriage more than a locomotive engine, the plaintiff had a right to expect that those in its control would do something towards avoiding a collision; and, while that would not justify the plaintiff in putting herself in a dangerous position, if she had seen the car and attempted of choice to pass before it, it might be an element in determining whether a certain position would be dangerous; and it would be a question for the jury whether the act was negligent in making a slight miscalculation which could be remedied by proper management of the car.

(Essex—Filed January 6, 1888.)

ON defendant's exceptions. Overruled.

This was an action of tort to recover for injuries received by the plaintiff while passing in a carriage over a private way leading from 2 MARR.

another private way to the plaintiff's premises, and claimed to have been received by reason of negligence of defendant's servants in running a car over its tramway, which crosses said private way.

Verdict for plaintiff, and defendant alleged exceptions.

Further facts appear in the opinion.

Messrs. N. Morse and C. Sewall, for defendant:

There is no conflicting or irreconcilable testimony in the plaintiff's case. As stated by the plaintiff's witnesses, the evidence does not disclose either due care, or the want of it, on her part. Upon this point this case does not differ from that of *Hinckley v. Cape Cod R. Co.* 120 Mass. 257.

The court has laid down the rule, in this class of cases, that where the whole evidence of the plaintiff does not tend to show due care, the plaintiff cannot recover.

Wilson v. Charlestown, 8 Allen, 137; *Todd v. Old Colony & F. R. R. Co.* 3 Allen, 21; *Gahagan v. Boston & L. R. Co.* 1 Allen, 187; *Lucas v. New Bedford & T. R. Co.* 6 Gray, 64.

The question of due care, where there is no conflicting testimony, is primarily to be determined by the court on the plaintiff's case. In the case of *Taylor v. Carew Mfg. Co.* 1 New Eng. Rep. 210, 140 Mass. 150, the court took the uncontradicted testimony of the plaintiff, and determined, as matter of law, that there was no due care, although the jury had found for the plaintiff.

Crafts v. Boston, 109 Mass. 519.

A verdict for a party, bound by the nature of his action to maintain one proposition against another, is necessarily wrong, if all the evidence upon which it is rendered tends equally to support either proposition,—that is, if the evidence is equally consistent with due care or negligence.

Crafts v. Boston, *supra*.

The plaintiff takes the burden to prove affirmatively due care, and it is not enough to say that nothing appears to the contrary.

Smith v. Westfield First Nat. Bank, 99 Mass. 605.

In many cases it has been held, the plaintiff having the burden, as matter of law, on undisputed facts, that the burden had not been sustained, where the same facts when applied to the negligence of the defendants would ordinarily be a question for the jury.

Aigen v. Boston & M. R. Co. 182 Mass. 426, citing *Williams v. Greely*, 112 Mass. 79.

The cases do not find that there should be absolutely no evidence of due care; but, as the court says in *Reed v. Deerfield*, 8 Allen, 524, "where the whole evidence introduced by the plaintiff, if believed by the jury, is so insufficient to support a verdict that the court would not permit one to stand, it is the duty of the court to instruct the jury, as matter of law, that there is not sufficient evidence to warrant a verdict for the plaintiff."

Garrett v. Manchester & L. R. Co. 16 Gray, 501; *Gilman v. Deerfield*, 15 Gray, 577.

In the case of *Fox v. Sackett*, 10 Allen, 535, there was direct evidence of due care, testified to by the plaintiff.

In *Toomey v. London B. & S. C. R. Co.* 8 C. B. N. S. 146, it is said that a mere scintilla of

hing connected with the accident, and could not give testimony as to her case at the time. It was in evidence that she was accustomed almost daily to drive over this crossing. Several witnesses who saw her before she reached the crossing testified to the manner in which she was driving. Four witnesses testified that they saw the plaintiff drive over the crossing. They described her manner of driving as fully as the parties asked them to, and it was for the jury to say whether she was driving in an ordinary way and with ordinary care, unless some fact appeared which showed, as matter of law, that he was negligent. Unless there was some such fact, the question was plainly for the jury.

Three of these witnesses testified that, when he plaintiff drove over the crossing, the car was twenty-five or thirty feet from her, and their testimony alone would justify no inference but that she was in the exercise of ordinary care. It is true that the jury found that these witnesses were wrong as to the position of the car, but they were called by the defendant, and they did not testify to anything in the plaintiff, inconsistent with ordinary care. The other witness, the only one of the four called by the plaintiff, also testified to a fact which the jury found to be true, and which the defendant claims was, in law, negligence, and took the question of due care from the jury,—that the car struck the hind wheel of the plaintiff's carriage. However strong evidence of negligence in the plaintiff this may have been, it clearly was not conclusive. Even in the case of a steam railway, the fact of a collision at a crossing, between the engine and a traveler, has never been deemed conclusive evidence that the traveler was wanting in due care. See *Tyler v. New York & N. E. R. Co.* 137 Mass. 238. There was evidence that it was unusual for cars to pass at that hour, and that the plaintiff had no reason to expect one; there was evidence that the plaintiff was looking in the direction from which the car was coming; there was no evidence that the car could be seen by her until she herself came upon the track, while there was evidence that her horse could be seen from the car before she or her carriage reached the track; and if she had seen the car, and attempted, of choice, to pass before it, it would be a question for the jury whether the act was negligent. The car was moving slowly, and was easily controlled,—in these respects resembling an ordinary carriage more than a locomotive engine. The plaintiff had a right to expect that it would do something towards avoiding a collision; and, while that would not justify the plaintiff in putting herself in a dangerous position, it might be an element in determining whether a certain position would be dangerous, just as the fact that a horse is under its driver's control is an element in determining whether it is dangerous to pass in front of it. A driver who, at a crossing of streets, sees that he apparently can go safely before a horse and carriage approaching on a cross-street, is not, as matter of law, obliged to stop and wait for the other to pass. Unless he is certain that he has made no mistake in his estimate of speed and distance, he may have a right to pass in front, and to assume that, if necessary, the speed of the other will be checked. So in this case, the fact that

the speed of the car could be checked if there should prove to be danger that it would run into the plaintiff's carriage was a fact proper to be considered by the jury in determining whether the plaintiff was negligent in making a slight miscalculation, which could be remedied by proper management of the car.

We think that the question whether the plaintiff was in the exercise of due care was for the jury, and that the rulings excepted to were correct.

Exceptions overruled.

Inhabitants of SOUTH SCITUATE

Inhabitants of STOUGHTON.

1. Estoppel from denying the legal settlement of a pauper, which may arise against a town on notice to remove pauper to itself, is limited to an action thereon between the towns giving and receiving notice, and does not apply in case of obedience thereto.
2. The acts of overseers of a town, in removing a pauper thereto, are incompetent as admissions on the part of the town; they are the acts of public officers, and bind the town by authority of law, and not by authority of the town.
3. Acts of public officers, not required by law to be recorded, are inadmissible as secondary evidence in absence of the record.

(Plymouth—Filed January 6, 1888.)

ON report. Judgment for defendant.

This was an action of contract brought by the plaintiff town to recover for the support and funeral expenses of one Mary A. Talbot, who fell into distress in the plaintiff town, and was by it supported until her death, and was then by it buried. It was admitted at the trial in the Superior Court for Plymouth County, before Brigham, Ch. J., that said pauper did fall into distress, as was alleged in the declaration, and, as therein alleged, was aided by the plaintiff town; that due and legal notice, as required by statute, was given said defendant town, and that a denial of the settlement of said pauper in said defendant town was reasonably returned; and that said pauper was never removed from said plaintiff town. It was also agreed that said pauper was the daughter of Charles Cromwell, who had a settlement in the town of North Bridgewater, now the city of Brockton. It appeared in evidence, by the records of said city, that said pauper was married May 8, 1851, to one Granville Talbot; that the ceremony was performed by one George Clark, a justice of the peace; that said Clark was one of the selectmen of said Brockton (then North Bridgewater); and that the selectmen acted as overseers of the poor, there having been that year no overseers elected. Said plaintiff's counsel claimed that this marriage was performed for the purpose of changing the settlement of said pauper from North Bridgewater to Stoughton. It also appeared in evidence that, within two

weeks after said marriage, said North Bridgewater, by its overseers, notified said Stoughton that said pauper, and her twin children, just born, were in said North Bridgewater, alleging that their settlement was in said Stoughton, and requesting their removal on the payment of the expenses of their support. It was admitted that said pauper and her twin children were removed by the overseers of the poor of said Stoughton to the almshouse therein, and there maintained for three months, at least, and that said Stoughton paid the bills presented by said North Bridgewater for the support of said pauper previous to her removal to said Stoughton; and at various times, during the term of eleven years or more thereafter, supported in its almshouse one of the children of said pauper. It was shown that in 1861 said North Bridgewater notified said defendant town that said pauper's daughter Alice was in distress, and that, in pursuance of said notice, said Alice was removed to said Stoughton's almshouse, and there for a while supported. There was no evidence that any denial of settlement was ever sent by said Stoughton to either of said notices sent as aforesaid by said North Bridgewater. It was admitted that all the records of said Stoughton, in any way relating to the said pauper in 1851 or 1861, had been totally destroyed by fire before the trial. Upon these facts the plaintiff rested; the jury, by order of the court, returned a verdict for the defendant, and the presiding judge reported the case to the supreme judicial court.

Messrs. Simmons & Pratt, for plaintiffs:

Upon the evidence, the pauper's settlement was *prima facie* in North Bridgewater, now Brockton.

Pub. Stat. chap. 83, § 1, cl. 2.

It was shown that she was married to one Talbot, under peculiar circumstances, by the very officers whose interest it was to fix her settlement upon a neighboring town. No evidence of his settlement was offered; but it was shown that afterward said pauper's minor child, who must have taken her father's (and hence her mother's) settlement (Pub. Stat. chap. 83, § 1, cl. 2), was removed to and supported by Stoughton, after notice from North Bridgewater. These facts constitute an estoppel upon these defendants as against North Bridgewater.

Pub. Stat. chap. 84, § 29.

The records being burned, and all public officers being presumed to act in accordance with law and within the scope of their authority, it is presumed that these records, especially those kept by the overseers, under Pub. Stat. chap. 27, § 72, would disclose facts authorizing and justifying the acts of the overseers in what they did, and the acts are thus admissible as secondary evidence of the contents of the books.

Bank of U. S. v. Dandridge, 25 U. S. 12 Wheat. 69, 70 (6 L. ed. 554), opinion of *Mr. Justice Story*; *Curtis v. Herrick*, 14 Cal. 117; *Isbell v. New York & N. E. R. Co.* 25 Conn. 556; 1 Greenl. Ev. § 40; *Hill v. Hennigan*, 11 Ir. C. L. 522; *Taylor*, Ev. 8th ed. 200.

It is not to be presumed, in the absence of evidence, that public officers would have committed a crime, as the overseers of North Bridgewater would have done, had they removed this pauper to a town where she was not legally settled.

Pub. Stat. chap. 84, § 31; *Hill*, 11 Ir. C. L. 522.

Mr. Oscar A. Marden, for

The liability sought to be established is wholly statutory, the burden is on the plaintiff town to show affirmatively that it is necessary to establish that liability.

Hyde Park v. Canton, 130 Mass. 513; *Shelburne*, 13 Gray, 341; *Uxbridge*, 131 Mass. 454; *Danvers*, 131 Mass. 513.

And it being agreed that the plaintiff town had a settlement in North Bridgewater, the presumption is that the pauper's settlement derived from the father continued to the plaintiff town to carrying the ordinary burden of the plaintiff town must overcome the presumption.

Pub. Stat. chap. 84, § 5; *Oak*, 13 Met. 192; *Worcester v. Wilbraham*, 586; *Ashland v. Marlborough*, 131 Mass. 513.

The only statutory estoppels of actions are those provided by Pub. Stat. chap. 84, §§ 15, 28, 29, neither of which facts shown in this report. The plaintiff town is a stranger to the facts shown in this report.

The facts do not amount to a settlement of the pauper's settlement in the defendant town.

1. Because the acts relied upon by the plaintiff town are the acts of public officers, and not bind the defendant town.

New Bedford v. Taunton, 9 Allen, 284; *Mouth v. Lakeville*, 7 Allen, 284.

2. Even if the acts stated in the complaint were sufficient to establish the settlement of the pauper in the defendant town.

Bridgewater v. Dartmouth, 12 Mass. 409; *Needham v. Newton*, 12 Mass. 409; *Tisbury*, 10 Cush. 409; *Amherst*, 13 Gray, 341.

W. Allen, J., delivered the opinion of the court:

This is an action to recover damages by the plaintiff town to the defendant town. The only controverted question was whether the pauper's settlement was in the defendant town. Her father had a settlement in North Bridgewater, and she derived it from him. In the year 1851 he died in that town. There was no evidence that her husband had a settlement in North Bridgewater, or that she ever acquired a settlement there, unless certain acts of the pauper of that town are competent evidence. These acts were the removal of the pauper and her children, after notice from North Bridgewater to the defendant town, by its overseers of the poor, and to them there at different times, for the support of the pauper, and the bills presented for the support of the pauper, and these acts of the pauper, might affect the weight of the evidence, if it were competent; but they do not affect the question of its competency.

1. The evidence is not competent to establish an estoppel under the statute.

46, §§ 19-21, which were in force at the time of the acts under consideration, are substantially the same as Pub. Stat. chap. 84, §§ 28-30, and provide that the overseers of the poor may send a written notice, stating the facts in regard to a person who has become chargeable to their town, to one or more of the overseers of the place where his settlement is supposed to be, requesting them to remove him. If the removal is not made within two months after the notice, a written answer stating the objections to the removal shall be sent; and if that is not done, the overseers who requested the removal may remove him to the place of his supposed settlement, and the overseers of that place shall receive and provide for him; and their town shall be liable for the expenses of his support and removal, to be recovered in an action by the other town, "and shall be barred from contesting the question of settlement in such action." The estoppel is plainly limited to the action, and to the parties to it. It does not arise in favor of third parties, or between the parties themselves, when, as in the case at bar, the overseers of the town notified voluntarily remove the pauper and pay the expenses. *Bridge-water v. Dartmouth*, 4 Mass. 273; *Edgartown v. Tisbury*, 10 Cush. 408.

2. The acts of the overseers of the poor in removing the pauper to their town and supporting her, and in paying to Bridgewater the expenses of her support, are not competent as admissions by the defendant. The overseers in those respects acted as public officers, and not as agents of the town. Their acts, whether in removing the pauper, or in providing for her support in their town, or in ordering payment for her relief furnished by Bridgewater, bound their town by authority of law, and not by authority of the town, and cannot be taken as admissions by the town or its agents. *New Bedford v. Taunton*, 9 Allen, 207; *Dartmouth v. Lakesville*, 7 Allen, 284; *S. C.* 9 Allen, 211, note; *Oakham v. Sutton*, 13 Met. 192; *Edgartown v. Tisbury*, *supra*.

We do not see that the loss of the records of the defendant town for the year when the overseers of the poor removed the pauper and furnished relief to her at all affects the question. One answer to the argument for the plaintiff—that the acts of the defendant's overseers of the poor are secondary evidence of the contents of the record kept under Pub. Stat. chap. 27, § 72—is that there was no provision for such record until after the acts were performed. Stat. 1877, chap. 186.

Judgment for the defendant.

COMMONWEALTH of Massachusetts

Francis J. MCCARTHY.*

The allegation that the defendant did willfully throw a missile, to wit, a stone, at a street car is not sustained by proof that he threw a billet of wood at the car. The words "to wit, a stone," limit the general meaning of the word "missile" and are descriptive of it.

(Middlesex—Filed January 6, 1888.)

ON defendant's exceptions. *Sustained.*
Complaint for throwing a missile, to wit, a stone, at a horse car.

At the trial, witnesses testified that, at the time alleged, they saw a man throw at a horse car, passing along on Pearl Street, in Cambridge, a triangular piece of wood about ten inches long one side, about seven inches long on the other two sides, and about one and a half inches thick. There was no evidence tending to show that a stone or anything else, except as above stated, was thrown.

At the close of government's evidence, defendant requested the court to rule that there was a variance between the allegation and proof, and to direct a verdict for defendant, which ruling the court declined to give.

The jury found the defendant guilty, and he alleged exceptions.

Mr. Henry H. Winslow, for defendant:

The complaint is in Pub. Stat. chap. 112, § 206, "Whoever willfully throws or shoots a missile at a * * * street railway car, * * * or in any way assaults or interferes with a conductor or driver," etc.

Missile is defined by Worcester: "A weapon thrown by the hand or by a machine." By Webster: "A weapon thrown or intended to be thrown, for doing execution, as a lance, an arrow, or a bullet."

The allegation, "did throw a certain missile," would not describe the offense intended by the statute.

Heard, Cr. L. pp. 67-70; *Com. v. Simpson*, 9 Met. 183; *Com. v. Clifford*, 8 Cush. 215; *Com. v. Bean*, 11 Cush. 414; *Com. v. Kelly*, 9 Gray, 1; *Com. v. McCaughey*, Id. 296; *Com. v. Bean*, 14 Gray, 52; *Com. v. Filburn*, 119 Mass. 297; *Com. v. Chase*, 125 Mass. 202; *Com. v. Maxwell*, 2 Pick. 139, 143.

The words "a stone" is a necessary ingredient in the offense, a matter of essential description, and cannot be rejected as surplusage.

Greenl. Ev., §§ 56, 60, 65; Heard, Cr. L. pp. 56-58.

Even if not necessary, as alleged, they identify the charge, and cannot be rejected as surplusage, because they are made essentially descriptive, and fix with certainty the offense charged.

Com. v. Wellington, 7 Allen, 299; *Com. v. Clair*, Id. 525; *Com. v. Gavin*, 121 Mass. 54; *Com. v. Hartwell*, 128 Mass. 415; *Com. v. Peirce*, 130 Mass. 31; *Com. v. Luscomb*, Id. 42; *Com. v. Moore*, Id. 45.

Nor can the words "a stone" be rejected as surplusage because alleged with a *videlicet*.

The use of the *videlicet* is to fix with certainty that which was before general.

Heard, Cr. L. p. 60; *Hastings v. Loring*, 2 Pick. 214, 223; *Com. v. Hart*, 10 Gray, 468; *Com. v. Chase*, 125 Mass. 202.

If anything can be rejected as surplusage it would be the words, "certain missile, to wit," leaving the charge, as intended by the pleader, "did throw a stone."

Hastings v. Loring, 2 Pick. 214, 223.

The offense charged is doing something, namely, throwing a stone; it is not like offenses where the result, like killing hons, is the offense.

Com. v. Soule, 9 Gray, 304; *Com. v. Falvey*, 108 Mass. 304. See *Com. v. McAfee*, Id. 458.

*See *Commonwealth v. Carroll*, *ante*, p. 430.

Defendant was informed by the complaint that he was put on trial for throwing a stone, not for throwing a piece of wood, and there was a variance between the allegation and proof.

Com. v. Reily, 9 Gray, 1.

Mr. Andrew J. Waterman, Atty-Gen., for the Commonwealth:

The ruling of the court was correct. There was no material variance between the allegation and the proof. It has long been the rule in indictments for murder that if the party is killed by a different weapon from that described, it is no variance. The reason of the rule is applicable to the present case.

1 Russ. Cr. 8th Am. ed. p. 557, and cases cited; *Com. v. McAfee*, 108 Mass. 458, and cases cited; *Com. v. Woodward*, 102 Mass. 155; *Com. v. Chapman*, 11 Cush. 422; *Com. v. Burke*, 14 Gray, 100.

The complaint charges the defendant with the commission of the crime of throwing a missile, and then proceeds to describe the kind of missile thrown. This descriptive part of the complaint may be stricken out, and there is still left a good charge of the crime committed. If the whole of the statement can be stricken out without destroying the charge, it is not necessary to prove the particular allegation; but if the whole cannot be stricken out without getting rid of a part essential to the accusation, then, though the averment be more particular than it need have been, the whole must be proved, or the indictment cannot be maintained.

The complaint in this case would have been sufficient had the descriptive allegation of the kind of missile thrown, i. e., "to wit, a stone," been omitted. It forms no essential part of accusation of the crime charged, nor is it descriptive of the identity thereof, and may therefore be stricken from the complaint.

Com. v. Randall, 4 Gray, 36, and cases cited; *Com. v. Wellington*, 7 Allen, 299; *Com. v. Pray*, 18 Pick. 359; *Com. v. Dextra*, 8 New Eng. Rep. 182, 143 Mass. 32; *Com. v. Blaney*, 138 Mass. 571; *Com. v. Hunt*, 4 Pick. 252.

W. Allen, J., delivered the opinion of the court:

This is a complaint under Pub. Stat. chap. 112, § 286, which provides that "whoever willfully throws or shoots a missile at a * * * street railway car" shall be punished. The complaint alleges that the defendant "willfully did throw a certain missile, to wit, a stone," at a street railway car. The evidence tended to prove that the defendant threw a billet of wood at a car, but there was no evidence that he threw a stone. The exception is to the refusal of the court to rule that there was a variance between the allegation and the proof.

The allegation is that the defendant threw a stone. The words, "to wit, a stone," limit the general meaning of the word "missile," and are descriptive of it; and the whole shows that the only missile which the defendant was charged with throwing was a stone. Even if those words are unnecessary, they are material, and cannot be rejected, because they are descriptive of the identity of what is essential to the offense. Some description of the thing thrown is essential, and the description in the

complaint is material, and must be laid. *Com. v. Wellington*, 7 Allen, 299; *v. Hartwell*, 128 Mass. 415; *Com. v. Tobias*, 1 Ne. 180 Mass. 42; *Com. v. Tobias*, 1 Ne. 506, 141 Mass. 129; *Com. v. Moor*, 45; 1 Greenl. Ev. 65.

The rule that when an allegation is descriptive of an offense charged, but of the manner in which it was committed, is sufficient to prove the substance of it in an indictment for murder, though alleged to have been caused by a stone, proof that it was caused by a stick is sufficient,—does not apply. Here the offense consists in throwing a missile, and words describing the missile are of the offense, and must be strict. We think that the allegation that thrown was a stone was not sustained that it was a billet of wood.

Exceptions sustained.

Edwin C. SWIFT

v.

John CARR *et al.*

It appeared in evidence that John Carr had withdrawn from the firm of Carr, Brown, & Co. business thereafter was carried on by the remaining member, F. Coffin, under the firm name of Carr, Brown, & Co. The plaintiff had received two certificates from Coffin. As evidence to prove notice to plaintiff that withdrawn from the firm, it was tent to show that said letter had a printed heading as follows: F. Coffin, under firm name of Carr, Brown, & Co., manufacturers of horns combs, tips, and w. buryport, Mass."

(Essex—Filed January 6, 1893.)

ON demandant's exceptions. *On* Writ of entry to recover a lot of land in buryport, in Essex county, brought by John Carr and Elizabeth H. Carr, his wife, Carr filed a plea of disclaimer, and the action brought, and before trial heirs came in under the same plea.

Elizabeth H. Carr filed a plea of disclaimer with specification of defense.

The demandant claimed title by deed made to him, as purchaser at auction, made, on an execution issued on against said John Carr and Edward as copartners, under the firm name of Carr, Brown, & Co.

The land was attached on mesne process, and the action by which said judgment was sustained.

The tenant, Elizabeth H. Carr, claimed by virtue of two deeds: the first by Carr to his daughter, Elizabeth M. Carr, the second by said Elizabeth M. Carr, tenant, Elizabeth H. Carr.

Both deeds bore date March 1, 1892, and were both recorded November 21, 1892, the cause of action in the suit on which

ment was made were five promissory notes, indorsed Carr, Brown, & Co.

Said notes were delivered to Gustavus F. Swift, senior member of the plaintiff firm, in payment for horns sold by him, and afterwards, before maturity, became the property of the firm of Swift Bros. & Co.

Gustavus F. Swift had for two years before dealt with said Carr and Coffin under the firm name of Carr, Brown, & Co.

Coffin testified that said firm of Carr, Brown, & Co. dissolved on the 1st day of February, 1888, and Carr retired from the firm on that date.

As evidence bearing on the question of notice of dissolution of the firm of Carr, Brown, & Co., and of the withdrawal of John Carr therefrom, and that Swift Bros. & Co. were not creditors of John Carr, at time of said attachment, in consequence of said notice, the tenant, Mrs. Carr, offered evidence that two letters (the written contents of said letters not being material), one bearing date June 18, 1888, and the other July 9, 1888, each containing one of the five notes, in part settlement for said horns, were mailed on those dates to said Gustavus F. Swift, Chicago, Ill.; said letters having a printed letter-head as follows: "Edward F. Coffin, under firm name of Carr, Brown, & Co., manufacturer and dealer in horn combs, tips, and waste, Newburyport, Mass."

To the admission of this evidence the defendant excepted.

It appeared that the suit on said notes was originally brought against Edward F. Coffin, under the name of Carr, Brown, & Co., as said notes were indorsed, and John Carr was subsequently joined by amendment.

Jury returned verdict for tenant. Defendant alleged exceptions.

Mr. F. Hutchinson, for defendant:

By the dissolution of the firm of Carr, Brown, & Co., Gustavus F. Swift, having dealt with the firm before, and knowing Mr. Carr as a member, was in no way affected unless he had actual knowledge or notice of it.

Pitcher v. Barrows, 17 Pick. 361, 365; *Holt-gre v. Winkler*, 85 Ill. 472.

To prove such notice, the evidence of the contents of the letter-heads was offered, "as evidence bearing on the question of notice of dissolution." It was not corroborative of, neither did it have any "bearing" upon, or connection with, any other such evidence. It was not admissible, unless it proved notice at such a time, and under such circumstances, as would tend to disprove the claim of the defendant that said Carr was indebted to Swift Bros. & Co. at the time of the attachment. The rights and liabilities of the parties having become fixed, no notice, however strong and sufficient in form and service, could in any way affect them at that time, or be admissible for that purpose.

Mudge v. Treat, 57 Ala. 1; *Dickson v. Indianapolis Cotton Mfg. Co.* 68 Ind. 9; *Bryant v. Hawkins*, 47 Mo. 410.

Both letters contained notes for delivery in carrying out the terms of the contract, were not sent for the purpose of notice, and there was no evidence or presumption that the printed head was read by Mr. Swift, and they must consequently be considered entirely insufficient for that purpose.

Pitcher v. Barrows, 17 Pick. 367; *Watkinson*

v. Bank of Pennsylvania, 4 Whart. (Pa.) 482; *Reilly v. Smith*, 16 La. Ann. 31; *Austin v. Holland*, 69 N. Y. 571. See also 7 Taunt. 600.

These notes having become valid negotiable paper, Swift Bros. & Co., the owners at time of attachment, were attaching creditors, and the evidence offered and excepted to had no tendency to prove that they were not.

Mr. Frank W. Hale, for tenant:

The letters in question having been received by G. F. Swift, they were properly submitted to the jury, even if entitled to little weight; but as the printed letter-heads contained all the essential information that could be imparted by a formal notice, it cannot be contended that they had no bearing whatever upon the question.

While it is the law that a retiring partner continues to be liable for the debts of the firm, to creditors who have had dealings with the partnership during his connection with it, until they have actual notice of his retirement, this does not mean that formal notice must be given. That which protects a retiring partner is the knowledge of the creditor. It matters not how the creditor learns of the dissolution.

Davis v. Keyes, 38 N. Y. 94; *Uhl v. Bingaman*, 78 Ind. 365; *Smith v. Jackman*, 138 Mass. 143.

No formal or precise announcement of the dissolution of a partnership, either by publication or otherwise, is necessary to bind dealers with the firm; but knowledge of any fact, however acquired, sufficient to put an ordinarily prudent man upon inquiry, will charge them with notice of whatever facts a reasonable investigation would have disclosed. Persons who have dealt with a firm are affected with notice of its dissolution, if a statement of the fact that they have dissolved, though informal and not signed by any member of the firm, has reached them in any way, which advised them of the fact, and was sufficient to put them on inquiry.

Young v. Todd, 32 Wis. 79; *Gilchrist v. Brande*, 58 Wis. 184.

Actual notice, although to be distinguished from constructive notice, may be inferred from circumstances (*Coddington v. Hunt*, 6 Hill, 595; *Maldin v. Mobile Branch Bank*, 2 Ala. 502; *Laird v. Irens*, 45 Tex. 622);—e. g., publication in a newspaper (*Treadwell v. Wells*, 4 Cal. 260); a single publication (*Jenkins v. Blizard*, 1 Stark. 418); change in printed checks (*Barfoot v. Goodall*, 8 Campb. 147; *Newcomet v. Brontzman*, 69 Pa. 185); notice posted up in a place where it might have been seen by the party sought to be charged with notice (*Irby v. Vining*, 2 McCord (S. C.) 379); knowledge that firm intends to dissolve (*Paterson v. Zachariah*, 1 Stark. 71); that firm is limited to expire at a certain time (*Schlater v. Winpenny*, 75 Pa. 321).

W. Allen, J., delivered the opinion of the court:

At the trial it was deemed to be a material question whether the defendant John Carr was liable as a member of the firm of Carr, Brown, & Co., to one Gustavus F. Swift, upon certain notes given by the firm to Swift. In 1881 and 1882 Carr and one Edward F. Coffin were copartners under the name of Carr, Brown, & Co., and had transactions with Swift.

Similar transactions were had between Carr, Brown, & Co. and Swift in 1883, in the course of which five notes, indorsed by the firm name, were given by the firm to Swift in April, June, and July of that year. There was evidence that the firm was dissolved on the 1st day of February, 1883, and that Carr then retired, and the business was afterwards carried on by Coffin alone, in the name of Carr, Brown, & Co. As evidence that Swift had knowledge that the firm had been dissolved, and that Carr was not a member, the defendant offered in evidence the printed letter-head of two letters, dated respectively in June and July, 1883, sent to Swift, each containing one of the notes before mentioned, which letter-head was in these words: "Edward F. Coffin, under firm name of Carr, Brown, & Co., manufacturer and dealer in horn combs, tips, and waste, Newburyport, Mass." The only exception is to the admission of this evidence. The question is not as to the weight or sufficiency of the evidence, but only as to its competency. There was evidence that the letters were received by Swift, because he received the notes which were enclosed in them. That the statement, at the head of the letter, that the name Carr, Brown, & Co., the indorser and sender of the note, was the business name of Coffin, was some evidence that Swift had notice that Carr had retired from the business, seems too plain for argument. The question whether that, with the other evidence reported, is sufficient, is not open on the exceptions.

Exceptions overruled.

Charles E. CARR

v.

Town of BERKLEY.

1. Where the **selectmen**, on February 17, laid out a **town way**, and on the next day filed the **lay-out** with the town clerk, and a warrant was issued for a town meeting on the 1st of March, to act upon the report of the selectmen, and, on February 27, after the warrant was posted, the **selectmen** filed with the town clerk a paper intended to be a **duplicate** of the paper before filed, with a **statement** added of the **former action**: "And we now hereby report such laying out, with the **boundaries** and admeasurements of the same, to said town, at the **meeting** of the legal voters, regularly warned and notified, for them to accept and allow the same,"—while the papers first filed might have been treated as a report, and acted upon by the town, it was not necessary to do so when **this final report** was **properly before the meeting**.
2. Where the **other courses** and distances and monuments have **no uncertainty**, the **description of one course** as "41½° east," instead of "N. 41½° east," will **not render** the description of the **lay-out** of the road **uncertain**.

(Bristol—Filed January 6, 1888.)

ON report. *Verdict set aside.*

This was a petition for the assessment of damages caused to the petitioner by the alleged

laying out, by the defendant, of the petitioner's premises.

Defendant required the petitioner to lay out the alleged road.

The substance of the evidence that purpose appears in the opinion being a copy of the lay-out shown town clerk on February 18, 1888.

The undersigned, selectmen on the petition of Herbert A. hundred and nineteen others, to way in Assonet Neck, so called Island through land of Charles ing given Charles E. Carr sever of our intention to lay out a to the premises on the day appointed viewed the proposed route opinion that there is need of a petitioned. We therefore lay out follows: Beginning at a stake posite the Island of Conspiracy high water, thence S. 85° 50' links to a rock and stones upon 55° 40' E. 19½ rods to a stake and 41½° E. 24 rods to a stake an easterly line of the Assonet Neck way to be 30 feet wide, and lyerly and northerly side of said mate the damages to be paid Berkley to Charles E. Carr at after taking possession of land way.

Philip H. Fletcher
Calvin T. Crane,

Upon this evidence, the justice court ruled that the way was out, and upon that ground directed for the respondent, and reported verdict; such entry to be made tice might require.

Messrs. Morton & Jennings.

The lay-out was a valid one provides that the laying out, waries and measurements, shall office of town clerk seven days the town meeting at which the selectmen concerning such lay acted on; and that was done in statute does not fix the time w shall be filed, although it is as of the cases that it must be filed least before the town meeting be acted on.

Commonwealth v. Carr, 3 Bl. 219, 143 Mass. 87; Jeffries v. Mass. 535; Blaisdell v. Wint. 140.

A report was filed by the selectmen accepted and allowed by the public meeting duly warned and for; and this, with the filing of the boundaries and measurements of the report, which scription of the measurements was all that was necessary.

Pub. Stat. chap. 49, §§ 71, 72. *Mr. William H. Fox,* for

The report upon which the town meeting, March 1, 1886, was shown town clerk only two days before

It would not be sufficient, made two reports, identically

ne in the town clerk's office seven days before the town meeting, and presented the other at the meeting.

In this case the two reports, although very early alike, are not identically so. In the report filed in the town clerk's office, the last course of the line of the proposed way is imperfectly stated, viz., "41½° east." It probably was intended to be either "N. 41½° east," or "S. 41½° east," but which?

W. Allen, J., delivered the opinion of the court:

Pub. Stat. chap. 49, § 65, provides that the selectmen of the several towns may lay out their own ways. Section 71 provides that no town may lay out by the selectmen shall be established until such laying out is reported to the town, and accepted and allowed at a town meeting, warned and notified therefor; nor unless "such laying out" is filed in the office of the town clerk seven days at least before such meeting.

In this case the selectmen proceeded in literal compliance with the statute. On February 17 they laid out their way, and on the next day they filed the lay-out with the town clerk. After that a warrant was issued for a town meeting, to be held on the 1st day of March, to take action upon the report of the selectmen in laying out the way. On February 27, after the warrant was posted and before the day of the meeting, the selectmen filed with the town clerk a paper which was intended to be a copy or duplicate of the paper before filed, with the following words added: "The laying out, with the boundaries and admeasurements, have been filed with the town clerk on the 19th day of February, 1896, being seven days before this meeting; and we now hereby report such laying out, with the boundaries and admeasurements of the same, to said town, at the meeting of the legal voters regularly warned and notified, for them to accept and allow the same." The statute does not require that the report to the town of the laying out shall be made seven days before the meeting, and it does not require that the laying out, filed in the clerk's office for the examination of all parties interested, and that reported to the town by its action, shall be contained in the same writing. Both may be combined in one; and in this case the papers first filed might have been treated as a report, and acted on by the town; but it was not necessary to do that when a formal report was properly before the meeting.

It is objected that the laying out filed with the clerk on February 18 was uncertain in description, because it gave one course as "41½° east," instead of "N. 41½° east." But there is no ambiguity in the whole description. The other courses and the distances and monuments have no uncertainty.

Verdict set aside.

Mary J. NEALLEY

v.

Inhabitants of BRADFORD *et al.*

In constructing and repairing a highway, the public has the rights of a

landowner as regards watercourses within the limits of the highway. It can make artificial watercourses for surface water. In regard to natural streams it must have regard to rights of riparian owners upon them. It has no right to obstruct the stream so that the water will be prevented from flowing off from lands of proprietors above, but it has a right to make changes in the course of the stream, within the location of the highway, which will not affect the rights in the stream of riparian proprietors upon it.

2. Where a natural watercourse begins within the limits of the highway, the fact that the plaintiff owns the fee to the centre of the highway will give her no right to the water upon it, as against the public. Any right relating to the water, as owner of the land, was taken with the land for public uses. The water in the highway was like earth and stone,—so much matter to be disposed of in the manner most beneficial to the highway,—the only restriction being that the rights of private property should not be infringed. There may be private property in earth and stones which happen to be upon the highway, but the only right in water running upon a highway, which can conflict with the right of the public to appropriate it to the repair of the way, is the right of riparian proprietors on a stream to the natural flow of the water. The right to convey a natural stream whose source and body and outlet are in the highway, in an artificial drain or ditch within the highway, cannot be distinguished from the right to carry surface water.

(Essex.—Filed January 6, 1888.)

APPEAL by plaintiff from a decree of a single justice of the Supreme Judicial Court dismissing plaintiff's bill in equity in a suit for the abatement of a nuisance. *Bill dismissed.*

The facts are stated in the opinion.

Messrs. Henry Carter and B. B. Jones, for plaintiff:

In the case of *Perley v. Chandler*, 6 Mass. 453, the headnote is as follows: "Upon the location of a highway, the public acquire an easement not lawfully to be interrupted by the owner of the land; but the soil and freehold remain in the owner for every use or profit consistent with such easement; he may maintain ejectment for it; and he may sink a watercourse below the surface, covering it so the highway remains safe and convenient for passengers. If a highway be located over watercourses either natural or artificial, the public cannot shut them up, but may make the road over them by the aid of bridges."

The principles so comprehensively stated in this case have never been overruled, but repeatedly reaffirmed, as in the following cases:

Lawrence v. Fairhaven, 5 Gray, 110; *Parker v. Lowell*, 11 Gray, 353; *Emery v. Lowell*, 104 Mass. 13; *Manning v. Lowell*, 130 Mass. 21.

Pub. Stat. chap. 52, § 12, provides that even

a "watercourse occasioned by the wash of a highway or town way" shall not be "conveyed by the side of such way, to incommode, * * * without the approbation of the selectmen first had in writing." But no power is given to obstruct or turn a natural watercourse which has existed from time immemorial, either with or without the approbation of the selectmen in writing, or otherwise. The fact that natural watercourses are not included in this provision, and that it is limited to those "occasioned by the wash of the highway or town way," seems conclusive on this point.

In *Elder v. Bemis*, 2 Met. 599, the action was for causing the watercourse "occasioned by the wash of the highway to be so conveyed by the side of the highway as to incommode the plaintiff in the use of his barn." It was decided that plaintiff had his remedy under Rev. Stat. chap. 25, § 5, which was same as Pub. Stat. chap. 52, § 12.

The only effectual remedy, as the court says in *Lawrence v. Fairhaven*, 5 Gray, 110, "in a suitable case," is by a bill in equity to suppress the nuisance. This principle is made very clear in this case of *Elder v. Bemis*, *supra*.

The rules and principles of law in reference to the diversion of water accumulating by the fall of rain or melting snow on the surface of the ground, are essentially different from those which are applicable to streams flowing in channels between defined and actual banks.

Flagg v. Worcester, 13 Gray, 601. See also *Perry v. Worcester*, 6 Gray, 544.

That any pretended parol license could be revoked, and was revoked, in this case, plaintiff cites following cases:

Morse v. Copeland, 2 Gray, 802; *Owen v. Field*, 12 Allen, 457; *Cook v. Stearns*, 11 Mass. 533; *Steven v. Stevens*, 11 Met. 251.

Messrs. Ira A. Abbott and Francis H. Pearl, for defendants:

It is well-settled practice that the report of a master on questions of fact shall have the weight and conclusiveness of a verdict of a jury, and his findings are not to be set aside or modified without clear proof of error on his part.

Richards v. Todd, 127 Mass. 167; *Trowl v. Berry*, 113 Mass. 189, and cases cited.

The bill of complaint and decree in *Inhabitants of Bradford v. Gage*, have the weight of evidence only.

1 Greenl. Ev. § 212; *Beatty v. Randall*, 5 Allen, 441; *Gilbert v. Thompson*, 9 Cush. 348; *Burlen v. Shannon*, 99 Mass. 200.

This was not a natural watercourse.

Gould, Waters, §§ 263, 264, and cases cited; *Luther v. Winnisimmet Co.* 9 Cush. 171; *Jackman v. Arlington Mills*, 137 Mass. 277, 279; *Lessard v. Stream*, 62 Wis. 112.

If the water flowing into the highway from the south is surface water, as found by the master, the defendants had not merely the right to divert, but to obstruct the flow,—to keep the water off the highway by any means.

Flagg v. Worcester, 13 Gray, 601; *Turner v. Dartmouth*, 13 Allen, 291; *Emery v. Lowell*, 104 Mass. 18, 16.

If there was a natural watercourse, as the master has found, extending from the southerly limit of the highway northerly, the proper officers of the town had the right to divert it as

they did, and the sole remedy she thereby suffered injury, Stat. chap. 52, §§ 15, 16.

This proposition is equally course extended through the plaintiff in her behalf.

Rove v. Granite Bridge Co. 348; *Mellen v. Western R. Co.* 348; *Lawrence v. Fairhaven*, 5 Gray, 110; *Dunn*, 184 Mass. 522; *son*, 29 Ark. 569; *Suffield v. Conn.* 521.

The master has found, as plaintiff, through her husband and authorized the change made by commissioners, in advance, irrevocable after the performance by them.

White v. Norfolk County, 2 Met. 599. The plaintiff is estopped by her drain into the drain made by the defendant, and by the acceptance of the circumstances found by the plaintiff, to the lawfulness of the town officers.

Seymour v. Carter, 2 Met. 599. *New Bedford*, 108 Mass. 208, *Durgin*, 5 Me. 9.

W. Allen, J., delivered the opinion of the court:

This is a bill for the abatement of a nuisance, praying that the defendants be enjoined against diverting the water from the highway through a culvert across the highway of the defendant Gage, and a ditch in the highway in front of the defendant's land, and for damages. The town of Bradford, the high town, who opened the ditch, and the owner of the water flowed after passing through the culvert. The case was referred to a master to find the facts, his findings, and the case was heard by a single justice. The master's report, and upon the report as it should change that might be made or comes up on appeal by the decree dismissing the bill. It is necessary to consider all the facts, and advert to the facts they bear upon the questions.

The plaintiff's land lies on the south side of the highway, and extends to the highway. Her house is on the land, and the eastern end of the land. There was a ditch in the south side of the highway, extending from the highway line westerly about 80 feet. The plaintiff's easterly line there extending southerly from the highway line, which water passed into the ditch, though the former did not extend to the latter. The plaintiff's cellar is on the land in the highway, about 25 feet from the easterly end of it. The land is wet, and water collected in the ditch. About 25 feet westerly from the plaintiff's easterly line was a culvert, which extended from the highway line to the northerly side of the highway, on land of the defendant Gage.

which water from the ditch flowed upon Gage's land. The bottom of the culvert was higher than the bottom of the ditch, and water stood in the ditch on both sides of the mouth of the culvert, and for 50 or 60 feet westerly from it. The road in front of the plaintiff's house was higher than at the culvert, and there was no escape for the water in the ditch below the level of the culvert. The road commissioners of Bradford cut down the street in front of plaintiff's house; established a regular descending grade from the culvert to beyond the plaintiff's westerly line; underdrained the roadbed, and made a ditch or drain on the southerly side of the highway, between the roadbed and plaintiff's line, from the westerly end of the old ditch to a point beyond the plaintiff's land, and obstructed the culvert. This was in 1882. In 1883 the plaintiff filled up the new ditch and opened the culvert. In 1884 the highway surveyor of Bradford, acting under the direction of the selectmen of the town, opened the ditch and filled up the culvert, which is the act of which the plaintiff complains. At that time there was, in front of the plaintiff's house and land, extending 212 feet from her westerly line to a point 80 feet easterly from her house, a covered drain, most of it a stone drain 12 by 15 inches in size, and the rest drainpipe 15 inches in diameter; from her easterly line, extending westerly about 80 feet, was the ditch which had been there from time immemorial, and, connecting the two, was the 50 or 60 feet of new ditch; through this ditch and drain ran the water which had formerly run through the culvert, and that which had run and stood in the old ditch. The acts were all done in the repair of the highway, and were suitable and beneficial.

No question is made of the authority of the road commissioners and highway surveyor to change the grade of the street (see *Callender v. Marsh*, 1 Pick. 418; *Burr v. Leicester*, 121 Mass. 241; *Mason v. New Bedford*, 187 Mass. 255; *Sullivan v. Fall River*, 4 New Eng. Rep. 632, 144 Mass. 579), or to divert the watercourse, and carry it in front of the plaintiff's land, if it was occasioned by surface water (see *Elder v. Bemis*, 2 Met. 599; *Benjamin v. Wheeler*, 15 Gray, 486; *Plogg v. Worcester*, 13 Gray, 601). But the plaintiff contends that it was a natural watercourse, and that there is no authority to divert a natural watercourse for the purpose of repairing a highway. The master found that there was no natural watercourse southerly from the highway; but that one arose within the limits of the highway, on its southerly side, in the ditch, easterly of the culvert that has been spoken of, and flowed into and through the culvert, and out upon land of Gage. The plaintiff excepted to the finding of the master that there was no natural watercourse south of the highway. An examination of the evidence shows that the finding was required by it. The defendant excepted to the finding that there was a natural watercourse within the limits of the highway. This exception would require careful consideration were the finding material. As we are of opinion that the officers had authority to divert the water, though of a natural watercourse, as found by the master, this and some other exceptions become immaterial.

The whole authority for repairing highways

was originally in the highway surveyors. Stat. 1786, chap. 81. The only statute limitation upon that authority was the provision that appears in Pub. Stat. chap. 52, § 12, that highway surveyors should not, without the approbation of the selectmen first had in writing, cause a watercourse occasioned by the wash of the highway to be so conveyed by the side of the way as to inconvenience a house, store, shop, or other building, or to obstruct a person in the prosecution of his business. This section does not make such act illegal, so that an action will lie for it, but provides a remedy in the nature of an appeal to the selectmen. *Elder v. Bemis*, *supra*.

Rev. Stat. chap. 24, § 7, provided that county commissioners, on an application for laying out or altering a highway, might order specific repairs, as is provided in Pub. Stat. chap. 49, § 16. By Stat. 1877, chap. 58 (Pub. Stat. chap. 52, § 3), highway surveyors are to act under the direction of the selectmen in expending money for repairs. By Stat. 1871, chap. 156, towns were authorized to choose road commissioners who should have all the authority of selectmen and highway surveyors, regarding ways. See Pub. Stat. chap. 27, § 75. The authority of the selectmen and road commissioners to order specific repairs is limited to town and private ways. Pub. Stat. chap. 49, § 65. Substantially the whole authority of the public over highways, as regards making repairs upon them, is vested in the highway surveyors or the road commissioners as their substitutes; and the rights of the public is the same in respect to the repair as it is in respect to the construction of a highway. That this power may be exercised to the damage of adjoining owners is recognized in the provision for compensation. Pub. Stat. chap. 52, § 15.

In constructing and repairing a highway, the public have the rights of a landowner as regards watercourses within the limits of the highway. It can make artificial watercourses for surface water. In regard to natural streams, it must have regard to rights of riparian owners upon them. It has no right to obstruct the stream so that the water will be prevented from flowing off from land of proprietors above (*Parker v. Lowell*, 11 Gray, 353), but it has a right to make changes in the course of the stream, within the location of the highway, which will not affect the rights in the stream of riparian proprietors upon it. *Roue v. Granite Bridge Corp.* 21 Pick. 344.

In the case at bar, the riparian proprietors on the stream below the highway concurred in the action of the road commissioners and of the highway surveyor, so that the question whether the plaintiff could take advantage of a wrong to them is not presented. As the natural watercourse begins within the limits of the highway, there is no riparian proprietor above the highway whose rights can be affected. If it is assumed that the plaintiff owns the fee to the centre of the highway, that would give her no right to the water upon it, as against the public. Any right relating to the water, as owner of the land, was taken with the land for public uses. The water in the highway was like earth and stones—so much matter to be disposed of in the manner most beneficial to the highway,—the only restriction being that the rights of private property should not be infringed. There may be

private property in earth and stones which happen to be upon the highway, but the only right in water running upon a highway, which can conflict with the right of the public to appropriate it to the repair of the way, is the right of riparian proprietors in a stream to the natural flow of the water. As there were no such rights involved in the case at bar, the stream was, practically, wholly within the limits of the highway, and the right to convey a natural stream, whose source and body and outlet are in the highway, in an artificial drain or ditch within the highway, cannot be distinguished from the right to carry surface water.

No damage was done to the plaintiff except from the inconvenience of having an open watercourse in front of her vacant lots, and no other or greater damage than would be caused by a watercourse for the wash of the street, unless a greater quantity of water might increase the inconvenience. But the amount of damage done to the plaintiff's estate is immaterial. The statute provides an adequate remedy. As the acts which occasioned the damage were lawful acts, done for the purpose of repairing the way, the plaintiff must pursue the remedy provided by the statute.

Bill dismissed.

William R. STOCKBRIDGE *et al.*, Petitioners,
v.

ESTATE OF Elam STOCKBRIDGE.

1. A will directed the executors to divide a certain portion of the estate equally among the children of C. S. D. H. S. was a son of C. S. and a nephew of the testator. The only children of D. H. S. who were living at the testator's death **petitioned for payment** to them of the amount which would have been payable to D. H. S. if he had survived the testator, and, to show that D. H. S. died before the testator, offered proof of his departure from his home some ten years before the testator's death, and that he had not since been heard of. *Held:*

(a) That the **presumption of death** after an absence of seven years applied to D. H. S., and that, under Gen. Stat. chap. 92, § 28,* re-enacted in Pub. Stat. chap. 127, § 23, **his issue who survived the testator were entitled to take what he would have taken had he survived the testator.**

(b) That the fact that the **gift to D. H. S. was only to him as one of a class** did not prevent the operation of said statute.

(c) That it was immaterial whether any of the class (children of C. S.) survived the testator.

2. The executors of said will had **deposited the money in question in a savings**

* This section is as follows: "When a devise or legacy is made to a child or other relation of the testator, and such child or relation dies before, but leaves issue who survive, the testator, such issue shall, unless a different disposition is made or required by the will, take the same estate that the person whose issue they are would have taken had he survived the testator."

bank, under an order of probate, passed in pursuance of an act of 1885, chap. 376, which recited that the judge of probate, in his residence of D. H. S. was *Held*, that this was not intended to have any further effect than to secure the proper keeping of the testator's accumulations, until it was ascertained who were entitled to them.

(Hampden—Filed January 18, 1887.)

ON report. *Decree for payment of petitioners.*

This was a petition to the probate court for the payment of legacies. It was heard before William Allen, J., and the case for the consideration of the court was the will of Elam Stockbridge, the testator, who died in 1881. His will was duly admitted to probate, and his estate settled by the executor. The residuary legacies became payable.

The will is dated December 18, 1881, and a portion of the residue is given to children of Chester S. Stockbridge, in these words: "One of said five my executors to divide equally among the children of Chester Stockbridge."

David H. Stockbridge is the son of Elam Stockbridge; the petitioners are the children of David H., and were the only children of him living at the decease of Elam Stockbridge. Neither David H. nor the petitioners were named in the will, nor take anything under a legacy to children of Elam Stockbridge.

The petitioners, to prove that Elam Stockbridge died before the testator, offered the deposition of the wife of said Elam Stockbridge, so much of which as bears upon the point is as follows:

Int. 2. Were you the wife of Elam Stockbridge?

A. Yes. We were married on the 15th of September, 1857.

Int. 4. When did you last see Elam Stockbridge? Where?

A. On the 17th day of August, 1881, at Princeton, Bureau County, Illinois.

Int. 5. At the time you last saw Elam Stockbridge, were you living together as man and wife?

A. Yes.

Int. 6. What family had you at that time? Who were the children, and were they?

A. We had three children: twelve years old, past; Hattie L. Stockbridge, old; and Mary G., one year old.

Int. 7. At that time, had the testator any means of support other than that which he derived from the said David?

A. None whatever.

Int. 8. State the circumstances under which the said David H. left his home, and when you last saw him. What did he do, and where did he go?

A. David was out of work, and had no money; he was offered work on the road of a new railroad in Michigan, and he went to the railroad was to run from Houghton, Michigan, to Chicago; he and others were to work on that job, and would go to Houghton.

Int. 9. After he left his home, as stated by you, did you receive any letters from him? If yes, how many and when? When was the last one received,—within what time after he left home?

A. Yes, I received two letters; the first one dated at Chicago, Illinois, and the last at Milwaukee, Wisconsin. The first was received about two days after he left, and the last I received about three weeks after he left home. I do not recollect the dates of those letters. I sent them to David's brother, Frank W. Stockbridge, at Pana, Illinois, and he has not returned them. David wrote me in his last letter that I should write him at Houghton, Michigan.

Int. 10. Have you ever heard from the said David H. since he left home, other than as stated? How old was the said David H. when he left his home, as stated? What efforts have you made to ascertain his whereabouts?

A. I did not since that last letter. David was forty-one years old on the 28th day of August, 1871, the month he left home. I have written him at Houghton, Michigan, and also to the postmaster at that place; his brother, Frank W., has made all the efforts he could to find his whereabouts. I have inquired of parties who left with him.

Int. 11. Have you ever written to the place from which the letters to you came, inquiring as to what had become of him? What was the name of that place?

A. I wrote him as stated.

Int. 12. What was the condition of health of the said David H. at said time he left home?

A. It was fair; but he was drinking very hard and had been for some years before he left home.

Further facts appear in the opinion.

Mr. Charles L. Long, for petitioners:

Whatever rights the petitioners have originate under the clause of the will: "One of said five parts I direct my executors to divide equally among the children of Chester Stockbridge." The petitioners being the children of David H. Stockbridge, who was a child of said Chester Stockbridge, and claiming that, as at the time Elam Stockbridge died the law presumed their father dead, owing to his absence for over seven years without having been heard from, they are, under the provisions of Gen. Stat. chap. 92, § 28, entitled to the legacy which he would have taken had he been living. The provisions of said chapter apply to such a legacy as this.

Moore v. Weaver, 16 Gray, 305.

At the time of the decease of the testator, David H. Stockbridge had been absent from his home and family nearly ten years, and the law presumes that he was dead at the time Elam Stockbridge died.

Loring v. Steineman, 1 Met. 204; *Jochumsen v. Suffolk Sav. Bank*, 3 Allen, 87; *Flynn v. Coffey*, 12 Allen, 183; *Re Phené's Trusts*, L. R. 5 Ch. App. 189.

The court had authority to order the deposit of David H. Stockbridge's legacy, on establishing the fact that he was absent from home, and that his residence was unknown, without the executors proving the negative proposition, that he was not dead. And if, after the deposit had

been made, and it appeared that he had died after leaving home, and prior to the testator's death, leaving children, would not such children be entitled to the money deposited, under Gen. Stat. chap. 92, § 28?

The statute of 1885 does not confer upon the court the power of determining, at the time of the order of deposit, to whom the legacy is due; and the decree cannot go to the extent of a decree in an intestate estate, the distribution of which is entrusted to the court; and as to which decrees are binding.

Loring v. Steineman, *supra*; *Pierce v. Prescott*, 128 Mass. 140.

No brief was filed for respondent.

C. Allen, J., delivered the opinion of the court:

Assuming that the statements contained in the deposition were true, they are sufficient, in the absence of anything to the contrary, to raise a presumption of fact that David H. Stockbridge died before the testator. The rule is carefully stated in *Loring v. Steineman*, 1 Met. 204, 211, by Chief Justice Shaw: "Upon a person's leaving his usual home and place of residence, for temporary purposes of business or pleasure, and not being heard of, or known to be living, for the term of seven years, the presumption of life then ceases, and that of his death arises. But this presumption may be rebutted by counter-evidence, or by a conflicting presumption." And in *Prudential Assur. Co. v. Edmonds*, L. R. 2 App. Cas. 487, 509, it was stated by Lord Blackburn to be "necessary, in order to raise the presumption, that there should have been an inquiry and search made for the man among those who, if he was alive, would be likely to hear from him." See also *Flynn v. Coffey*, 12 Allen, 183; *Jochumsen v. Suffolk Sav. Bank*, 3 Allen, 87, 96; *Bowditch v. Jordan*, 181 Mass. 321; *Re Phené's Trusts*, L. R. 5 Ch. App. 189; *Re Leves' Trusts*, L. R. 6 Ch. App. 356; 1 Greenl. Ev. § 41; 1 Taylor, Ev. § 200. It should therefore now be taken for granted that David H. Stockbridge died before the testator; and, by virtue of Gen. Stat. chap. 92, § 28, re-enacted in Pub. Stat. chap. 127, § 28, his issue who survived the testator are entitled to take what he would have taken had he survived the testator. The circumstance that the gift to him was only as one of a class does not prevent the operation of this statute. *Moore v. Weaver*, 16 Gray, 305. The fact that David H. Stockbridge was a nephew of the testator is found in the will. It does not appear, nor in the view which we have taken is it material, whether any children of Chester Stockbridge survived the testator. That fact, if it existed, would not cut off the right of the children of David H. Stockbridge; it would only diminish the amount to which they would be entitled.

The executors of the will of Elam Stockbridge deposited the money in the Springfield Institution for Savings by virtue of an order of the judge of probate, passed in pursuance of Stat. 1885, chap. 376, it being recited that it appeared to him that the residence of David H. Stockbridge was unknown. This, however, was not intended to have any further effect than to provide for the proper keeping of the money, with its accumulations, until it should be ascertained and determined who are properly

entitled to receive the same. It now appears that the petitioners are so entitled; and an order may be framed for the payment of two thirds of the amount to the two petitioners who are *sui juris*, and of one third to the guardian of Mary G. Stockbridge, a minor, when such guardian shall be duly appointed.

Decree accordingly.

Roderick McPHEE

v.

Catherine BRODERICK *et al.*

Under the statute requiring that the statement filed to secure a mechanics' lien for labor shall contain "the name of the owner or owners of such property, if known," a statement that "said lot of land being owned, to the best of my knowledge and belief, by Catherine Broderick, of said Chelsea," is sufficient, where the petitioner innocently states his belief, although he is in error as to the ownership, especially where the honest mistake has not in any way misled or injured the respondents.

(Suffolk — Filed January 6, 1888.)

ON report. *Decree affirmed.*

This was a petition to enforce a mechanics' lien for labor performed for respondent Litchfield, in the erection of a building. It was filed in the Chelsea Police Court, against Litchfield and Broderick, and appealed into the superior court. Within ninety days after petitioner had ceased to labor, he summoned McNamara into court as a co-respondent. In the erection of the building, Litchfield was acting under a contract with Broderick, a former owner, but the title to the premises was not in her then nor afterwards. When the statement of lien was filed in the registry of deeds, the title was in McNamara.

At the trial, the presiding justice ruled that the certificate of lien, which appears in the opinion of the court, was sufficient in law, and, upon the whole case, entered a decree establishing the lien, and respondents excepted. The case was reported; if the ruling was correct the decree to be affirmed, otherwise a new trial to be ordered.

Messrs. Crowley & Maxwell, for respondents:

The words "the name of the owner or owners of such property, if known" (Pub. Stat. chap. 191, § 6), have not been fully construed. But see—

Kelly v. Laws, 109 Mass. 395; *Patrick v. Smith*, 120 Mass. 510; *Getchell v. Moran*, 124 Mass. 404, 407, 408.

The petitioner, not knowing the name of the owner, may describe the property, and state his ignorance of the name of the owner; but if, in fact, not knowing accurately the owner's name, he undertakes to state the name, he does so at his peril. A nonstatement misleads no one; a misstatement misleads everyone,—for all have constructive notice of the recorded lien.

When the name is not stated, conveyancers are not misled, for they are put on inquiry to examine the description of the property, and so identify the estate. But if the estate is represented to be the property of John Smith,

when in fact it is the property then the conveyancer is misled; up the title of John Doe, he is an examination of a claim of lien index in our registry of deeds knowledge.

See *Kelly v. Laws*; *Patrick v. Getchell v. Moran*, *supra*.

The statute having always been construed, and the equities being of the parties are to be determined of the law.

Mr. T. J. Morrison, for petitioner: Petitioner, while employed by the respondent, formed the labor upon the premises acted under a contract with B. McNamara's consent (see Pub. Stat. § 1); and McNamara was properly became, a party respondent was limited by Pub. Stat. chap. 191, § 6.

Notwithstanding the statement of lot of land being owned, to the best of my knowledge and belief, by Catherine Broderick, of said Chelsea," the certificate was sufficient in law against McNamara.

See Pub. Stat. chap. 191, § 6.

Petitioner believed Broderick was the owner. Under the circumstances, that the title was natural. He certainly knew the name of the true owner. This was from *Kelly v. Laws*, 109 Mass. 395; and from *Benjamin*, 128 Mass. 534, in which the court held that a statement of valuable consideration for a deed affecting the title, known to the petitioner, settled against him.

The words "if known," in Pub. Stat. chap. 191, § 6, under any rule of construction, entitled to receive their full meaning.

In *Kelly v. Laws*, *supra*, the court, in giving effect to the clause of the statute (Pub. Stat. chap. 191, § 6), says: "The claimant from the necessity of stating the name of the owner only when it is known to him, thus providing for cases where an intermediate party employs without disclosing the name of the owner, whose authority he acts."

The statement of belief in the certificate is superfluous,—not necessary,—and immaterial; for the case was sustained without it.

See *Kelly v. Laws*, *supra*.

It should be treated as a simple, immaterial, unnecessary statement of opinion as to the owner's name alone in a statement of lien filed in the registry of deeds, which has resulted therefrom, held fatal.

See *Hauptman v. Catlin*, 20 Mass. 201; *nam v. Ross*, 46 Mo. 337; *Tebbet v. Cat*, 208.

Morton, Ch. J., delivered the opinion of the court:

The only objection made by the respondent to the validity of the certificate filed by him in the registry of deeds was insufficient. The statement that "the lien shall be dissolved, upon the expiration of thirty days after he ceases to furnish labor or materials for, to

structure, files, in the registry of deeds for the county or district in which the same is situated, a statement of a just and true account of the amount due him, with all just credits given; a description of the property intended to be covered by the lien, sufficiently accurate for identification; and the name of the owner or owners of such property, if known." In the case before us the petitioner duly filed a certificate, which was, in all respects, a compliance with the statute, unless the statement therein as to the ownership of the property was insufficient. This statement was as follows: "Said lot of land being owned, to the best of my knowledge and belief, by Catherine Broderick, of said Chelsea." In fact, the property was owned by the defendant McNamara, but the petitioner believed that the defendant Broderick was the owner. The statute and the decisions regard it as important that the name of the owner should be given in the certificate, if it can be done; because otherwise subsequent purchasers, who buy upon the faith of the registry title, are liable to be misled. And it has been held that, if a petitioner knows the true owner, and gives a wrong name in his certificate, it avoids the certificate, and he loses his lien. *Kelly v. Laws*, 109 Mass. 395; *Amidon v. Benjamin*, 128 Mass. 334. But the statute contemplates that there may be cases where the name of the owner need not be given in the certificate. The name is to be given "if known." This implies that, if the name is not known to the petitioner, the certificate is good if it does not name the owner. In this case the petitioner did not know the owner, and thus it differs from *Kelly v. Laws* and *Amidon v. Benjamin*, *supra*. This case, then, is one where the name of the owner is unknown. If the certificate had so stated, no fault could be found with it. Does the fact that he innocently states his belief that the respondent Broderick is the owner vitiate the certificate? To so hold would be to import into the statute a provision not found there. We are of opinion that this cannot be done, especially in a case like this, where the honest mistake of the petitioner has not in any way misled or injured the respondents.

Decree affirmed.

CLARA E. FOGG

v.

EBEN N. PRICE *et al.*

1. Whether or not the filing of an answer in equity has, since the adoption of Rule 13, permitting a demurrer to be inserted in an answer, the effect of overruling a separate demurrer previously interposed, the court may, under Rule 22, allow such answer to be withdrawn; and, on such withdrawal, the demurrer will stand unaffected by the answer.
2. A covenant in a lease, that "if the premises are for sale at any time, the lessee shall have the refusal of them," but which does not fix the price or provide any way in which it can be fixed, is not of a nature to be specifically enforced.
3. In equity, the defense of laches may be taken advantage of by demurrer.

3 MASS.

(Essex.—Filed January 5, 1888.)

ON plaintiff's exceptions in an equity suit.
Bill dismissed.

The bill in this case was filed by Clara E. Fogg, against Eben N. Price, Charles H. Price, and Joseph Price, and alleged that Eben N. Price, being owner of a certain estate with buildings thereon, leased the same, by a written lease, on or about April 9, 1867, to Julian A. Fogg; that Fogg entered under the lease, and on or about July 29, 1875, being still in possession, assigned the lease and term to Edward A. Hodgkins; that on or about September 21, 1875, Price, wholly regardless of the proviso in the lease, "that if the premises are for sale at any time, the lessee shall have the refusal of them," with intent to defraud Hodgkins, conveyed the premises to Charles H. Price and Joseph Price, in no way informing the lessee or Hodgkins of the sale; that Charles H. and Joseph Price, being aware of the proviso in the lease, entered upon and ejected Hodgkins from the premises, and kept him out of possession for more than ten years, until he recovered a judgment in ejectment against them dated April 5, 1886; that, pending that suit, Hodgkins had conveyed the lease and term, the suit, the cause of action, and the claim for damages, to plaintiff, who obtained possession of the premises under the judgment of April 5. The bill prayed that the deed to Charles H. and Joseph Price be declared void; that specific performance of the contract be enforced; that defendants be decreed to convey the premises to plaintiff; also for damages, and that defendants be enjoined from conveying or otherwise interfering with the premises until the further order of the court, and for a receiver.

The cause came on to be heard under the following circumstances, before C. Allen, J.:

Plaintiff filed her bill April 21, 1886. Defendants filed their demurrer July 27, 1886, setting up, *inter alia*, that it appeared from the bill that the cause of action, if there was any, did not accrue within six years. Defendants filed their answer July 27, 1886. Plaintiff filed her exception to answer December 6, 1886.

At the opening, and before argument on demurrer, plaintiff asked the court to rule as follows: "The defendants, having demurred to the whole bill, and answered the whole bill, have thereby overruled their own demurrer."

The court intimated to the defendants' counsel that the answer might be withdrawn. Defendants thereupon made a motion to be allowed to withdraw their answer. Plaintiff asked the court to rule that the answer could not be withdrawn without the consent of plaintiff. The court declined so to rule, and the answer of defendants was allowed to be withdrawn; and the court then entertained the demurrer, and, upon a hearing, ordered it to be sustained, upon the ground of laches, and plaintiff alleged exceptions.

Mr. Julian A. Fogg, for plaintiff:

The plaintiff, by her bill, has clearly stated a most flagrant breach of a written contract, said contract being made with all due formality. The contract is easily understood; it has a common and well-defined meaning and is expressed in the following words: "Provided that, if the premises are for sale at any time, the lessee

shall have the refusal of them." The plaintiff is the assignee, having all the rights possessed by the lessee, and can legally sue in her own name.

Aldrich, Eq. Pl. p. 41.

Such a contract might be assigned for a sufficient consideration, and no assignment in writing is necessary to its validity; an obligation of record or under seal may be assigned by a writing unsealed or by a mere verbal agreement.

Dunn v. Snell, 15 Mass. 485; *Dawson v. Coles*, 16 Johns. 51; *Ford v. Stuart*, 19 Johns. 342.

The assignee of the written contract is entitled to maintain this action for its specific performance.

Batten, Spec. Perf. 358; *Currier v. Howard*, 14 Gray, 513; *Ensign v. Kellogg*, 4 Pick. 4; Aldrich, Eq. Pl. & Pr. 201.

The objection of the defendants, that the cause of action did not accrue within six years, is not well taken.

See *Levy v. Lando*, 3 Meriv. 81; *King v. Mosford*, 1 N. J. Eq. 274; *Aylett v. King*, 11 Leigh, 486; *Nelson v. Carrington*, 4 Munf. 332. See also *Coulson v. Walton*, 34 U. S. 9 Pet. 62 (9 L. ed. 51); *Rector v. Price*, 1 Mo. 373; Fry, Spec. Perf. Cont.; *Cuttsbert v. Creary*, 6 Madd. 189.

The effect of filing the answer was to overrule and destroy the demurrer.

Dan. Ch. Pr. 584; *Clark v. Phelps*, 6 Johns. Ch. 214; *Beauchamp v. Gibbs*, 1 Bibb, 481; *Robertson v. Bingley*, 1 McCord, Ch. 352.

If the defendant demur to the whole bill, an answer to a part thereof is inconsistent, and the demurrer will be overruled.

Story, Eq. Pl. § 442; *Souzer v. De Meyer*, 2 Paige, 574; Mit. Eq. Pl. by Jeremy, 209, 210; *Chase's Case*, 1 Bland, Ch. 217; *Leacroft v. Dempsey*, 4 Paige, 124; *Spofford v. Manning*, 6 Paige, 383; *Miller v. Furse*, 1 Bailey, Eq. 187; *Jarvis v. Pulmer*, 11 Paige, 650; *Kuypers v. Reformed Dutch Church*, 6 Paige, 570; *Saxon v. Burksdale*, 4 Desaus. 522; *Bull v. Bell*, 4 Wis. 54; Aldrich, Eq. Pl. 98; 1 Dan. Ch. Pr. pp. 785, 592, 593.

Mr. George B. Ives, for defendants:

There can be no question that the presiding justice had the right, in his discretion, to allow the answer of the defendants to be withdrawn, and that no exception lies to the exercise of his discretion in that matter.

Rules for the Regulation of Practice in Chancery, No. 22.

The proviso is so indefinite in its terms that it could never have been enforced.

Pray v. Clark, 113 Mass. 283. See *Willard v. Tayloe*, 75 U. S. 8 Wall. 557, 567 (19 L. ed. 501).

If this proceeding can be brought at all, it must be in the name of the party who held the lien when the breach complained of took place; although this covenant, were it sufficiently definite, would undoubtedly run with the land, and hence the benefit as well as the burden of it would pass to the assignee of the lease.

1 Washb. Real Prop. 5th ed. p. 525.

An assignee is not liable for any breach of covenant which occurs before he became assignee; nor after he has parted with the estate

and possession to a new assignee, who may take advantage of any such breach.

Holmes, J., delivered the opinion of the court:

It was formerly a rule that a demurrer and answer to the same were treated as one thing; the demurrer was a reason for the subsequent filing of an answer, and the demurrer. Now that a demurrer is inserted in an answer (Rule 13), there is no longer any reason why a demurrer should be overruled by the court subsequently. But whether it has such an effect or not, the court has no power to allow it to be withdrawn (Rule 13). If it was withdrawn, then, so far as the question is concerned, it was as if it had never been filed. To say that the demurrer is only a misleading figure of speech is a part of the record, which may be operative, so long as another party has shown that it had no function to perform. But when the record ceased to be a part of things, it was not necessary for the court to go through the empty form of filing the clerk to note a second filing. If it were, it would not help us as we should permit it to be done. But we are of opinion that the bill does not case for equitable relief, and that the set out is not of a nature to be enforced.

The covenant is: "If the premises shall be sold at any time, the lessee shall be bound to pay the purchase money to the assignee of the same." This is simply a covenant to give the lessee the first chance to purchase, an agreement to sell if the lessee agrees, but not otherwise. It does not fix a price nor provides any way in which the price is to be fixed. Suppose that the premises were sold for sale, and that the tenant had filed his bill at once, it is plain that the tenant would not have named any sum at which the premises should be compelled to sell. Therefore, in the light of a contract so treated by the bill, it does not satiate of frauds; and, apart from the fact that such a contract as equity can enforce. *Pray v. Clark*, 113 Mass. 283; *Denison*, 114 Mass. 16; *Gelston v. M.D.* 334; *Abel v. Radcliff*, 1 Vern. 411; *Bronley v. Jefferies*, 2 Vern. 411.

It may be said that the contract that the lessor will deal with the same terms as with anyone else will not discriminate against him. But the lessor has now fixed his price by a contract with the purchaser had notice of it. The defendants have removed the duty of specific performance by their conduct. It might be that the result would be substantial justice as against the plaintiff, but in order to do it a term would be made which is not in the contract. The contract certainly does not contemplate the body else as a mode of ascertaining which the lessor will sell to the plaintiff. *Pray v. Clark*, *supra*. The Statute remains unsatisfied, notwithstanding

happened. It is not the event, but the nature of the contract, which is to be considered, and that must be determined by looking at it as it stood at the time it was made. See *Stapilton v. Stapilton*, 1 Atk. 2, 10; *Walton v. Coulson*, 1 McLean, 120, 129; *Moore v. Fitz Randolph*, 6 Leigh, 175, 186.

In deciding the case upon this ground, we do not mean to intimate that the bill does not disclose laches. See *Milwaut v. Thanet*, 5 Ves. Jr. 726, note; *Eads v. Williams*, 4 De G. M. & G. 674, 691; *Brooke v. Garrod*, 8 Kay & J. 608; *Ranelagh v. Melton*, 2 Dr. & Sm. 278; *Weston v. Collins*, 18 Week. Rep. 510; Fry, Spec. Perf. §§ 1072, 1073. Neither do we mean to say that this defense is not open upon demurrer. There is no doubt that the Statute of Limitations can be taken advantage of in this way, because, although at common law the statute would have to be pleaded, and matter of avoidance could not be alleged before the replication (2 Wm. Saund. 63, note 6; *Sawyer v. Boston*, 4 New Eng. Rep. 324, 144 Mass. 470, 472), in equity such replication as the plaintiff desires to make, other than the formal joinder of issue, must be inserted in the bill, and therefore, if the lapse of time is shown and not met, a demurrer lies. It has been thought that a different rule applied to laches, on the ground that it was a conclusion of fact which could not be drawn on demurrer. *Murf. Eq. Pl. 4th ed. 212*. But the Massachusetts decisions hold that a demurrer will lie in clear cases. *Plymouth v. Russell Mills*, 7 Allen, 488; *Williams v. Hart*, 116 Mass. 513.

We have assumed, in favor of the plaintiff, without deciding, that, although the covenant sought to be enforced was broken before the assignment to the plaintiff, and the right of action was therefore attached to the person of her assignor (*Clark v. Swift*, 8 Met. 390, 392), the chose in action might be assigned in equity (3 Met. 395),—at least, for purposes of specific performance,—and that the assignee might sue in her own name, without joining her assignor, as properly as if the contract had not been broken.

Bill dismissed.

Daniel MCKENNA

v.

N. Tenney KIMBALL *et al.*

1. Where the town owned the high-school building and the lot, but had appointed no agent to have charge of it, the school committee was by statute required to keep the schoolhouse in good order, and to provide all things necessary for the comfort of the scholars, including the care of the lot on which the house stood, as well as of the house. It was their duty to take proper measures to protect the schoolhouse from threatened danger, and to see that the access to it over the lot from the adjoining street was safe and comfortable for the scholars, and that the lot was kept in proper condition for them to use in connection with the schoolhouse.

2. The doctrine of respondent superior is founded on the supposed benefit to the

master of the act of the servant, and does not apply to a public officer employing agents in the discharge of a public duty. The school committee were the judges of the necessity and propriety of removing a tree from a lot on which the high-school building was situated, and it was not necessary to recite in the vote ordering such removal the occasion for their action; nor was it necessary that the vote should have been upon a written motion. Where the vote was to employ a suitable person to remove the tree, and it was afterwards cut down by two men who acted under orders from the person designated, the committee are not responsible to one upon whom the tree fell.

(Essex—Filed January 6, 1888.)

ON plaintiff's exceptions. *Overruled.*
This action was brought against the inhabitants of the town of Bradford and three persons who were members of the school committee of that town, to recover damages for personal injuries alleged to have been received by reason of the negligence of the committeemen. Before the introduction of any evidence, plaintiff discontinued against the town. The committeemen had ordered a tree standing upon the school grounds to be felled. Plaintiff testified that he was at work in the highway opposite the schoolhouse lot at the time the tree was being felled, and when the tree went down it fell across the highway, and a limb struck him upon the back and severely injured him; and that he heard no warning from anyone that the tree was about to fall. Two witnesses testified that they were at work with the plaintiff at the time the tree fell, and that they heard a shout of warning after the tree had begun to fall, but none before. There was evidence that no rope or support of any kind was used while the tree was being cut down. One witness testified that he looked at the roots of the tree after it had fallen, and that they had all been cut away except two; that all the roots extending sidewise from the tree had been cut, and the earth removed from about the base of the tree; and that the tree was about forty feet in height. There was no other evidence of negligence of those felling the tree, or of due care on the part of the plaintiff.

Upon this evidence, the presiding justice ordered a verdict for the defendants, and plaintiff alleged exceptions.

Messrs. William H. Moody and Edmund B. Fuller, for plaintiff:

The facts that the defendants passed a vote, on the ground, to cause the tree to be felled, and to employ one Knight to fell it; that subsequently the defendants did direct Knight to fell the tree,—taken together with the fact that the tree was felled by two men other than Knight, although it did not appear by whose orders,—tend to show that the felling of the tree was by the defendants' orders, and was proper evidence for the jury to consider on the question of whether the two men who felled the tree were servants or agents of the defendants, and whether they felled it by defendants' orders.

Com. v. Peto, 186 Mass. 155; *Burgess v. Gray*, 1 C. B. 578; *Reed v. Ashburnham R. Co.* 120 Mass. 48; *Forsyth v. Hooper*, 11 Allen, 419; *Kimball v. Cushman*, 103 Mass. 194.

The fact of agency, or whether the relation be that of master and servant, may be proved by circumstantial evidence; and if there is any such evidence, even though slight, it should be submitted to the jury.

Reed v. Ashburnham R. Co. supra; *Preston v. Knight*, 120 Mass. 5; *Forsyth v. Hooper, supra*.

The testimony of the plaintiff that he had no warning from anyone that the tree was about to fall, and of the two witnesses that they heard a shout of warning after the tree had begun to fall, but none before, together with the evidence that no rope or support of any kind was used; and the testimony as to the roots and the height of the tree,—since it was without the least contradiction,—was proper and competent evidence to warrant a verdict for the plaintiff.

Com. v. Peto; *Reed v. Ashburnham R. Co.*; *Forsyth v. Hooper*; *Burgess v. Gray*; *Kimball v. Cushman*; and *Preston v. Knight, supra*.

Pub. Stat. chap. 44, § 46, does not impose upon the school committee the duty of removing trees from the land of the town, although a schoolhouse stands thereon.

Gen. Stat. chap. 88, § 36; Rev. Stat. chap. 28, §§ 32, 28.

It does not appear that there was any vote of the town of Bradford in the matter.

If the defendants did the acts proved, without any authority from the town or any duty imposed by statute, they were trespassers, and liable for negligence.

Wamesit Power Co. v. Allen, 120 Mass. 355.

If, as trespassers or mere volunteers, the defendants undertook to fell the tree, it was their duty to see that the work was properly executed, so as not to cause injury to anyone, and they are liable for any injury caused to anyone by their own acts or the acts of their servants.

Osborne v. Morgan, 180 Mass. 102; *Brown Paper Co. v. Dean*, 123 Mass. 267, 270; *Wamesit Power Co. v. Allen, supra*; *Gilmore v. Driscoll*, 122 Mass. 208; *Kimball v. Cushman, supra*; *Nowell v. Wright*, 3 Allen, 166; *Bell v. Josselyn*, 3 Gray, 309.

A public officer is responsible for his negligence or that of his servants.

Nowell v. Wright, supra; *Elder v. Bemis*, 2 Met. 599; *Adsit v. Brady*, 4 Hill, 680; *Robinson v. Chamberlain*, 34 N. Y. 889; *Mersey Docks Co. v. Gibbs*, L. R. 1 H. L. Cas. 98-118; *Sutton v. Clarke*, 6 Taunt. 29; *Jones v. Bird*, 5 Barn. & A. 837; *White v. Hindley Health Bd. L. R.* 10 Q. B. 223; *Blackmore v. Vestry*, L. R. 9 Q. B. Div. 451; *Henley v. Mayor*, 5 Bing. 91.

The act complained of was a misfeasance, as distinguished from a nonfeasance; therefore the defendants cannot set up the fact that they were public officers or agents of the town, nor can they justify on the ground that they were performing a duty imposed on them by statute.

Nowell v. Wright, 3 Allen, 166, 168; *Bell v. Josselyn*, 3 Gray, 309; *Hall v. Smith*, 2 Bing. 156; *Schinotti v. Bumstead*, 6 T. R. 646.

And they cannot excuse themselves, as in the case of a person failing to perform a non-statutory duty, by saying that they employed a competent contractor.

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Gray v. Pullen, 5 B. & S. 970; *Bourne A. S. R. Co. 6 H. & N. 48*.

If the town, instead of leaving the school committee, had passed the tree felled, and had no person to do it, over whom it had whom it might have directed, it been liable.

Waldron v. Haverhill, 3 New E. 143 Mass. 582; *Tindley v. Salem*, -173; *Sullivan v. Holyoke*, 135; *Deane v. Randolph*, 132 Mass. 47; *Charlemont*, 107 Mass. 414.

Messrs. Ira A. Abbott and Pearl, for defendant:

There was no evidence that the caused the tree to be felled by whiff claims to have received injury was no evidence of due care on the plaintiff, or lack of it on the part felled the tree. And, assuming had charge of the felling, it ap claim was made that he was not person for the work.

If the defendants caused the tree it was in the discharge of a duty law on them as public officers chap. 44, § 46), and they are not action.

In *Nowell v. Wright*, 3 Allen, 1 of liability of public officers kinds is discussed, pp. 167, 168, dents of an office whose possess held responsible to third parties rated. They are such as clearly t office of school committee. The the court in *Hall v. Smith*, 2 H quoted with approval, namely, tha ants were not liable for "the m such as they were obliged to emplo having been in that case, as in the of such a character that they wou pected to perform it personally.

See also *Callender v. Marsh*, 1 P White v. Philpation, 10 Me. 108; Adams, 3 Allen, 171; *Keenan v. 110 Mass. 474*; *Upham v. Marsh 546*; *Johnson v. Dunn*, 134 Mass v. Adams, 2 Ind. 143; *Bartlett v. Johns*, 439, 450; *McKinnon v. Pen 609*; *Boulton v. Crowther*, 2 B. &

W. Allen, J., delivered the op court:

Pub. Stat. chap. 44, § 21, prov election of a school committee by which shall have the general char indence of all the public ac town. The school committee is public officers whose duties are p statute, and in the execution of it members do not act as agents of t as public officers in the perform duties. Besides the general prov referred to, the statutes specify v required of the committee, and the care of schoolhouses. This d lute in regard to high-school h Stat. chap. 44, § 41; chap. 45, § 1

Since the abolition of school dist 1892, chap. 219, Pub. Stat. chap. 4 the care of all the schoolhouses to

tee unless the town otherwise directs. The language is the same in both provisions. The school committee "shall keep such houses in good order, and shall provide a suitable place for the schools, where there is no schoolhouse, and provide fuel and all things necessary for the comfort of the scholars therein, at the expense of the town." Section 50 provides that the school committee of a town shall have the general charge and superintendence of the schoolhouses therein, so far as relates to the uses to which the same may be appropriated. The town of Bradford gave no direction in regard to the care of the schoolhouses, and it was the official duty of the defendants to care for them, with all the authority expressly or impliedly given to them as the school committee of the town. The committee voted to cause a tree standing on the high-school lot to be cut down, and to employ one Knight, who was a highway surveyor, to fell it; and directed Knight to do so. The tree was afterwards cut down by two men, who it may be assumed acted under orders from Knight. Knight was a suitable person to be employed to fell the tree. The tree fell upon the plaintiff and injured him, as he alleges, in consequence of the negligence of the persons engaged in cutting it down. The only question is whether the defendants are responsible for the negligence of those persons.

If the school committee had authority to order the tree to be felled, the vote must be taken to have been a proper exercise of that authority. It does not appear that any notice of the meeting was required, and it does not appear what notice was given; but the committee were all present at the meeting. It is not necessary that the vote should have been upon a written motion. No objection was made that the vote was not proved by the record required by Pub. Stat. chap. 44, § 27, and the questions whether a record of the vote was made, and whether, if there was no record, the vote was therefore invalid, were not raised. See *Russell v. Lynnfield*, 116 Mass. 365.

The defendants were not themselves negligent; and if their vote was an official act, they are not responsible for the negligence of those whom they employed in carrying it out. The doctrine of *respondat superior* is founded on the supposed benefit, to the master, of the act of the servant, and does not apply to a public officer employing agents in the discharge of a public duty. *Nowell v. Wright*, 8 Allen, 166; *Hill v. Borton*, 122 Mass. 344; *Story*, Ag. § 319.

The case is then narrowed to the single question whether the school committee had authority to remove the tree from the lot on which the high-school building was situated. If they had, they were the judges of the necessity and propriety of the removal, and it was not necessary to recite in the vote the occasion for their action. It is immaterial whether the tree endangered the school building or the children attending the school, or what the reason for its removal was. The right to remove it involved, or rather arose from, the duty of determining whether the removal was necessary. The town owned the school building and lot, but it had appointed no agent to have charge of it, and no officer had any authority over it

except the school committee. The duty expressly put upon the committee by statute to keep the schoolhouse in good order, and to provide all things necessary for the comfort of the scholars, included the care of the lot on which the house stood, as well as of the house. It was their duty, not only to take proper measures to protect the schoolhouse from threatened danger, but to see that the access to it over the lot, from the adjoining street, was safe and comfortable for the scholars, and that the lot was kept in proper condition for them to use in connection with the schoolhouse. This would be included in their general duty of charge and superintendence of the school, if it was not within their specific duty in regard to schoolhouses. But we cannot doubt that the statute made it their duty to keep the lot, as well as the house upon it, in good order. If snow, or if a fallen tree, incumbered the lot, they could remove it; and they were not obliged to wait until the tree fell. It was their duty to exercise, and to act upon, their judgment and discretion as to the necessity and propriety of cutting it down, and in so doing they were acting as public officers, in the discharge of a public duty.

Exceptions overruled.

Kate T. LIFFIN

v.

Inhabitants of BEVERLY.*

In an action of tort to recover for personal injury sustained by a defect in a way which the defendants were bound to keep in repair, where the notice pointed to a particular place of the highway, which it was said was defectively constructed and in a dangerous and unfinished condition, and the proof was that, by reason of such imperfect construction, water would at times accumulate on its side and run over the way and gully out a channel across it, and that the plaintiff broke through the ice into a hole or gully four or five inches deep,—under Statute 1882, chap. 36, the jury would be authorized to find, in the absence of other evidence, that there was no intention to mislead, and that the defendant was not in fact misled by any inaccuracy in stating the cause of the injury.

(Essex.—Filed January 6, 1888.)

ON plaintiff's exceptions. *Sustained.* The action was brought to recover damages for personal injuries alleged to have been sustained by a defect in a way which the defendants were bound to keep in repair.

Plaintiff offered to prove that there was in the defendant town a public highway called Elliot Street, on which the plaintiff lived; that December 24, 1884, plaintiff, while traveling upon said street, and in the exercise of due care, struck her foot against a hard substance of either snow or ice; that at the same time her

*See *Stanton v. Salem*, ante, p. 429, and note.

sufficient, and ordered a verdict for the defendants.

Mass. Pub. Stat. chap. 52, § 19; Laws 1882, chap. 86.

A very slight suggestion of the cause will be sufficient when the conditions of the statutes are complied with.

Fortin v. Easthampton, 3 New Eng. Rep. 37, 142 Mass. 486.

Mr. H. P. Moulton, for defendants:

Plaintiff's notice did not describe the defect relied upon at the trial, and was insufficient except as a notice of a defect caused by an accumulation of snow and ice.

Noonan v. Lawrence, 180 Mass. 161; *Dalton v. Salem*, 181 Mass. 551.

No notice having been given that the plaintiff's injury was sustained by reason of a hole or depression in the street, it was incumbent upon the plaintiff to show that the town had not in fact been misled as to the nature of the defect by the notice given.

Stat. 1882, chap. 36; *Fortin v. Easthampton*, 3 New Eng. Rep. 37, 142 Mass. 486.

W. Allen, J., delivered the opinion of the court:

Statute 1882, chap. 36, provides that a notice shall not be deemed to be insufficient by reason of any inaccuracy in stating the cause of the injury, if it is shown that there was no intention to mislead, and if the party entitled to notice was not in fact misled.

The place of the injury is minutely described in the notice, and it is said, as a cause of the injury, that the way at that place was defectively constructed, and in a dangerous and unfinished condition. The plaintiff offered to prove that the way was imperfectly constructed, so that at times water would accumulate on its side, and run over the way, and gully out a channel across it; and that she broke through the ice into a hole or gully four or five inches deep, caused by such faulty construction of the way. The jury might have found that there was no intention to mislead, and that the defendant was not in fact misled by the notice. Suppose the plaintiff had proved her case as she opened it, and shown that, if the defendant's officers had gone to the spot designated in the notice, they could have found a way defectively constructed, so as to collect the water in winter and pour it over the traveled path, and a hole or gully four or five inches deep caused by such defective condition, would not a jury be justified, in the absence of any evidence to the contrary, in finding that the defendant was not misled? The notice pointed to a particular place of the highway which it was said was defectively constructed, and left in a dangerous and unfinished condition. It does not follow, from the fact that that particular defect was not mentioned, that the defendant was misled; and a jury would be authorized to find, upon proof of the facts stated by the defendant, and in the absence of other evidence, that there was no intention to mislead, and that the defendant was not in fact misled. *Fortin v. Easthampton*, 3 New Eng. Rep. 37, 142 Mass. 486; *Cantelbury v. Boston*, 1 New Eng. Rep. 584, 140 Mass. 215; *Spellman v. Chicopee*, 181 Mass. 448.

Exceptions sustained.

2 Mass.

Christopher ABBOTT

NEW YORK & NEW ENGLAND R. R. CO.

George EDWARDS v. SAME.

Jane AMMIDOWN v. SAME.

William H. CHENEY v. SAME.

Charles W. WELD v. SAME.

1. If the requirements of Gen. Stat. chap. 63, § 5, to "furnish a plan," means more than to deliver it on demand, "the plan," by the words of the section, is not to be furnished until after the railroad company has taken the land for its road; and the title of the corporation therein is not affected by failure to furnish it, but only the right to enter upon and use the land,—which is suspended, except for making surveys, until the plan has been delivered. After the road has been constructed and in operation for nearly twenty years, it is too late for the landowner to object to the use of the land because of a failure by the railroad company to furnish a plan.
2. The power to take land by eminent domain may be given to a foreign corporation. When the use for which land is taken is otherwise a public use, such as a railroad within the State granting the power, the use is not the less public because the owners are domiciled or incorporated out of the State. A corporation, by consent of the Legislature, may take this power as quasi successor of another corporation to which it was originally granted; and it is not material whether the legislative consent be regarded as authorizing a transfer of the old power, or as delegating a new power in the same terms as the old. When the power is claimed under the form of a transfer, rather than of original grant, the legislative consent or grant may be inferred more readily than when the whole action is new, because the Legislature has already adjudicated the use to be public, and has granted a coextensive power. While the power could not be transferred to, or exercised by, a purchaser from the original donee, without such consent or grant in this State, the *delectus personarum* is of little more than theoretical importance, and is the least-determining element in the more common cases where the power is conferred; and this is so whether the power to take land by eminent domain is properly called a franchise or not. The Legislative consent may be expressed by way of ratification of what purports to be a transfer already executed.
3. Where, at the time of the attempted transfer by the Southern Midland Railroad to the Boston, Hartford, & Erie, it had power by Statute 1861, chap. 155, § 7, to purchase and enjoy "all the rights

and privileges" of the Midland Railroad Company, and to "use, enjoy, lease, sell, or convey the same to any other railroad company;" and **where** it had been long contemplated that the road would not only connect with roads outside the State, but that the corporations within and without the State might unite (Stat. 1850, chap. 268, § 9; 1852, chap. 158),—it was reasonable that the parties concerned should assume that the power to sell was not confined to domestic purchasers, especially as the purchase of cars jointly with connecting roads was allowed, indicating that other corporations besides domestic ones were in the mind of the Legislature; and it might be assumed that the Legislature intended the purchaser to stand in the seller's shoes, and have whatever powers the seller would have had if the sale had not been made. The Statutes of 1865, chaps. 171, 275, and 1864, chap. 810, prove that this construction of the statute of 1861 is the true one, or else sufficiently express the consent of the Legislature; and moreover the Legislature intended that the power to "locate"—the word being a term of art, in using which the Legislature can have but one meaning—should be exercised by the Boston, Hartford, & Erie as quasi successor to its vendor, for the power is given in the form of an extension of the time previously allowed. Stat. 1863, chap. 116, § 2; 1862, chap. 126; 1861, chap. 44; 1860, chap. 44; 1859, chap. 23; 1858, chap. 13; 1857, chap. 32; 1856, chap. 33; 1855, chap. 115; 1854, chap. 447; 1851, chap. 134; 1849, chap. 194, § 2.

4. Various Acts of the Legislature subsequent to the location, as Stat. 1866, chap. 142, ratifying the mortgage made, and providing for the exchange of bonds secured by former mortgages, and the recording of the mortgage; and Stat. 1866, chap. 266, authorizing the Boston, Hartford, & Erie to locate, construct, and maintain a road, of about 600 feet, to the Rhode Island line, subject to the general statutory provisions for compensation; Stat. 1866, chap. 278, § 5, authorizing the company to construct a railroad from its "chartered line" in Newton to its "chartered line" in Somerville; Stat. 1867, chap. 75, incorporating the Roxbury Branch Railroad, authorizing the corporation to transfer its franchise, property, and rights to the Boston, Hartford, & Erie Railroad Company; and other statutes giving like powers to other corporations; Stat. 1867, chap. 133, § 5; chap. 170, § 14; 1868, chap. 35, § 8; 1869, chap. 406; and 1867, chap. 284, authorizing a loan from the State to the company,—are to be considered with Stat. 1868, chap. 145, which was intended to make the corporation a Massachusetts corporation (Stat. 1874, chap. 334), and to ratify unions with other roads. This statute (1863, chap. 145) sanctions in terms such a substitution as the earlier Acts sanction by fair implication.

There are also the Statutes 450, increasing the State aid, and chap. 456, authorizing mortgages of land; Stat. 1861, authorizing the foreclosure mortgage to the Commonwealth; Stat. 289, ratifying the proceeding of bondholders of the Boston, Erie in organizing the debt, authorizing the new corporation to acquire all the rights, powers, franchises of the former company, to make a new mortgage of land and franchises. If it be in the defendant did not succeed in the rights of the Boston, Hartford, & Erie, because its title was derived from the foreclosure of a mortgage, dated a few days before the suggestion, if not answered, is by the fact that the mortgage was not foreclosed, covered subsequent location, ratified in that form by Stat. 142. Chap. 289 also authorizes the corporation to acquire all the franchises of the former company, to make a new mortgage of roads, property, and franchises. Stat. 1874, chap. 334, dissolution, Hartford, & Erie, saving. Under this legislation, the Boston, Hartford, & Erie Railroad must be taken to have had the right to make its mortgage March 30, 1866.

5. Where for twenty years the corporation has dealt with the land and its predecessors as having title to their road, and as possessing the powers which it is to exercise; has advanced large money on that assumption; and the landowners (the plaintiffs) succeeded in the same view, while over their land has been in mortgage; and a mortgage has been sold in the market, should be slow to pronounce the mortgage to have been mistaken, constantly-manifested opinion, matter resting wholly with the corporation.
6. The adverse use of a wide three-rod location of a railroad before the widening, could be into a right of way across the rods after the widening, with it a necessary right of the strips on either side of the residue of the five rods. As the location, such location gave the right to the exclusive use, taken, and this interrupted the right to the exclusive use, made a fresh start necessary whole.

(Worcester—Filed January 1874)

ON report. Judgment on verdict. Actions of tort for trespass and for obstructing alleged right of way. Tried in the Superior Court before

The court directed a verdict for the defendant, and the plaintiffs alleged exceptions.

The facts are stated in the opinion.

Messrs. A. J. Bartholomew and David Manning, for plaintiffs:

Upon all questions of fact necessary to legally establish this right claimed by the defendant, and its title thereto, the burden of proof was upon the defendant to prove its alleged justification of its admitted acts upon the plaintiffs' farms.

Hazen v. Boston & M. R. Co. 2 Gray, 579; *Lathrop v. Grosvenor*, 10 Gray, 58; 1 Redf. R. R. 3d ed. p. 243.

The presumptions of fact and law are in favor of the plaintiffs, and against the right set up and claimed by the defendant, as stated in *Wilson v. Lynn*, 119 Mass. 178.

In cases of rights by prescription, where there is any evidence to sustain the suit, and any controversy relating thereto, unless the evidence be so slight that a court would set aside any number of verdicts upon it, the rule is that the court should submit it to the jury, with proper instructions.

Denny v. Williams, 5 Allen, 1; *Brooks v. Somerville*, 106 Mass. 274.

The plaintiffs submit that, under the provisions of the statutes in force here August 5, 1854, and March 30, 1866, when these locations were filed, all railroad companies, after taking lands under their charters, and before proceeding to construct their roads, were required to furnish a plan of the lands taken, to the owners; and all rights of the corporations to enter upon or use such lands, except to make surveys, were suspended until such plans were so delivered.

Rev. Stat. chap. 39, § 60; 1848, chap. 327, § 2; Gen. Stat. chap. 68, § 45; Pub. Stat. chap. 112, § 102. See *Derby v. Framingham & L. R. Co.* 119 Mass. 517; *Fisher v. New York & N. E. R. Co.* 135 Mass. 109; *Charlestown Branch R. Co. v. Middlesex County*, 7 Met. 83.

This court has not yet gone further in sustaining the act of entering and constructing a road as an actual taking than to say that it might operate as an estoppel to prevent the corporation from disputing the right of the landowners to obtain damages. But such a taking in fact would be of no specific width. If actual, then it would only be so much as the roadbed and embankments were proven to actually cover or occupy.

Hazen v. Boston & M. R. Co. 2 Gray, 579; *Boston & P. R. Co. v. Midland R. Co.* 1 Gray, 361; *Springfield v. Connecticut River R. Co.* 4 Cush. 69; *Davidson v. Boston & M. R. Co.* 8 Cush. 106. See *Bent v. Hubbardston*, 138 Mass. 100.

The act of filing a location by railroad corporations in this Commonwealth is, under our statute, the taking of land for a public purpose, in the exercise of the rights of eminent domain.

Charlestown Branch R. Co. v. County Comrs. 7 Met. 83; *Hazen v. Boston & M. R. Co.* 2 Gray, 578; *Boston & L. R. Co. v. Salem & L. R. Co.* 2 Gray, 35, 36.

The power to take land for a public use can be granted only by the Legislature in express terms.

127 Mass. 52; 14 Gray, 288; 7 Gray, 225; 119 2 Mass.

Mass. 178; 109 Mass. 536; *Mills, Corp.* § 46; *Lance's App.* 55 Pa. 16; 25 N. Y. 309; 17 Ohio, 840; *Wood, R. R.* 799, 803, pp. 670, 671; *Beekman v. Saratoga & S. R. Co.* 3 Paige, Ch. 45; *Boston Water Power Co. v. Boston & W. R. Co.* 23 Pick. 860.

This power can never be presumed; it must always be proved.

Mills, Corp. § 48.

It is incident to the sovereignty of every government that it may take private property for public purposes. But the government in whose sovereignty this power alone resides, through its Legislature, must judge the expediency, or expediency of, granting it with the limitation stated above.

Charles River Bridge v. Warren Bridge, 7 Pick. 445, 453; *Perry v. Wilson*, 7 Mass. 394; *Orenshaw v. Slate River Co.* 6 Rand. (Va.) 245; *Wells v. Somerset & K. R. Co.* 47 Me. 345; *Stanford v. Worn*, 27 Cal. 171.

The right of eminent domain may be exercised in favor of a foreign corporation, but not without the express grant of that power, by name or by unmistakable language, by the Legislature of the State within whose jurisdiction that right is to be so exercised; because such foreign corporation holds no franchises, by its charter, extending beyond the jurisdiction of the government creating it.

Blackstone Mfg. Co. v. Blackstone, 13 Gray, 489.

A railroad corporation cannot, except by the consent of the government, convey its franchise and property to another company, or itself authorize such other company to exercise its franchises and powers.

Branch v. Jessup, 106 U. S. 468 (27 L. ed. 279); *Clark v. Barnard*, 108 U. S. 451 (27 L. ed. 786); *Bailey v. N. Y. Cent. & H. R. R. Co.* 89 U. S. 22 Wall. 639 (22 L. ed. 849); *Green County v. Conness*, 109 U. S. 104 (27 L. ed. 872); 85 U. S. 18 Wall. 206 (21 L. ed. 888); *Mills, Corp.*; *Morawetz, R. Corp.* § 980.

When a railroad corporation has legally located and constructed its road between the terminal points thereof, it has exerted and exhausted its power, and cannot then relocate, except by the authority of the Legislature.

Brigham v. Agricultural Branch R. Co. 1 Allen, 317; *Mills, Em. Dom.* § 53, chap. 7.

The corporation must have the power of eminent domain when it exercises it; and cannot afterwards avail itself of its acts of taking land by subsequently acquiring that power.

Derby v. Framingham & L. R. Co. 119 Mass. 516.

Mere consent to purchase does not involve the doctrine of eminent domain, being in derogation of private rights (9 N. J. Eq. 401; 83 Barb. 102); it may be delegated to foreign corporations, but does not extend to them (53 N. Y. 60; *Holbert v. St. Louis, K. C. & N. R. Co.* 45 Iowa, 23. See *Worcester v. Norwich & W. R. Co.* 109 Mass. 103).

This is the precise point we make here, that our Legislature never authorized the Boston, Hartford, & Erie Railroad to purchase of the Southern Midland Railroad, chartered in this State, its franchises, property, or power to condemn land, and so never authorized that company to exercise in this State the power of the Southern Midland to take land.

chase November 1, 1858. The Boston & New York Central was successor by consolidation to the powers of the Southbridge & Blackstone Railroad, incorporated by Stat. 1849, chap. 194. Stat. 1852, chap. 158; Stat. 1854, chap. 447; *Boston & P. R. Co. v. Midland R. Co.* 1 Gray, 340. As such successor it had made a location three rods wide over the *locus* on August 5, 1854; and, as this was assumed by the counsel for the plaintiffs to have been valid, subject to the objection just disposed of, we shall make the same assumption.

To repeat, the Boston, Hartford, & Erie Road's grantor, under a changed name, was the purchaser of the franchise and rights of the Midland Railroad. The Midland Railroad was given general powers, and succeeded to all the powers of the Boston & New York Central, including the powers of the Southbridge & Blackstone. Assuming this three-rod-wide location of the Boston & New York Central to have been valid, we do not understand the counsel for the plaintiffs to deny that the grantor of the Boston, Hartford, & Erie could have made the five-rod location in 1866, if it had not conveyed away its franchise and property, and if the legislation then in force had applied to it. Stat. 1865, chap. 171; Gen. Stat. chap. 63, § 38; *Boston & P. R. Co. v. Midland R. Co.* 1 Gray, 340. We do not understand that the location of 1866 was without the limits prescribed by Stat. 1849, chap. 94, § 2.

Before examining the powers of the Boston, Hartford, & Erie Railroad more specifically, it will be well to advert to one or two general considerations. It was conceded by the plaintiffs' counsel that the powers to take land by eminent domain may be given to a foreign corporation. When the use for which land is taken is otherwise a public use, such as a railroad within the State granting the power, the use is not the less public because the owners are domiciled or incorporated out of the State. In *Re Townsend*, 39 N. Y. 171, it was held that the power could be given to a company in another State in aid of a canal which also was in another State. And the proposition which we have laid down has never been doubted, so far as we know, by any court of last resort. *New York & E. R. Co. v. Young*, 33 Pa. 175; *State v. Sherman*, 22 Ohio St. 411, 434; *Southern R. Co. v. Southern & A. Td. Co.* 46 Ga. 43, 51; *Gilmer v. Lime Point*, 18 Cal. 229, 251, 255. See *Clark v. Barnard*, 108 U. S. 436, 452 (27 L. ed. 780).

The decision of the court in *Burt v. Merchants Ins. Co.* 106 Mass. 356, that the power could be conferred upon the United States government, is criticised in *Kohl v. United States*, 91 U. S. 367, 373 (23 L. ed. 449); see also *Darlington v. United States*, 82 Pa. 382; but the criticism, whatever may be thought of it, is not applicable to a case like the present.

It seems to us equally clear that a corporation, by consent of the Legislature, may take this power as quasi successor of another corporation to which it was originally granted; and it is not very material whether the legislative consent be regarded as authorizing a transfer of the old power, or, more strictly, as delegating a new power in the same terms as the old. See *State v. Sherman*, 22 Ohio St. 411, 428. The substance of the transaction is seen

in cases of consolidation. *Boston & P. R. Co. v. Midland R. Co. supra*. But there is nothing in reason to confine it to such cases. See *Atkinson v. Marietta & C. R. Co.* 15 Ohio St. 21; *Coe v. Columbus, P. & I. R. Co.* 10 Ohio St. 372, 387; *Hall v. Sullivan R. R. Co.* 21 Law Rep. 138, 141.

When the power is claimed under the form of a transfer, rather than of original grant, the legislative consent or grant may be inferred somewhat more readily than when the whole question is new, because the Legislature has already adjudicated the use to be public, and has granted a coextensive power. See *Black v. Delaware & R. Canal Co.* 22 N. J. Eq. 130, 402. For, while it is very plain that the power could not be transferred to, or exercised by, a purchaser from the original donee without such consent or grant in this Commonwealth (*Braslin v. Somerville H. R. Co.* 4 New Eng. Rep. 888, 145 Mass. 64, 87; *Commonwealth v. Smith*, 10 Allen, 448), the reasons which have led some courts and judges to doubt the need of such consent for the transfer of franchises show that the *delectus personarum* is of little more than theoretical importance, and is the least determining element in the more common cases where the power is conferred. *Shepley v. Atlantic & St. L. R. Co.* 55 Me. 395, 407; *Kennebec & P. R. Co. v. Portland & K. R. Co.* 59 Me. 9, 28; *Miller v. Rutland & W. R. Co.* 36 Vt. 452, 492; *Bickford v. Grand Junction R. Co.* 1 Canada S. C. 696, 738. And this reasoning is of equal force whether the power to take land by eminent domain is properly called a franchise or not. *Coe v. Columbus, P. & I. R. Co. supra*; *Chicago & W. I. R. Co. v. Dunbar*, 95 Ill. 571; *Pierce v. Emery*, 32 N. H. 484, 507, 511, 513.

Finally, the legislative consent may be expressed by way of ratification of what purports to be a transfer already executed. *Shaw v. Norfolk County R. Co.* 5 Gray, 162, 180; *S. C.* 16 Gray, 407, 410; *Galveston R. Co. v. Cowdrey*, 78 U. S. 11 Wall. 459 (20 L. ed. 199). And it may be gathered by implication from a series of acts. *East Boston F. R. Co. v. Eastern R. Co.* 13 Allen, 422.

At the time of the attempted transfer by the Southern Midland Railroad to the Boston, Hartford, & Erie, it had power, by Stat. 1861, chap. 155, § 7, to purchase and enjoy "all the rights and privileges" of the Midland Railroad Company, and to "use, enjoy, lease, sell, or convey the same to any other railroad company." And, inasmuch as from an early date it had been contemplated that the road would not only connect with roads outside the State, but that the corporations within and without the State might unite (Stat. 1850, chap. 268, § 9; Stat. 1852, chap. 158; 1 Gray, 358), it was not very extraordinary if the parties concerned assumed that the power to sell was not confined to domestic purchasers, especially as, in the next line, a purchase of cars jointly with connecting roads was allowed, showing that other corporations beside those of this State were in the mind of the Legislature.

It was hardly less natural that it should be assumed that the Legislature intended the purchaser to stand in the seller's shoes, and to have whatever powers the seller would have had if the sale had not been made.

If there had been no consolidation, and the transfer had been direct from the Southbridge & Blackstone Road to another Massachusetts corporation, we hardly can suppose that it would have been argued that the purchaser had not the same powers to take land and to complete the road that the Southbridge & Blackstone Road would have had if its time had been extended by similar words before the sale. No doubt the expression of the Legislature's belief and intent might have been plainer. But the

By Stat. 1868, chap. 145, the corporation created in the State of Connecticut and acting within this Commonwealth is recognized by Acts heretofore passed.

gialature, is declared to be a corporation by that name, and vested with all the franchises, powers," etc., set forth in the General Laws; "and the acts of said company, in forming a union or connection with one or more railroad companies in the States of Rhode Island, Connecticut, and New York," to connect Boston with the Erie Railway Company in New York by a continuous line, are ratified. This seems to be intended to make the corporation a Massachusetts corporation (Stat. 1874, chap. 334), and to ratify unions with other roads. The Act then continues: "And the said Boston, Hartford, & Erie Railroad Company is hereby substituted in the place, and vested with all the franchises, rights, property, and powers, and is subject to all the duties and liabilities, of the Southern Midland Railroad Company," etc. This part of the statute sanctions, in terms, such a substitution as we have construed the earlier Acts to sanction by fair implication, and shows very plainly what was in every body's mind from the beginning. If our construction is right, the Act is simply declaratory, and passed *ex majori nutela*.

Stat. 1869, chap. 450, increases the amount of State aid to the road to \$5,000,000; chap. 436 authorizes bonds and mortgages of lands and flats; Stat. 1871, chap. 372, authorizes the foreclosure of a mortgage to the Commonwealth.

Stat. 1873, chap. 289, ratifies the proceedings of the bondholders of the Boston, Hartford, & Erie in organizing the defendant; authorizes the new corporation to acquire all the rights, powers, and franchises of the former company, and to make a new mortgage of "its railroad property and franchises." We may remark here, with reference to a suggestion thrown out in the second case, that the defendant did not succeed to all the rights of the Boston, Hartford, & Erie, because its title was derived in part from foreclosure of a mortgage which was dated a few days before the location; that if the suggestion could help either the plaintiffs in the first cases or the defendant in the second, and if it is not answered by this statute, it is by the fact that the mortgage covered subsequent locations (see 107 Mass. 3, note), and was ratified in that form, as we have seen, by Stat. 1866, chap. 142.

Finally Stat. 1873, chap. 289, ratifies the proceedings of the bondholders of the Boston, Hartford, & Erie in organizing the defendant; authorizes the new corporation to acquire all the rights, powers, and franchises of the former company, and to make a new mortgage of "its railroad property and franchises." Stat. 1874, chap. 334, dissolves the Boston, Hartford, & Erie, saving all rights.

It thus appears that for twenty years the Commonwealth has constantly dealt with this corporation and its predecessors as having a good title to their road, and as having possessed the powers which they assumed to exercise. It has advanced a large sum of money on that assumption. For nearly twenty years before these actions were brought the plaintiffs have acquiesced in the same view, while the road over their land has been in public operation. Meantime a mortgage was made, and the bonds sold in the market. We think that courts should be slow to pronounce the Le-

gialature to have been mistaken in its constantly manifested opinion upon a matter resting wholly within its will, when, for so long a time, everything has been conducted upon that footing. But we are satisfied, for the reasons which we have given, that the opinion of the Legislature was correct, and that the Boston, Hartford, & Erie R. R. Co. must be taken to have had the power and right to make its location of March 30, 1866.

It was admitted that if the five-rod-wide location of 1866 was valid, the claims of the plaintiffs to rights of way must be abandoned. The alleged adverse use had not continued for twenty years across the five rods. It would be too refined to say, and it was not argued, that the adverse use, if any, of a way across the three-rod location of 1854, begun before the widening, ripened into a right of way across the original three rods after the widening, and carried with it a necessary right of access across the strips on either side, which made the residue of the five rods. For, without admitting that there would have been any such right of access across the outside strips, had a right of way existed across the three rods before the widening, it is enough to say that, as no right had been acquired at that time, the new location gave the railroad the right to the exclusive use of the land taken, and thus interrupted, for a moment, at least, any adverse user, and made a fresh start necessary as to the whole. *Old Colony R. Co. v. Miller*, 125 Mass. 1, 5; *Smith v. New York & N. E. R. Co.* 2 New Eng. Rep. 413, 142 Mass. 21, 22.

It follows that the rulings of the court below that the locations were valid, and that the plaintiffs' evidence failed to show an adverse use of the crossings for a period of twenty years before the obstruction of them by the defendant in 1885, were correct, and that, by the terms of the report, judgment must be entered on the verdict.

Judgment on verdict.

Elizabeth COMSTOCK

v.

Charlotte P. CHAMBERLIN.

William COMSTOCK

v.

William EDWARDS.

Mr. J. M. Cochran, for plaintiff.

Mr. Rockwood Hoar, for defendant Chamberlin.

Mr. A. J. Bartholomew, for defendant Edwards.

Holmes, J.: The cases of *Comstock v. Chamberlin*, etc., were actions for breach of covenant of warranty, the eviction complained of being by the same location of 1866. The only question seriously argued is whether that location was valid, as the court ruled.

Verdicts to stand.

Edmund PYNE, Jr., By his Next Friend,

v.

John WOOD, Jr.

1. In a suit in the name of a **minor**, by his next friend, to **recover money paid**

upon the purchase of a bicycle, the facts that the plaintiff was present when his father demanded the money of the defendant, and himself carried the bicycle to the defendant's shop, and consented to the bringing of the action, warrant the finding that the contract was avoided by the plaintiff, and that the action was properly brought, although the plaintiff, as a witness, stated that he was willing to stand by the contract.

2. It was not error to find that the bicycle was not a necessary article, although at least half the hour allowed the plaintiff for dinner would be consumed in walking unless he had a bicycle.

(Essex—Filed January 6, 1888.)

ON defendants' exceptions. *Overruled.*

This was an action of contract brought to recover back money paid upon account in the purchase of a bicycle.

At the trial it appeared that on June 1, 1886, plaintiff, being then nearly seventeen years of age, purchased a bicycle of the defendant, and paid \$30 in cash on account of the same. He executed a contract by which he agreed to pay a certain sum each month until the bicycle was paid for, until which time the title was to remain in defendant. The amount paid in cash was a part of the money which the plaintiff had saved from his own earnings. At that time he worked regularly in a shoeshop, earning \$10 per week, out of which he paid his father for board \$4 per week. There had been no special emancipation or giving away of plaintiff's time, except what may be implied from the circumstances. He afterwards paid \$30, and also exchanged the machine originally purchased for another, slightly different, and executed a new contract similar to the old one. He afterwards paid \$4 on general account. He paid all the cash out of his own earnings, to which his father had no claim other than that which might be asserted to the earnings of a minor child. At a later day his father demanded the money paid, but having been refused payment by the defendant, he left the machine at the defendant's place, and caused this action to be commenced. The boy was present when these demands were made, and also carried the machine to the defendant's shop when it was returned. Defendant did not accept the machine in rescission of the contract, but claimed the machine as his under the contract.

The son testified that at the time of the trial he was willing to stand by the contract, and had no wish to have the present action prosecuted, but the court found that the action was brought by his consent. A question was raised how far the machine was a "necessary," and it appeared that the plaintiff worked in Lynn, but resided in Swampscott, at his father's, more than a mile off; that during the hour allowed for dinner he could easily go home to dinner, but that at least half of the hour allowed for dinner would be consumed in walking; and it was claimed that it was impracticable for him to take his meals at home unless he had a bicycle.

Upon this state of law and fact, the case was tried without a jury. The court held that the contract was voidable, and that an action in

this form might be maintained by in the name of the son, and found in favor of the plaintiff, and defendant alleged exceptions.

Messrs. Stephen H. Phillips and W. Porter, for defendant:

No parent, as a natural guardian, can legally and autocratically disaffirm a contract, or to compel him to disaffirm, manifestly beneficial to his child.

Bradford v. French, 110 Mass.

The father had no right to disaffirm a contract, or to compel him to disaffirm, against his true interest. Though an infant may have made an excellent bargain, which his father could not deprive him of, his manifest interest. He may be released arbitrarily on coming of age. No one can release him.

Buckingham v. Drury, 3 Bro. P. C. 478; *Daly v. Lynch*, 3 Bro. P. C. 478; *v. Parsons*, 3 Burr. 1801.

The answer to the question whether the bicycle was not a "necessary," in the acceptance of that term, if it is against the fixed facts, or rests on inferences supported by unsound reasoning, is just as much open for re-examination in a court of law as an absolutely incorrect finding of fact, or a refusal to set aside a verdict not upon a conflict of evidence, but without evidence, or directly in defiance. This court concedes the propriety of considering a finding by the superior court manifestly insufficient in law to justify a reversal.

Cheever v. Perley, 11 Allen, 587; *Land R. Co.* 127 Mass. 577. See *Co. v. Freeman*, 12 Gray, 405.

Whenever it could be made to the supreme court that there was no preponderance of evidence, the verdict, it has always been considered, is voidable.

Cheever v. Perley, 11 Allen, 587; *Lenox Iron Works*, 4 Allen, 333; 12 Cush. 498; *Forsyth v. Hooper*, 12 Cush. 498; *Messrs. Ira B. Keith and Leighton*, for plaintiff:

The contracts in this case were voidable. This suit could be maintained in this form under the evidence.

Whether the bicycle was a "necessary," was not a question of fact, and thereon cannot be revised by this court. *Sheffield v. Otis*, 107 Mass. 282; *Stott*, 108 Mass. 46; *Backus v. Co.* 108 Mass. 886; *Edmundson v. Bric*, 110 Mass. 886.

If the bicycles were not necessary, the contracts were not beneficial to the plaintiff, they were voidable.

McCarthy v. Henderson, 138 Mass. 143.

It is not necessary to decide whether the father had been emancipated, as the father's next friend in this case, would be bringing another suit in his own name, claiming the same money, claiming the same right to his minor child's earnings.

Fowler v. Parsons, 8 New Eng. 143 Mass. 401, and cases cited.

The suit having been brought by the infant plaintiff could not be dismissed through a guardian *ad litem* of the father, as he is bound by their acts, especially said acts are done with the knowledge and consent of the court.

Walsh v. Walsh, 116 Mass. 377.

W. Allen, J., delivered the opinion of the court:

There is nothing in this case to distinguish it from *McCarthy v. Henderson*, 138 Mass. 810, and it must be governed by that decision.

The facts that the plaintiff was present when his father demanded the money of the defendant, and himself carried the bicycle to the defendant's shop when it was returned to him; and that the plaintiff consented to the bringing of the action,—certainly warrant the findings that the contract was avoided by the plaintiff, and that the action was properly brought. The statement of the plaintiff, on the witness stand, that he was then willing to stand by the contract, did not show that he had not avoided the contract, or that there was not a good cause of action.

There was no error in the finding that the bicycle was not necessities. *Merriam v. Cunningham*, 11 Cush. 40; *Leonard v. Stott*, 108 Mass. 46.

Exceptions overruled.

ELLA O'SHAUGHNESSY, *per Pro. Ami.*
v.

SUFFOLK BREWING CO.

Where, under the verdict, it appears that the plaintiff, a child eight years of age, on her way to school, sat down on the edge of the sidewalk to sharpen her pencil on the curbstone, with her feet in the gutter, and defendant's team, in passing, hit her, the instructions properly left it to the jury to determine, under all the circumstances in the case, whether the plaintiff was using such care as was reasonably to be expected of her. It was not the duty of the court to rule, as matter of law, that the plaintiff was not entitled to recover because there was no evidence which would warrant the jury in finding that she was in the exercise of due care.

(Suffolk—Filed January 6, 1888.)

ON defendant's exceptions. *Overruled.*

This was an action of tort brought in behalf of plaintiff, a child of eight years of age, by her mother, as next friend, to recover damages for personal injuries sustained by being run over in a public street in South Boston by a wagon of defendant, by reason of the negligence of defendant's servant.

The answer was a general denial.

At the trial, the evidence being all in, defendant asked the court to rule, as a matter of law, that plaintiff could not recover, because there was no evidence which would warrant the jury in finding that she was in the exercise of due care; also to give certain instructions to the jury; both of which requests were refused, and exception was taken. Exceptions were also taken to portions of the charge as given.

A verdict having been returned for plaintiff, defendant alleged exceptions.

The points in controversy appear in the opinion.

Messrs. M. F. Dickinson, Jr., and Hollis R. Bailey, for defendant:

The learned judge who presided at the trial

instructed the jury: "If a person of full age should sit upon the curbstone, with feet in the gutter, in a street much traveled over, where there were horse cars and horse-car tracks, and where that person knew there was occasion for vehicles, in avoiding the horse-car track and horse cars, to come close to the curbstone, his being there would be evidence that he was in a situation where no person of ordinary prudence and caution, in view of what he knew and what he saw, ought to be."

The same is equally true in the case of a child of the age and capacity of this plaintiff.

Messenger v. Dennie, 137 Mass. 197; *Same v. Same*, 1 New Eng. Rep. 759, 141 Mass. 335.

Where, as a matter of common knowledge and experience, the court can see that, upon all the undisputed facts, the plaintiff was not in the exercise of ordinary care, and that the injury received was in part attributable to the plaintiff's want of care, it is the duty of the judge to instruct the jury, as a matter of law, to find a verdict for the defendant.

Wheelwright v. Boston & A. R. Co., 135 Mass. 229; *Garrett v. Manchester & L. R. Co.*, 16 Gray, 505; *Wills v. Lynn & B. R. Co.*, 129 Mass. 851.

The burden of proof is upon the plaintiff to show positively that she was in the exercise of due care.

If she offers no evidence that she was in the exercise of care, or if the whole evidence shows that she was careless, the court must instruct the jury, as a matter of law, that the action cannot be maintained.

Gahagan v. Boston & L. R. Co., 1 Allen, 189; *Todd v. Old Colony & F. R. R. Co.*, 7 Allen, 208.

A mere scintilla of evidence is not sufficient to authorize a judge to submit to the jury the question whether the plaintiff was in the exercise of due care. There must be evidence upon which a jury may reasonably and properly infer that the plaintiff was in the exercise of due care.

Butterfield v. Western R. Co., 10 Allen, 532.

While it is true that a child is not held to the same degree of care as an adult, it is well settled that a child must exercise that degree of care which may reasonably be expected of children of his or her own age.

Collins v. South Boston R. Co., 2 New Eng. Rep. 649, 142 Mass. 814, 815; *Oram v. Metropolitan R. Co.*, 112 Mass. 88; *Wendell v. N. Y. Cent. & H. R. R. Co.*, 91 N. Y. 420.

A child sitting upon a curbstone is not a traveler.

Lyons v. Brookline, 119 Mass. 491.

Messrs. Stillman B. Allen and Thomas J. Barry, for plaintiff:

Courts have invariably left the matter of contributory negligence of children to the jury, except in cases where there was flagrant misuse of the highway, or evidence of such negligence beyond all reasonable doubt, "according to the common experience of all men."

Mattey v. Whittier Mach. Co., 1 New Eng. Rep. 482, 140 Mass. 387; *Collins v. South Boston R. Co.*, 2 New Eng. Rep. 649, 142 Mass. 301; *McDonough v. Metropolitan R. Co.*, 137 Mass. 210; *Gibbons v. Williams*, 135 Mass. 333; *Murley v. Roche*, 130 Mass. 380; *Lynch v. Smith*, 104 Mass. 52; *Mulligan v. Curtis*, 100 Mass. 512; *Lovett v. Salem & S. D. R. Co.*, 9 Allen, 557; *Whart. Neg.* § 313.

C. Allen, J., delivered the opinion of the court:

In view of the verdict, it must now be assumed, in favor of the plaintiff, that the injury to her occurred substantially in the manner which she described, namely, that, while on her way to school, she sat down on the edge of the sidewalk, in order to sharpen her pencil upon the curbstone, with her feet in the gutter, and that the defendant's team came along and hit her while she was in that position. The instructions to the jury left them free to find a want of due care on her part, and were carefully guarded in all respects, unless it was the duty of the court to rule, as matter of law, that the plaintiff was not entitled to recover, because there was no evidence which would warrant the jury in finding that she was in the exercise of due care. It is to be observed, in the view of the evidence which is now to be taken, that there was no spirit of recklessness on her part, no intention to take a risk, no thought of encountering danger or hazard, no calculation of chances; there was simply a lack of sufficient precaution. Under these circumstances, the case differs from *Messenger v. Dennie*, 137 Mass. 197; *S. C. 1* New Eng. Rep. 759, 141 Mass. 335, and we think it was properly left to the jury to determine, under all the circumstances of the case, whether the plaintiff was using such care as was reasonably to be expected of her. See *Collins v. South Boston R. Co.* 2 New Eng. Rep. 649, 142 Mass. 314; *Matvey v. Whittier Mach. Co.* 1 New Eng. Rep. 482, 140 Mass. 337; *O'Connor v. Boston & L. R. Co.* 135 Mass. 361, 362; *Murley v. Roche*, 130 Mass. 330; *Lynch v. Smith*, 104 Mass. 57; *Mulligan v. Curtis*, 100 Mass. 514; *Bliss v. South Hadley*, 5 New Eng. Rep. 124, 145 Mass. 91.

Exceptions overruled.

COMMONWEALTH of Massachusetts
v.

Edwin WENTWORTH.

1. A building let to a **tenant** who enters into possession under a **lease** is not under **control** of the **landlord**.
2. An indictment charging that defendant, having **control** of a building, knowingly and unlawfully **permitted the illegal sale** therein of intoxicating liquors, is not sustained by proof that, on due notice of such sale, defendant **did not take possession** of the premises as provided by the Public Statutes.

(Norfolk—Filed January 7, 1888.)

ON defendant's exceptions. *Sustained.*

This was an indictment on Pub. Stat. chap. 101, § 9, charging that between June 1, 1886, and February 4, 1887, defendant had under his control a certain building, and did unlawfully and knowingly permit a certain tenement in said building to be used by Edward H. Galligan for the illegal sale and illegal keeping for sale of intoxicating liquors; and that Galligan did knowingly, willfully, and without having any legal appointment or authority therefor, keep and maintain a certain

common nuisance, to wit: said building.

Before trial defendant asked to quash the indictment, but the court overruled the motion, and defendant duly appeared.

At the trial it was admitted that the defendant was the owner, during the time the building described in the indictment, of no claim was made that any person was licensed during said time to sell or give away intoxicating liquors in any part of the building.

There was evidence tending to show that Edward H. Galligan was the lessee of the building; that during the time he leased the lower front room or tenement of the building had on one side a bar, on the other one or more beer pumps under the counter, and shelves behind, on which, on various occasions, bottles were seen, also fruit, beer bottles and glasses behind and under the counter. That on June 12, 1886, a seizure was made under search warrant, of two half-barrels of rum, and of a few gallons of rum, and other intoxicating liquors, in a part in the first-story front room of the building; that one James Galligan was behind the bar; that Edward H. Galligan was not on the premises at the time the seizure was made; that in the cellar was found a keg of beer, connected with one of the pumps above mentioned. This beer was sold to the public. Evidence was put in that Edward H. Galligan was frequently seen in the building within the time covered by the indictment. One witness testified that he appeared at the lookout for officers. A police officer testified that he had seen, on an average, three men weekly going in or out of the building from the first floor under the influence of liquor.

Various witnesses testified that they had frequently purchased liquor at the building at the times of one Fanell or of James Galligan, once of Edward H. Galligan.

To the evidence as to acts and omissions of the defendant duly objected to, and objection being overruled, he duly appeared.

Some evidence was offered that the defendant had notice that the premises were used for the sale of liquor.

Defendant testified that he was thirty years old; that he leased the building for the use of the barber-shop, to Edward H. Galligan, during the time alleged, and for no other purpose; that during the first part of the time Edward H. Galligan paid the rent for the building to the latter James Galligan, and that he did not occupy or use the building directly, during the time alleged, for the sale of the premises. On cross-examination the witness testified that he did not know whether the business was carried on in the premises more than he did anywhere else. He testified that it was a common talk in the neighborhood that a large quantity of liquor was seized in the saloon he had let to Edward H. Galligan; that he saw the bar; that he presumed to know what the business was, and that they might draw their own conclusions from the fact that he himself was in the liquor business many years ago, and that he knew the business; and in reply to the question, "Did you believe liquors were sold there?" answered, "I presume it was so."

Defendant asked the court to instruct the jury that the government have failed to prove, by sufficient evidence, that the defendant, during the time alleged, or any part thereof, had the actual control, or any such control as is required to constitute the offense charged; that the government have failed, on all the evidence, to support the complaint; that belief is not the knowledge required to constitute the offense charged; that if the premises described were leased to Edward H. Galligan during the time alleged, and said Galligan was in occupation of the same under said lease, the defendant cannot be convicted.

But the court refused so to rule, and the defendant duly excepted.

The court did instruct that "the government must prove, beyond a reasonable doubt, that these premises were kept as a common nuisance under the statute, being commonly used, during some substantial portion of the time averred by the indictment, for the illegal sale, or the illegal keeping for sale, of intoxicating liquors; that said tenement so maintained was under the control of the defendant, by virtue of the provisions of Pub. Stat. chap. 101, § 8; that during some portion of the time covered by the indictment the said defendant knew of such use and maintenance by said Edward H. Galligan; and that thereafterwards,—that is, after such knowledge, and within the time covered by the indictment,—the defendant knowingly permitted such tenement to be used for the purpose aforesaid.

"To constitute the guilty knowledge necessary to be proved in this case, it is not necessary that the defendant should have the absolute certainty which may be supposed to arise from the actual sight of the violation of law; but, while it was not sufficient that the defendant had suspicion, or that there was reasonable ground for belief of such use, it is sufficient if there were such facts and circumstances brought to the attention of the defendant as actually induced in his mind the conviction that such illegal use was made of the premises.

"A man may be said to permit what he has the right and power to prevent, but which right and power he does not choose to exercise.

"The defendant claimed that the government must prove that the illegal use of the premises, and the knowledge of the defendant, and the permission by him, extended to the entire time covered by the indictment; and duly excepted to the instructions given, so far as they were inconsistent with his said claims and prayers, and also excepted as to the instruction as to 'knowledge' and 'permission.'"

The jury found the defendant guilty, and he alleged exceptions.

Mr. J. L. Eldridge, for defendant:

The indictment does not allege that the defendant had the actual control, or any control, of the tenement. Using the words of the statute is not sufficient. The charge was not "knowingly letting." The evidence failed to show the defendant's control of the whole building as alleged.

Com. v. McGaughey, 9 Gray, 296.

It also failed to show defendant's control for the time alleged, and did not support the indictment.

2 Mass.

Com. v. Adams, 109 Mass. 344; *Com. v. Logan*, 12 Gray, 136.

The ruling as to the effect of the lease should have been given; and the instruction that the defendant had the necessary control by virtue of Pub. Stat. chap. 101, § 8, was erroneous. Suppose the lease became void from the illegal use of the premises, the defendant would have only the right to enter or bring ejectment; until entry he could not be said to have the control of the building. The defendant was not bound, if he knew of such illegal use, to make a forcible entry, or any entry at all. If the defendant, being "convinced" of such use by Edward, had entered, ejected Edward, and taken possession of the premises, Edward could have brought an action for damages, and in such case the "conviction" of the defendant would not have been a defense. If the statute requires such risk, it is unconstitutional. The words of the statute, "whoever knowingly permits," do not apply to leased premises. The words "whoever, after due notice" (Pub. Stat. chap. 100, § 20) applied to leased premises or premises under the control of the owners, etc. A person having the control of a building might knowingly permit the illegal use if he saw such use or heard of such use being made and then did not dissent. The knowledge required by the statute is personal knowledge. Common report was not sufficient.

Mr. Andrew J. Waterman, Atty-Gen., for the Commonwealth:

All the requests to rule in the form stated were properly denied, and the defendant's rights were fully protected in the charge as given.

A single sale was evidence of keeping with intent to sell.

Com. v. Hoar, 121 Mass. 375.

Proof that the premises were kept for illegal sale during any part of the time warranted a conviction.

Com. v. Mitchell, 115 Mass. 141; *Com. v. Kerriasey*, 141 Mass. 110.

The statutes (chap. 101, § 8) expressly provide that an illegal use of the premises restores to the owners the right of possession; and when there is knowledge of such illegal use the owner becomes chargeable with aiding in maintaining whatever nuisance thereafter exists.

Field, J., delivered the opinion of the court:

If a building is let to a tenant, who enters into possession under a lease, the building is not under the control of the landlord, but is under the control of the tenant, while he continues in possession under the lease, unless there are special provisions in the lease which give the control to the landlord. The landlord, by Pub. Stat. chap. 101, § 8, can recover possession, by entry or by action, if the tenant uses the building for the illegal purposes described in § 6 of this chapter; but, unless there are special provisions in the lease, the landlord cannot in any other manner prevent the tenant from using the building for these illegal purposes.

Pub. Stat. chap. 101, § 9, provides for the punishment of three different acts. If a person who owns or has control of a building knowingly lets it for the illegal purposes specified; or if, while having the building under his con-

trol, he knowingly permits the building to be used for these illegal purposes; or if, after due notice that the building is used for these illegal purposes, he omits to take all reasonable measures to eject the occupant,—he “shall be deemed guilty of aiding in the maintenance of such nuisance.”

If the statute had been less carefully drawn, there would be some force in the contention that a person may be said to permit what he does not prevent, if he has lawfully the power to prevent it and it is made by law his duty to prevent it. But the last clause of the section was, we think, intended to define the whole duty of a landlord who, having let his building, not knowingly, for any of these illegal purposes, has due notice that the tenant, after he has taken possession and control, is using the building for these purposes. See Pub. Stat. chap. 100, § 20.

The evidence recited in the exceptions tended to prove an offense under the last clause of the section, if it tended to prove any offense; while the indictment is under the second clause of the section. There was no evidence that the defendant actually had the control of the building described in the indictment. So far as appears, he had not the control, but he could have taken control by ejecting his tenant, if the tenant was using the building for the illegal sale of intoxicating liquors. The principal exception must be sustained, and it is unnecessary to consider the others.

Exceptions sustained.

COMMONWEALTH of Massachusetts

v.

Benjamin F. HOLT.

1. As Stat. 1886, chap. 318, § 2, prohibits, under a penalty, the sale of milk which is not of good standard quality, a **contract for the sale of “milk of one dairy”** will be held to mean that the milk shall be such as **can be lawfully bought and sold.**
2. Where, in **prosecutions for selling impure milk**, the milk analyzed has not been taken under provisions of statute, the **testimony** of any person of sufficient skill to analyze milk, and who has analyzed some of the milk shown to have been sold, is **admissible.**

(Suffolk—Filed January 7, 1888.)

ON defendant's exceptions. *Overruled.*

Complaint to the Municipal Court of Boston, alleging that the defendant, on April 28, 1887, “did sell to Robert Rooney one pint of milk not of good standard quality; that is to say, milk containing less than 13 per cent of milk solids.”

At the trial before Brigham, Ch. J., superior court, it appeared that the defendant made a special contract with the wife of Robert Rooney, by which he was to deliver to her one quart each day of the milk of one dairy.

On the morning of April 28, after the milk had been delivered by the defendant's agent, Rooney, without any notice of his intention, to

the defendant or his agent, can thus delivered to the milk inspection. The milk inspector caused the same to be analyzed, and brought complaint, which he signed and prosecuted in usual way.

About five weeks after the trial court, but before the trial in this case, the defendant called upon the milk inspector, requesting a portion of the milk for analysis; but the remainder of the milk had been preserved, nor had the inspector sealed a portion of the same for analysis, and the defendant requested the return of the milk.

It appeared from the evidence that the milk contained less than 13 per cent of milk solids, and was not of good standard quality.

The defendant asked the court to rule that as this was a special contract for the sale of one dairy, it was immaterial what the milk might be. If delivered to the defendant as he received it from the inspector, he would not be guilty; (2) that, as the defendant and his agent were deprived of the opportunity of requesting a portion of the same for analysis at the time it was taken, no request was made, and the results of the analysis were not admissible in evidence; (3) that, under the circumstances, the defendant's subsequent analysis was sufficient, and the analysis was admissible; (4) that the analysis was inadmissible under the provisions of the Acts of 1886, c. 318, § 4, had not been complied with.

These rulings the court refused to sustain, and the defendant excepted.

The jury returned a verdict of guilty, and the defendant alleged exceptions.

Mr. James A. McGeough for the defendant:

The first ruling requested should be sustained. This was not a case of a sale of skimmed milk, nor was it a sale of milk sold again, but a sale directly to the defendant for a special purpose, and under a special contract.

The results of the analysis were admissible: (1) because the defendant was entitled to a portion of the milk analyzed by the inspector, and if, under the circumstances, it was necessary, the request prior to the trial of the superior court was sufficient (Acts of 1886, c. 318, §§ 1-3); (2) because the provisions of the Acts of 1884, chap. 310, § 4, were not complied with (*Com. v. Spear*, 3 New Eng. Rep. 143 Mass. 172; *Com. v. Lockhardt*, 144 Mass. 132).

This provision of the statute of 1886, repealed by the Acts of 1886, chap. 318, as decided in *Com. v. Kennard*, 144 Eng. Rep. 368, 143 Mass. 418.

The law does not favor a repeal of the statute. Where two statutes can be construed together, the earlier statute is to be preferred.

Bish. Writ. L. bk. 2, chap. 18, § 1. Sedg. Stat. & Const. L. 2d ed. p. 1, note; *Com. v. Flannely*, 15 Gray 465; *Smith*, 108 Mass. 444; *Com. v. Heald*, 144 Mass. 465.

Mr. Andrew J. Waterman for the Commonwealth:

The law broadly covers the sale of milk, and it was immaterial

tract existed of the character claimed by defendant.

Pub. Stat. chap. 57, § 5; Acts 1886, chap. 318, § 2.

It does not appear that the evidence of the inspector was objected to when offered. The clause of the statute requiring a portion to be kept and delivered to the defendant on request is directory, and does not form a condition precedent to the use of testimony of the inspector.

The various provisions of the statute relating to the mode of proof of the adulteration of milk, now in force, are peculiar and somewhat unusual. If this mode of proof is relied upon, it would be necessary, doubtless, that a strict compliance with the law should be had. But other appropriate modes of proof of the fact of adulteration are not precluded, and the same means of proof competent before these directory provisions of the statutes were enacted are competent now. The evidence of the analysis of the milk was clearly admissible.

Com. v. Spear, 3 New Eng. Rep. 427, 143 Mass. 172; *Com. v. Kennesson*, 3 New Eng. Rep. 368, 143 Mass. 418.

Field, J., delivered the opinion of the court:

Stat. 1886, chap. 318, § 2, prohibits, under a penalty, the sale of milk which is not of good standard quality, and the alleged contract was immaterial. Indeed, the contract would be held to mean that the milk delivered should be such as could lawfully be bought and sold. The testimony of the milk inspector, to the results of the analysis, was received in evidence. The milk was delivered to the milk inspector for analysis by the purchaser of the milk, and was not taken from the possession of the defendant, pursuant to Stat. 1886, chap. 318, § 1. In cases where the milk analyzed has not been taken under the provisions of statute, the competency of evidence is to be determined by the common law; and the testimony of any person who had sufficient skill to analyze milk, and who had analyzed some of the milk, which was shown to have been sold by the defendant, was admissible. *Com. v. Spear*, 3 New Eng. Rep. 427, 143 Mass. 172.

Exceptions overruled.

David T. HAGAN

v.

John K. SARTWELL.

Where defendant in review, having executed and delivered an assignment and a satisfaction of his claim against the plaintiff, continues the prosecution of the action then pending, oral evidence of fraud on the part of the attorney for plaintiff in review, in obtaining defendant's execution of an agreement to pay the costs of the pending action on the claim, is immaterial.

(Suffolk—Filed January 7, 1888.)

On exceptions by defendant in review, original plaintiff. *Overruled.*

Sartwell had an account against Hagan on 2 Mass.

which he brought suit attaching his goods. Hagan, being at the time indebted to other parties, proposed to make a general compromise with his creditors, which they accepted. He subsequently paid the amount agreed upon, and his creditors, including Sartwell, signed the following release and assignment:

Exhibit C.

February 28, 1888.

In consideration of the several sums hereto set against our respective names, to us severally paid by John Everett, of Canton, we do each of us severally acknowledge full payment and satisfaction of each and all claims and demands we and each of us have against David T. Hagan, and we do hereby release all claims we and each one of us now have against said David T. Hagan.

Witness our hands and seals, hereby severally adopting the single seal hereto affixed.

\$128.87. J. K. Sartwell & Co. [L. s.]

Exhibit D.

February 26, 1888.

In consideration of the several sums set against our respective names, to us severally paid by John Everett, of Canton, we do each of us assign, transfer, and set over to the said John Everett each and all claim or claims we and each one of us have against David T. Hagan.

Witness our hands and seal, hereby severally adopting the single seal hereto affixed.

\$128.87. J. K. Sartwell & Co. [L. s.]

Sartwell also executed the following instrument:

Exhibit B.

Boston, February 29, 1888.

Received of John Everett the sum of twenty dollars, and I hereby agree to pay all my costs in the suit of J. K. Sartwell & Co. v. David T. Hagan, and save John Everett and David T. Hagan from all costs on said suit and attachment.

J. K. Sartwell, [L. s.]
P. J. Doherty, my Attorney,
J. K. Sartwell & Co.

Sartwell claimed that Hagan had agreed to pay the costs of suit, and they not being paid he went on with his suit and obtained judgment by default.

Hagan obtained a writ of review. Upon the trial, Sartwell offered evidence to show that, before he signed the agreement "B," there was an oral agreement between him and Everett, that Hagan was to pay all the costs in Sartwell's suit against him, and also \$20 for the fee of Sartwell's attorney; that he, Sartwell, did not read the paper B before signing it; that Everett, when he paid the \$20, said he wanted a receipt for it as a voucher, and thereupon drew up the paper B, which he handed to Sartwell to sign; that Everett did not inform Sartwell that said paper B contained an agreement on the part of Sartwell to assume and pay all costs; that Sartwell signed the agreement without reading it, relying upon the fact that he was dealing with a lawyer, and in confidence, that it contained nothing but a receipt for the \$20 paid him to cover the amount of his attorney's fee; that, at the request of Everett, he signed his attorney's name to the agreement;

and that no notice was given to him by Everett that the paper contained anything else than a receipt for the attorney's fee.

Sartwell offered this evidence to show that his signature to the paper B was obtained by fraud. The court ruled that this evidence was inadmissible to vary the terms of the written agreement B, and that the evidence offered would not authorize the jury to find that the defendant's signature to that agreement was obtained by fraud on the part of the plaintiff. The court ruled that the plaintiff, in review, was entitled to recover, and directed a verdict for him, and Sartwell alleged exceptions.

Mr. Philip J. Doherty, for defendant:

The case should have been submitted to the jury with appropriate instructions. The defendant in error was not bound by the agreement of composition signed by him. Its terms were not complied with unless the paper B, signed by him, operated as a waiver of the payment of costs in full. His signature to this instrument was fraudulently obtained.

The evidence offered by him to show that his signature to the paper B was obtained by fraud had a tendency to show that an agreement on the part of Sartwell to pay all costs was fraudulently submitted for a receipt. It was a question of fact for the jury to determine, whether or not the defendant was negligent in allowing himself to be deceived as to the character of the paper he signed.

If a party is deceived or misled as to the actual contents of an instrument, it does not bind him.

Com. Dig. *Fait*, bk. 2; *Edwards v. Brown*, C. & J. 312; *Keilw.* 70, pl. 6.

Defendant was deceived, not merely as to the legal effect, but as to the actual contents of the instrument.

Foster v. MacKinnon, L. R. 4 C. P. 704, 713.

The party whose signature to such paper is obtained by fraud as to the character of the instrument, who is ignorant of such character, and who has no intention of signing it, and who is guilty of no negligence in affixing his signature, or in not ascertaining the character of the instrument, is no more bound by it than if it were a total forgery, the signature included.

Walker v. Ebert, 29 Wis. 194.

In *Trambly v. Ricard*, 180 Mass. 259, 261, Ames, J., in delivering the opinion, says: "But, beyond this, the evidence offered by the plaintiff, which the jury might have fully believed, tended to show that the written contract was produced by the defendants immediately after an oral contract for the unconditional sale and delivery was completed. The jury may well have found that the production of the writing at that time was in itself an affirmation on the part of the defendants that its terms did not differ from the terms of sale agreed on. Fraud may be proved from the acts and conduct of a party quite as effectively as from his declarations. *Emerson v. Brigham*, 10 Mass. 197; *French v. Vining*, 102 Mass. 132; *Walters v. Morgan*, 3 De G. F. & J. 718. And any act falsely intended to induce a party to believe in the existence of some other material fact, and having the effect of producing such belief to his injury, is a fraud."

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Gibbs v. Linabury, 22 Mich. *Guthrie*, 43 Ind. 227.

Deceit may sometimes take a and there may be circumstances of silence would have all the legal effect of actual misrepresentation.

French v. Vining, 102 Mass. 132.

Mr. J. L. Eldridge, for plaintiff:
The evidence was inadmissible on the terms of the written agreement. The ruling as to the evidence was correct. There was no evidence that the receipt was fraudulently obtained. The defendant took the paper, and could reasonably suppose that it contained the alleged agreement. The only inducement was the payment of the \$20.

Trambly v. Ricard, 180 Mass. 259.

Field, J., delivered the opinion.

On February 3, 1883, Sartwell, a creditor of Hagan, signed an agreement under seal, whereby he agreed to accept of his claim against Hagan, 25 per cent, to be paid within twenty days from the date of the agreement. The agreement provided also that, in addition to said sum, all costs shall be paid. When the agreement was signed by Sartwell, he had no action at law against Hagan, on which Hagan's goods had been seized. The writ had not then been entered. Through Everett, his attorney, Sartwell, including Sartwell, the 25 per cent, the time agreed upon, and Sartwell delivered to Everett the papers and the exceptions, marked "C" and the papers are under seal, and the first release all claims against Hagan, and purports to assign to Everett against Hagan. At the same time Sartwell signed these papers, he signed a paper annexed to the exceptions, marked "B", which Sartwell offered to show that, between him and Hagan, the agreement marked B, then the agreement, between him and Hagan, was to pay all the costs of Hagan's suit against him, and a fee of said Sartwell's attorney. Sartwell did not read the paper annexed to the exceptions, marked "B"; that said Everett, when he signed it, said he wanted a receipt for it, and thereupon drew up the paper annexed to Sartwell to sign, and he signed it and delivered it to Everett. Sartwell testified that he did not read the paper annexed to the exceptions, marked "B", and that he had confidence in Everett, and supposed that he contained nothing but a receipt for the amount of the fee, and he paid him to cover the amount of the fee; and his contention was that he could have read the paper if he had read it, and although Everett misled him, except to present the signature, under the circumstances, he was in fact deceived and misled, and that his signature was obtained by fraud. Paper B purports to be an agreement that Sartwell will pay all costs in Hagan's suit against him. Hagan subsequently entered the sheriff's fees in the suit, and entered the writ on the return day,

and the defendant having been defaulted, he obtained judgment against Hagan, whereupon Hagan brought this writ of review. The court ruled that the evidence of Sartwell, which is recited in the exceptions, was inadmissible to vary the terms of the written agreement B, and that the evidence offered would not authorize the jury to find that the defendant's signature to that agreement was obtained by fraud on the part of the plaintiff, and to this Sartwell excepted. We are unable to see that the question presented was material. There is nothing in the exceptions to indicate that the delivery of papers C and D was conditional upon, or influenced by the form of paper B; and papers C and D would have been a defense to the action of Sartwell against Hagan, or a sufficient ground for dismissing it, if Sartwell prosecuted it without Everett's consent. If paper B were reformed so as to read as Sartwell contends it should read, the legal effect of papers C and D remains. Sartwell, according to his own statement, delivered the papers C and D to the attorney of Hagan, for Hagan's benefit, without insisting upon the payment of the costs. He trusted to Hagan's paying the costs in the future. As paper B does not discharge or relate to the claim or cause of action of Sartwell, but only to the costs of suit, it could not be pleaded in bar of the action, or used to defeat the action. If Sartwell should bring an action on the promise of Hagan to pay the costs, the validity of this paper would be material, provided that, notwithstanding the delivery of papers C and D, an action could be maintained on this promise. But the validity of this paper is not material in the present suit, when it appears that Sartwell has executed and delivered papers C and D, concerning which no fraud or misunderstanding is claimed.

Exceptions overruled.

COMMONWEALTH of Massachusetts

v.

George B. ELIOT.

1. When a town within whose limits the whole of a pond lies, makes application for a lease of such pond to it, under Pub. Stat. chap. 91, the notice of hearing provided by § 13 of that statute is not required.
2. Where, on a complaint for unlawfully fishing in a great pond which had been leased to a town, the lease to the town was proved, and there was no evidence that the lease had been determined by the board of commissioners of inland fisheries, or that it had been surrendered by the town, and it appeared that the town was still in possession and liable to pay the rent reserved,—*Held*, that a ruling that there was no evidence to be submitted to the jury upon the question whether the town had abandoned the lease, was proper.

(*Exec*—Filed January 7, 1888.)

ON defendant's exceptions. *Overruled.*

This was a complaint, under Pub. Stat. chap. 91, § 27, against the defendant for unlawfully fishing in Great Pond, situated wholly in North Andover, which pond had been leased to the inhabitants of said town, under the provisions of said chapter. At the trial in the superior court, upon appeal, the Commonwealth put in evidence a lease of the pond to the inhabitants of North Andover.

It also appeared in evidence, from the records of the town clerk, that on August 25, 1884, the inhabitants of the town, at a town meeting, and under the third article in the warrant for said meeting, voted to lease Great Pond for a term of years, and to instruct the selectmen to petition for a lease, and to do it without delay. Frye, who was a selectman of the town in 1884, testified that, as such selectman and under said vote, he went to the chairman of the board of commissioners of inland fisheries, for the purpose of obtaining a lease from the Commonwealth, to the inhabitants of North Andover, of Great Pond; that he received a notice from Brackett, who was then acting as commissioner of inland fisheries, which he took with him, and made two copies, and posted them in three places in North Andover; that they were posted between three and five days of the date of the lease, which was the date of the hearing; that said notices had been lost, and that generally said notices stated that application had been made by the inhabitants of North Andover for a lease of Great Pond, under the provisions of Pub. Stat. chap. 91, and that a hearing would be had at the State House in Boston upon the matter September 5, 1884; that nobody appeared in opposition to the lease, and that he then received it.

Defendant asked the court to rule, and instruct the jury, *inter alia*, as follows: In order to the validity of a lease of a great pond, there must be an application by the lessees, a hearing upon that application, and notice of the hearing. And the hearing must be at a reasonable hour, and at a reasonable place, and there must be reasonable notice of the time and place for hearing.

The court declined to give any of the instructions or rulings asked, but ruled as follows: That, it being undisputed that the whole of said pond was within the limits of the town of North Andover, the notice of hearing provided by § 13 was not necessary, and no notice was required; that no actual setting apart or occupancy of said pond by the town, for the purposes of said lease, was necessary to be proved in this case; and that there was no evidence to be submitted to the jury, upon the question of whether the town had abandoned the lease.

A verdict of guilty was returned, and defendant alleged exceptions.

Mr. W. S. Knox, for defendant:

It was necessary for the government to show a valid lease to the town of North Andover. In order to do this, it must show compliance with the provisions of Pub. Stat. chap. 91, § 13. Where a town in which the pond wholly lies is the lessee, the reason of the provision is the same; for, though the town may have voted to take a lease, or apply for a lease, this cannot be notice that one has been applied for.

CASES

DETERMINED IN THE

Supreme Judicial Court of Massachusetts,

1888.

CHIEF JUSTICE,

HON. MARCUS MORTON.

ASSOCIATE JUSTICES,

HON. WALBRIDGE A. FIELD,
HON. CHARLES DEVENS,
HON. WILLIAM ALLEN,

HON. CHARLES ALLEN,
HON. OLIVER WENDELL HOLMES, JR.,
HON. MARCUS P. KNOWLTON.

Parker L. CONVERSE, *Admr.*,

Edward F. JOHNSON, *Admr.*

1. Under Gen. Stat. 155, § 9, **one whose domicile and actual residence was in New Hampshire** when she executed a note, and so continued until her death, she only **making short occasional visits** in this Commonwealth, was **not entitled to the benefit of the Statute of Limitations**. Within the meaning of the statute she never came into this Commonwealth.
2. Pub. Stat. chap. 197, § 12, was intended to be a re-enactment of Gen. Stat. chap. 155, § 10, and was **enacted in the form reported by the commissioners; and their omission of the words, "and not afterwards, if otherwise barred by the provisions of this chapter," cannot be held to have been intended to change the law**. Pub. Stat. chap. 197, § 12, cannot well be construed to mean that in every case the executor or administrator of a deceased person, who was entitled to bring an action, must bring the action within two years after the grant of letters testamentary or of administration. The section was not intended to further limit the bringing of actions, but to **extend the time within which they could be brought, when the person entitled to bring them died before the expiration of the time or within thirty days after the expiration of the time limited by other provisions of the statute**. It was not intended that the debtor should have a defense to which she was not otherwise entitled, or that the executor or administrator should not collect debts due the estate by suits brought more than two years after their appointment, where the debts were not barred by other provisions of the statute.

(Middlesex—Filed January 7, 1888.)

3 MASS.

ON defendant's appeal. *Judgment affirmed.*
This action was brought upon the following promissory note.

\$600. Concord, N. H., Dec. 10, 1867.

Value received, I promise to pay to Marshall F. Barrett, or his order, the sum of six hundred dollars, with interest at the rate of five per cent, payable annually. Mary F. Hart.
U. S. Rev. Stamp.

Payments of interest were regularly indorsed on the note until December 10, 1882, when the payments ceased.

Mary F. Hart resided in Concord, N. H., when the note was given, and continued to reside there until her decease, which occurred June 3, 1870. Defendant was appointed administrator with the will annexed of property of decedent situated in Middlesex County, April 14, 1885.

Barrett died April 5, 1883, and plaintiff was appointed administrator of his estate June 26, 1883.

August 3, 1885, demand for payment of the above note was made and refused, whereupon this action was begun June 19, 1886.

The case was presented to the court on an agreed statement of facts, and, judgment having been entered for plaintiff, defendant appealed.

Mr. E. F. Johnson, for defendant:

The note in suit specifies no time of payment, and, although it provides for the payment of interest annually, is yet, in legal effect, a note payable on demand.

Jones v. Brown, 11 Ohio St. 601.

A promissory note payable on demand is due as soon as it is given; an action may be brought upon it immediately without demand; and the Statute of Limitations begins to run against it from its date.

Shute v. Pacific Nat. Bank, 136 Mass. 487.

The fact that Mary F. Hart, the maker of the note, was, on the day of the date thereof, and from that time up to her decease, a resident of another State, brings the case within the provisions of Pub. Stat. chap. 197, § 11,

and "the time of her absence shall not be taken as part of the time limited for the commencement of the action."

See *Langdon v. Doud*, 6 Allen, 425.

But the fact of Mary F. Hart coming into this Commonwealth under the circumstances which existed in this case, caused the Statute of Limitations to begin to run, under Pub. Stat. chap. 197, § 11, and the decision in *Whitton v. Wass*, 109 Mass. 40.

See *Milton v. Babson*, 6 Allen, 322; *Langdon v. Doud*, 6 Allen, 423.

Rockwood v. Whiting, 118 Mass. 337, merely holds that, on the facts, the Statute of Limitations had not run the requisite period of time to complete the bar.

The Statute of Limitations having begun to run prior to Mrs. Hart's death, it follows that it would continue to run after her decease.

Corliss S. Engine Co. v. Schumacher, 109 Mass. 416.

Plaintiff cannot bring himself within the enabling provisions of Pub. Stat. chap. 197, § 12, for, (1) Marshall F. Barrett was not, at his decease, "a person entitled to bring the action" (*Bates v. Kempton*, 7 Gray, 382; *Ostrom v. Curtis*, 1 Cush. 461); (2) Marshall F. Barrett did not die "before the expiration of the time herein limited;" (3) this action was not "commenced by the executor or administrator of such deceased person at any time within two years after the grant of letters testamentary or of administration" (*Hill v. Mixer*, 5 Allen, 27; *Gallup v. Gallup*, 11 Met. 445; *Holmes v. Brooks*, 68 Me. 416).

If the facts in the case at bar were changed in this, that the plaintiff had begun his suit within two years after his appointment as administrator of the creditor's estate, but more than two years after the defendant's appointment as administrator of the debtor's estate; and it were also a fact that the latter had given no notice of his appointment, so that what is known as the short Statute of Limitations against executors would not apply,—it is certain that the plaintiff could not then maintain his suit.

Corliss S. Engine Co. v. Schumacher, 109 Mass. 416; *Lancey v. White*, 68 Me. 28.

If, by the provisions of § 12, the period of time within which an action may be commenced against the administrator of a debtor's estate is limited to two years from the date of his appointment, it must follow that, when exactly the same language is used in the same section, the time within which the administrator of the creditor's estate can bring suit must be equally limited. If "may" has been decided by the courts to mean "shall" for the one contingency, it certainly must be so construed for the other.

Section 12 is of itself a Statute of Limitation; and the repeal of the final clause, "and not afterwards, if otherwise barred by the provisions of this chapter," in Gen. Stat. chap. 155, § 10, by the enactment of Pub. Stat. chap. 197, § 12, renders it necessary for an executor or administrator to begin suit, in all cases, within two years of his appointment; so that, if no other objection held, and this suit were not barred by the other provisions of the Statute of Limitations, the fact that the plaintiff in the case at bar did not commence action within two years

of his appointment, would of itself prevent the maintenance of his suit.

Mr. J. W. Johnson, for plaintiff.

This action was brought on June 1, 1870, within two years of the grant of administration, on the estate of Mary F. Hart, the defendant.

Pub. Stat. chap. 186, § 9; *Chapman v. Hill v. Mixer*, 5 Allen, 28.

The provisions of Pub. Stat. chap. 186, § 9, do not avail against this action.

Mary F. Hart in this Commonwealth was given, though known to Barrett, was not such a coming into the Commonwealth as will enable this court to hold a matter of law, that the statute did not run and continued to run. The appointment as administrator of Mary F. Hart first gave jurisdiction to the Commonwealth to an action upon this note.

The provisions of Pub. Stat. chap. 186, § 9, do not avail against this action.

It does not require the plaintiff's administrator to bring his action within two years of the date of his appointment. The section was enacted to restrict, the time within which actions may be brought.

Gallup v. Gallup, 11 Met. 445.

No action could have been brought by the defendant administrator within two years of his appointment (Pub. Stat. chap. 186, § 9) so that the plaintiff administrator was not required to bring this action within two years of his appointment.

The plaintiff administrator, or executor, perhaps, have had administration of the estate of Mary F. Hart committed to a suitable person; but if they prefer to bring the action of the next of kin, or executor, they could do so without prejudice to their rights to proceed within two years of the appointment of a defendant administrator. But the provisions of Pub. Stat. chap. 186, § 9, do not avail in favor of this plaintiff.

Hill v. Mixer, *supra*.

Field, J., delivered the opinion of the court:

The promissory note was dated June 1, 1867, and was, in legal effect, payable to order of Mary F. Hart. The construction we give to Pub. Stat. chap. 55, § 9, is that, as Mary F. Hart's domicile and actual residence in this Commonwealth when she gave the note, and she never came into this Commonwealth, or resided out of the whole time which elapsed between the date of the note and her death. *Rockwood v. Whiting*, 118 Mass. 337.

She died testate in New Hampshire, September 3, 1870, and her will was duly proved in that State. In December, 1870, a copy of the will of administration were ever issued in that State. In December, 1870, a copy of the will was duly filed, allowed, and recorded in the probate court of Essex County in this Commonwealth. This was done on the 1st day of January, 1871, and the persons named as executrix

but, as they failed to file a bond, no letters testamentary were granted to them, "and the estate remained unadministered until April 14, 1885," when the defendant was duly appointed administrator with the will annexed, by the probate court of that county, and gave due notice of his appointment.

Marshall F. Barrett, the payee and holder of the note, died in this Commonwealth on April 5, 1883, and the plaintiff was duly appointed administrator of his estate by said probate court on June 26, 1883, and gave due notice of his appointment. He brought this suit on June 19, 1886.

The defendant, as administrator, could not have been sued within one year after he gave a bond as administrator, which we assume was on April 14, 1885, the date of his appointment; and a suit must be commenced against him within two years after he gave the bond. Pub. Stat. chap. 186, §§ 1, 9.

After Mary F. Hart died, there was no one anywhere who could be sued, until the defendant was appointed administrator.

It has been decided that Pub. Stat. chap. 197, § 12 (Gen. Stat. chap. 155, § 10), is to be considered distributively. *Hill v. Mixer*, 5 Allen, 27. The precise point decided in this case is that an action brought by the executor of the estate of the holder of the note, against the executor of the estate of the maker, more than two years after his appointment, although within two years after the plaintiff was appointed executor, cannot be maintained; and it is said that Gen. Stat. chap. 155, § 10, does not extend the time for bringing the action beyond that limited by Gen. Stat. chap. 97, §§ 5-8.

If Barrett had lived, the Statute of Limitations would not have been a defense if he had brought this suit at the time it was brought. The contention is that it cannot be maintained by the administrator of his estate because brought more than two years after the grant of letters of administration to him.

Pub. Stat. chap. 197, § 12, was intended to be a re-enactment of Gen. Stat. chap. 155, § 10, and it was enacted in the Public Statutes in the form reported by the commissioners. The commissioners made some unimportant verbal changes, and omitted the words, "and not afterwards, if otherwise barred by the provisions of this chapter," found at the end of the section in the General Statutes. It cannot be held that this omission was intended to change the law. Pub. Stat. chap. 197, § 12, cannot well be construed to mean that, in every case, the executor or administrator of a deceased person, who was entitled to bring an action, must bring the action within two years after the grant of letters testamentary or of administration. The section was not intended to further limit the bringing of actions, but to extend the time within which they could be brought, when the person entitled to bring them died before the expiration of the time, or within thirty days after the expiration of the time, limited by other provisions of the Statutes. It was not intended by this section that the debtor should have a defense to which he was not otherwise entitled, or that an executor or administrator should not collect debts due the estate, by suit brought more than two years after their appointment,

when the debts were not barred by other provisions of the statutes. See *Corliss S. Engine Co. v. Schumacher*, 109 Mass. 416.

Judgment affirmed.

Wilbur M. BELL

v.

John Q. A. PIERCE.

Where the sheriff released a defendant, arrested on meane process in a civil action, on receiving a bond which was not valid as a bail bond (although, if accepted by the plaintiff, it might have been valid as a common-law bond); and the plaintiff repudiated such bond, and declared that he should look to the sheriff for satisfaction of his judgment, and that he would not accept a surrender of the defendant by the sureties on the bond; and thereafter the plaintiff recovered judgment against the defendant in the action, and, on payment of such judgment by the sheriff, assigned the judgment and the said bond to the sheriff.—*Held*, in an action on behalf of the sheriff against the sureties on said bond, that, under the circumstances, the assignment of the bond by the plaintiff in the original action should not be permitted to operate as an acceptance of the bond by him so as to make it effective as against the sureties.

(Middlesex—Filed January 9, 1888.)

ON plaintiff's exceptions. *Overruled.*

This was an action of contract to recover the amount alleged to be due upon a certain bond, of which the following is a copy:

Know all men by these presents that we, Frank T. Fay, of Watertown, in the county of Middlesex, as principal, and Abner C. Stockin and John Q. A. Pierce, both of said Watertown, and James H. Snow of said Watertown, as sureties, are holden and stand firmly bound unto Wilbur M. Bell, of Lunenburg, in the State of Vermont, in the sum of three hundred dollars, to the payment of which to the said Bell or his executors, administrators, or assigns, we hereby jointly and severally bind ourselves, our heirs, executors, and administrators.

The condition of the obligation is such, that whereas the said Fay has been arrested on meane process in an action of contract wherein said Bell is plaintiff, and the said Fay and John Palmer are defendants, the writ in which action is dated the 16th day of October, 1886, and is returnable before the justices of the Superior Court at Cambridge on the first Monday of November next,—

Now, therefore, if the said Frank T. Fay shall appear before the said justices of the said court, to be holden as aforesaid, to answer unto the said plaintiff in said action, shall abide the final judgment in said action, and shall not avoid, then this obligation shall be void, otherwise it shall be and remain in full force and virtue.

In witness whereof we hereunto set our hands and seals this 29th day of October, 1885.

Signed and sealed Frank T. Fay, [Seal]
in presence of Abner C. Stockin, [Seal]
J. Q. A. Pierce, [Seal]
J. H. Tyler. James H. Snow. [Seal]

Middlesex, ss. October 29, 1885. I hereby approve the above bond.

Joseph H. Tyler, Master in Chancery.

At the trial of the action before the court without a jury, it appeared in evidence that on October 29, 1885, one Frank T. Fay was in jail at East Cambridge, having been arrested on mesne process in an action in favor of this plaintiff. The sureties on the bond, accompanied by Samuel P. Abbott, an attorney at law, called at the office of the master in chancery whose approval the bond bears, desiring, as they said, to get Fay out of jail. Abbott handed to the master in chancery a blank bail bond, which was then filled in, and, after its execution and approval, delivered to the jailer in the presence of the sureties, said attorney Abbott, and said master, and Fay was at once released.

The court in terms found that the bond was executed by the defendant and his co-obligors as and for a bail bond for the purpose of relieving Frank T. Fay from imprisonment upon mesne process, and was delivered to the jailer as a public officer, and that said jailer received and accepted the same in his official capacity; and thereupon, deeming it a good and sufficient bail bond, discharged said Fay from arrest.

Neither Bell, the plaintiff in the original action, nor his attorney saw the bond until after the recovery of judgment. The court found that there was no acceptance of it unless a certain assignment hereafter mentioned, as matter of law, constituted such acceptance, or was conclusive proof of it.

Within less than thirty days after the judgment was recovered, Abbott, acting for Fay and the sureties upon the bond, saw Crawford (Bell's attorney), and told him that Fay was in Boston, and at Abbott's office, and inquired if said Crawford wanted Fay in this matter, and was answered in the negative. He also spoke about having Fay delivered into the jail, and said Crawford replied that in case of such delivery he should treat Fay as an outsider, and should have nothing to do with him, and that in any event he should hold the sheriff responsible for his judgment. The court found that the sureties upon the bond desired to surrender Fay, and to relieve themselves from liability, as sureties upon a bail bond have a right to do, and that they would have so surrendered him if the bond had been in proper form, or if the plaintiff would have accepted the body of Fay and discharged them from liability.

Subsequently Henry G. Cushing, the sheriff of said county, took an assignment of the judgment in favor of Bell against Fay, and also an assignment of the bond, with a power to collect, sue, or enforce the same, all in one instrument, paying therefor the amount of the judgment, and brought and prosecuted this suit in the plaintiff's name for his (the sheriff's) benefit,—said judgment never having been satisfied.

Plaintiff requested the court to rule that the

bond, being directly between parties debtor and creditor, or so in form, was a valid obligation at common law, and that judgment thereon should follow, and be given to the plaintiff. The court refused to rule as requested, but entered his finding for the defendant, and plaintiff alleged exceptions.

Mr. A. S. Hall, for plaintiff:

The bond sued on was voluntarily executed by the defendant and his co-obligors; there was sufficient consideration, and the parties thereto acted individually, and not in any official capacity; and they had a right to enter into any contract they chose which was not contrary to law. The bond is not contrary to law; the parties had a right to make it, and it is valid at common law.

See *Holbrook v. Klenert*, 113 Mass. 266; *Burroughs v. Loder*, 8 Mass. 378; *Morse v. Hodsdon*, 5 Mass. 314; *Sweetser v. Hay*, 2 Gray, 49; *Brighton Bank v. Smith*, 5 Allen, 413; *Mosher v. Murphy*, 121 Mass. 276; *Pratt v. Gibbs*, 9 Cush. 82; *Clapp v. Coffran*, 7 Mass. 98; *Conant v. Newton*, 126 Mass. 105.

The defendant and his co-obligors were bound to know what they executed, and cannot be allowed to set up as a defense that they supposed they executed something else. They had counsel with them to direct them, and their own mistakes will not excuse them from the fulfillment of the obligation. The bond must speak for itself.

1 Greenl. Ev. §§ 275, 277.

The court in this case erred in finding that "the bond declared on was executed by the defendant and his co-obligors as and for a bail bond;" that is, finding what they secretly intended. The court also erred in finding that the sureties on the bond would have surrendered Fay "if the bond had been in proper form." That might not have been in their power.

See *Black v. Bachelder*, 120 Mass. 171; *Merrick v. Dame*, 9 Cush. 248; *Winslow v. Driskell*, 9 Gray, 868.

As in *Morse v. Hodsdon*, and *Clapp v. Coffran*, *supra*, the plaintiff had two remedies,—one against the sheriff for not taking a bail bond, and the other upon the bond in suit, as a good common-law bond. The assignment of the bond, and authorizing this suit thereby, is conclusive evidence of the acceptance of the bond. The assignment of the bond shows a claim of property therein just as much as in the judgment also assigned.

The defendant's answer does not set up the nonacceptance of the bond as a "substantial fact intended to be relied upon in avoidance of the action," and therefore he is precluded from relying upon it as a defense.

Mr. B. B. Johnson, for defendant:

The court found that the debtor, Fay, attempted to surrender himself in due season, in order to relieve the defendant and his co-sureties on said bond, but was refused because of the character of the bond, and because the plaintiff, Bell, declined to recognize it, and said that he should look to the sheriff for the amount of his judgment. This is conclusive as to his approval of the bond, and the rights of his assignee under it, and should relieve the sureties. In order to enable a suit to

be brought in the name of the plaintiff, Bell, delivery of the bond to him must be proven. This the court finds was not done. The bond was not intended for delivery to the obligee named therein; and the sheriff, receiving the same as a public officer, has no authority to receive or accept said bond for said Bell; and it cannot be held to be a contract between Bell and the defendant, Pierce.

Fay v. Richardson, 7 Pick. 91; *Powers v. Russell*, 13 Pick. 75; *Woodman v. Coolbroth*, 7 Me. 18; *Fitte v. Green*, 3 Dev. 291.

The defendant intended to become surety for one under control of the sheriff, and to whom he could surrender the obligor in accordance with law and practice; therefore the instrument (because void under the statute law) cannot be deemed a common-law bond; for such a construction would increase the liability of the defendant beyond the measure of the statute under which such bonds are given, and are required to run to the sheriff.

Conant v. Newton, 126 Mass. 105.

There is a difference in the rule of construction of the liability of obligors in bonds given to a public officer and those delivered by the obligor directly to the obligee, pursuant to a contract, especially when the obligor is in duress. The bond in this cause being of the former class must conform to the statutory requirements, or there is no remedy.

Pratt v. Gibbs, 9 Cush. 82.

The sheriff has no rights not possessed by the assignor, Bell, in said bond at the time when it was delivered to said sheriff, and should not be allowed to take advantage of his own negligence. The assignment cannot be evidence of acceptance by the assignor.

C. Allen, J., delivered the opinion of the court:

The bond was not valid as a bail bond, since it ran directly to the plaintiff in the action, and not to the sheriff or other officer. Pub. Stat. chap. 163, § 2. The approval of the master in chancery therefore signified nothing. But the bond might be valid at common law, if approved and accepted by the obligee. *Pratt v. Gibbs*, 9 Cush. 82. An actual or implied acceptance is essential in order to constitute a delivery. *Hawkes v. Pike*, 105 Mass. 560; *Chase v. Breed*, 5 Gray, 440; 4 Kent, Com. 454; Met. Cont. 14.

In the present case, the plaintiff never authorized or ratified the taking of the bond; on the other hand, he always repudiated it. Up to the time of the assignment he obviously intended to do no act to accept or ratify it, and declared, by his counsel, that in any event he should hold the sheriff responsible for the judgment. He thus treated the bond as invalid at a time when, if valid, the sureties could and would have saved the condition by surrendering their principal. It was too late afterwards to make it valid and binding upon them by an act done without their consent, and to their injury. Under the circumstances, the assignment of the bond to the sheriff, upon the payment by the sheriff of the amount of the judgment, could not have the effect to give vitality to a bond which up to that time was invalid.

Exceptions overruled.

3 MASS.

Asa H. HERRING

v.

Charles H. DOWNING.

1. Where an assignee in insolvency has knowledge of the **pendency of a suit by assignor**, on a claim which might have passed by assignment, and **does not interfere**, but attends the trial as a witness, it is abundant evidence of his assent.
2. An agreement between creditor and insolvent debtor,—that, in consideration of debtor's **working up stock** which he had transferred to the creditor, debtor should have **surplus of proceeds** of the same after payment of certain claims of the creditor,—is founded upon a **good consideration**, and action thereon for surplus will be maintained.

(Essex—Filed January 7, 1888.)

ON defendant's exceptions. *Overruled.*

This was an action of contract, tried before a jury. The firm of A. H. Herring & Son, of which plaintiff was a member, failed in March, 1883. Their liabilities were about \$8,000, and their assets were worth to them, to use in their business, about \$7,000, but if sold at forced sale were of much less value. Among the creditors were Amos W. Downing & Co., who held a claim against them of about \$1,850. Defendant was a member of this firm. At a meeting of creditors an attempt was made to settle by a payment of forty cents on a dollar, but it failed, and on June 11, 1883, A. H. Herring & Son delivered to defendant a receipted bill of parcels of all their assets for the expressed amount of \$2,770.94, which was all the goods were fairly worth, and was supposed to be 40 per cent of the indebtedness of Herring & Son. On the same day defendant signed a note for \$2,770.94, payable to the order of A. H. Herring & Son in six months from date, without interest. Both the note and the bill of sale were retained by defendant,—the note as the property of A. H. Herring & Son, for the benefit of their creditors. The business was continued after this for a time in the name of A. H. Herring, agent. On September 13, 1883, Herring & Son filed their petitions in insolvency, and were duly adjudicated insolvent debtors October 16, 1883, and Amos W. Downing was appointed assignee. They received their discharge May 6, 1884. Plaintiff did not call the assignee's attention to the claim made in this action.

Plaintiff testified that, shortly before January 1, 1884, defendant proposed to plaintiff that one Cram should put some money into the business, and have an interest therein; that the plaintiff assented to the suggestion, and thereupon, on January 1, 1884, an account of stock was taken. The account showed that there was sufficient in the business to pay the note for the benefit of the creditors, and leave \$3,740 in the business, but this account only showed \$390 in money. Cram became a partner in the business, which was thereafter carried on under the name of Downing & Cram. The plaintiff testified that the defendant told Cram that the

\$3,000, which was credited to the defendant as capital, belonged to the plaintiff, but that he (plaintiff) could not appear in the business, because he had not obtained his discharge in insolvency.

The plaintiff testified that the amount of \$3,000, which was left in said business January 1, 1884, was reached by giving defendant, at his request, a check for \$290.20, and by setting aside \$450 for plaintiff to use for personal expenses. The defendant denied that there was anything said about setting aside any money for the plaintiff's use.

Before July, 1884, the note was paid in full to the assignee, to whom it had been delivered. In July, 1884, the defendant, under circumstances which were in dispute, sold the assets to Cram, the value of the same at the time being sufficient to pay the claim of Amos W. Downing & Co. in full, and leave a balance of \$1,816.81.

This balance the defendant has retained.

The declaration in this case contained three counts, the first of which claimed \$3,167.17 for the balance found due to plaintiff by the parties on accounting together, with interest thereon. The third count was as follows:

"And the plaintiff says that it was agreed by and between plaintiff and defendant, that in consideration that the plaintiff and his son should work up certain stock of the defendant, which had been owned and used by the firm of A. H. Herring & Son, in the business of manufacturing shoes, the plaintiff should have, as his property, whatever remained of said stock after paying from the same a certain note for the amount of \$2,770.94, which the defendant held for the benefit of the creditors of said A. H. Herring & Son, and a certain claim amounting to \$1,840.55, which the firm of A. W. Downing & Co. (of which the defendant was a member) held against said A. H. Herring & Son. And the plaintiff says that, in pursuance of said agreement, said stock was worked up by plaintiff and his son, and said note and claim was paid therefrom, and there remained of said stock, after said payments, property of the value of \$1,816.81, which the defendant retained and refused to deliver to plaintiff, and deprived the plaintiff of."

The case went to the jury on the first and third counts only.

The defendant asked the presiding justice to rule that, upon the evidence, this action could not be maintained, because the right of action had vested in the assignee.

The presiding justice refused so to rule, and ruled and instructed the jury that the action might be maintained with the assent of the assignee, and that it was competent for the jury to find such assent from the assignee's knowledge of the pendency of the suit, his non-interference with it, and his attendance at the hearing before the auditor, and at the trial in the superior court.

The defendant asked the presiding justice to rule that there was no evidence for the jury on the third count, and to direct them to return a verdict for the defendant on that count, and also asked for a general ruling that, on the evidence, the action could not be maintained.

The jury returned a verdict for the defendant on the first count, and for the plaintiff on

the third count, and defendant alleged exceptions.

Mr. William H. Moody, for defendant:

The contract must be proved as laid in the declaration.

Hart v. Tyler, 15 Pick. 171; *Cunningham v. Hobart*, 7 Gray, 428; *Stone v. White*, 8 Gray, 589; *Peck v. Waters*, 104 Mass. 345.

The evidence showed no binding contract of any kind, and plaintiff's testimony—that "if there should be anything over that, after paying that, that should be mine"—proved merely a gratuitous undertaking on the part of the defendant; a mere *nudum pactum*, and not a contract upon consideration.

But such a contention is unnecessary, as the evidence varied from the third count in two respects. There was no evidence (1) of the allegation that "the plaintiff should have, as his property, whatever remained of said stock after paying from the same a certain note * * * and a certain claim * * *;" (2) of the allegation that, "in consideration that the plaintiff and his son should work up certain stock of the defendant."

The consideration which forms the basis of the contract must be set forth with great accuracy, as otherwise the whole contract will be misdescribed.

Stone v. White, 8 Gray, 594.

There was no such consideration as alleged. If there was any promise at all by the defendant, it was upon the original consideration of the sale of goods. The working up of the goods was not intended by the parties as the consideration of any promise.

Warren v. Durfee, 126 Mass. 338.

Upon any admissible construction of the contract, the plaintiff had an interest in the goods which passed to his assignee. The presiding justice should have ruled, upon the evidence, that the action could not be maintained. There was not sufficient evidence of the assent of his assignee.

Smith v. Chandler, 3 Gray, 392; *Gay v. Kingsley*, 11 Allen, 345; *Mayhew v. Pentecost*, 129 Mass. 382.

Messrs. J. P. & B. B. Jones, for plaintiff:

Upon all the evidence, the presiding justice properly left it to the jury, under appropriate instructions, to determine what the contract was.

Thurston v. Thurston, 1 Cush. 89; *Cameron v. Palmer* (o. 10 Allen, 539).

If the technical objection should be made that the son should have been joined as a coplaintiff, then the case should have been disposed of by an order that judgment be entered against defendant upon an amendment.

Pub. Stat. chap. 450, § 12; *Winch v. Homer*, 122 Mass. 438; *Buckland v. Green*, 133 Mass. 421; *Costello v. Crowell*, 134 Mass. 280.

The contract was not one which passed to the assignee. The right of action had never vested in him, and the plaintiff can maintain this action without his assent.

Pub. Stat. chap. 157, § 46, provides as follows: "The assignment shall vest in the assignee all the property of the debtor, real and personal, which he could have lawfully sold, assigned, or conveyed, or which might have been taken on execution upon a judgment against him at the time of the first publication

of the notice of issuing the warrant in case of voluntary proceedings."

In the case of an executory personal contract the promisor cannot sell or assign it.

3 Chitty, Cont. p. 1088; *Robson v. Drummond*, 2 Barn. & Ad. 803; *Clinton v. Fly*, 10 Me. 292; *Davis v. Coburn*, 8 Mass. 299.

But, assuming that the plaintiff's rights under the contract vested in the assignee, the plaintiff could maintain this action with the assent of the assignee, and, even in the absence of any fraudulent concealment, he could maintain the action if the assignee did not interfere.

See *Stone v. Hubbard*, 7 Cush. 595, 596; *Herrbert v. Sayer*, 5 Q. B. 965; *Gay v. Kingsley*, 11 Allen, 345, 346; *Clark v. Calvert*, 8 Moore, 96, 112; *Mayhew v. Pentecost*, 129 Mass. 332; *Sawtelle v. Rollins*, 23 Me. 196; *Hallett v. Fowler*, 10 Allen, 36; *Powers v. Raymond*, 187 Mass. 488; *Squire v. Lincoln*, Id. 399.

Even if the cause of action had been fraudulently concealed from the assignee, and the suit had been brought without his knowledge, his subsequent assent to it entitles the plaintiff to maintain it.

School Dist. No. 1 v. Richardson, 23 Pick. 62; *Matheson v. Eureka Powder Works*, 44 N. H. 299; *Ancona v. Marks*, 7 H. & N. 686; *Moore v. Spiegel*, 3 New Eng. Rep. 421, 148 Mass. 418.

Field, J., delivered the opinion of the court:

The jury returned a verdict for the plaintiff only upon the third count of the declaration. The defendant asked rulings, which were refused, that, upon the evidence, the action could not be maintained, because the right of action had vested in the plaintiff's assignee in insolvency; that there was no evidence for the jury on the third count; and, generally, that on the evidence the action could not be maintained.

The date of the petition in insolvency, of A. H. Herring & Son, was September 13, 1888, and they were duly adjudicated insolvent debtors on October 16, 1888, and Amos W. Downing was appointed assignee. The alleged contract was made on or about June 11, 1888. Whether this contract was, at the time the assignment in insolvency took effect, such an executory contract for personal services that it did not pass to the assignee, need not be decided; because, if it was not, an action could be brought in the name of the plaintiff, for a subsequent breach of it by the defendant, if the assignee assented, and there was abundant evidence that the assignee had assented to the plaintiff's maintaining the action in his own name. *Squire v. Lincoln*, 187 Mass. 399; *Powers v. Raymond*, 187 Mass. 483; *Hallett v. Fowler*, 10 Allen, 36; *Gay v. Kingsley*, 11 Allen, 345; *Mayhew v. Pentecost*, 129 Mass. 332.

There was evidence for the jury that the parties entered into the agreement set out in the third count. The plaintiff testified that the defendant said he would take the bill of sale, and give his note for that amount; and then said that "we might go on as before, and continue to manufacture and raise the amount of the indebtedness,—the 40 per cent,—and that if there should be anything over that, after paying that, that should be mine." There was other evidence that, in addition to the payment of the note given by the defendant,—which was in 3 Mass.

amount 40 per cent of the whole indebtedness of A. H. Herring & Son,—it was agreed that the plaintiff should pay in full the claim of Amos W. Downing & Co. against A. H. Herring & Son.

The whole consideration of this agreement, as proved, is not set out in the third count; but, as we construe the exceptions, this objection was not taken. If it had been, the defect could have been cured by an amendment. There was evidence of the promise, or agreement, declared on, and that this promise or agreement was founded upon a sufficient consideration, a part of which is properly described in the declaration.

Exceptions overruled.

Michael TOOMEY

v.

E. W. SANBORN.

Defendant and his wife boarded with tenant occupying the wife's house. A passageway to the rear of the house was constructed and maintained, among other purposes, for use by the city's servants in removing ashes and offal from the house. Defendant, having charge of repairs upon the house, directed a dangerous hole to be uncovered in the passageway, which was left unguarded, into which the plaintiff, a city servant, in the discharge of his duty as such, and exercising due care, fell and was injured. Held, that defendant was liable.

(Suffolk—Filed January 7, 1888.)

ON defendant's exceptions. *Overruled.*

This was an action of tort to recover for personal injuries.

Plaintiff was an employee of the health department of the city of Boston. Part of his duty was to collect the offal from houses facing on Hancock Street. Access to the rear of these houses was had by a passageway from Cambridge Street, which communicated with houses numbered 1, 3, 5, and 7 on Hancock Street. Some workmen employed in making repairs upon house No. 5 removed a plank from the floor of the passageway, and plaintiff fell into the opening thus caused, and received the injuries complained of.

The declaration contained three counts. The first, alleging defendant to be owner of the premises, and the second, alleging him to be in occupation and control of them, were withdrawn.

The third count was as follows, viz.: "The defendant carelessly and negligently removed the planking of a certain passageway, thereby uncovering an excavation and hole beneath, and neglected to properly guard the same, and warn and notify those using said passageway of the removal of said plank and the existence of said opening, excavation, and hole; and said passageway was thereby rendered unsafe to those using the same. The plaintiff was rightfully using said passageway, and was in the exercise of due care, and in consequence of the

aforesaid condition of said passageway, and the aforesaid negligence of the defendant, he fell into said opening, excavation, and hole, and was seriously hurt."

Mr. Edward Avery, for defendant:

The relation of defendant to the passageway is not set out in the third count, nor is it alleged that he was under any obligation or owed any duty to the plaintiff in relation thereto, unless it is implied in the use of the term "carelessly and negligently."

Sweeney v. Old Colony & N. R. Co. 10 Allen, 372.

The evidence fails to show that defendant bore any other relation to the passageway than that of a mere volunteer, gratuitously superintending and directing the workmen.

He was liable, if at all, only for gross negligence.

Higgins v. McCabe, 126 Mass. 20, and cases cited in the opinion.

The evidence fails to show that defendant, or anyone for whom he was acting, held out any inducement or invitation, express or implied, to plaintiff, to enter on or use the passageway, or knew that the plaintiff was using or intending to use the passageway. The plaintiff was not using the passageway for the purpose of any business with defendant or his wife.

Carlton v. Franconia I. & S. Works, 99 Mass. 216; *Davis v. Central Cong. Soc.* 129 Mass. 367.

There was no evidence of gross carelessness or negligence on the part of defendant. The court should have instructed the jury to return a verdict for defendant.

At the trial defendant asked the court to instruct the jury that, on the whole evidence, the plaintiff was not entitled to recover under the third count. This instruction was refused, and defendant excepted.

Defendant also asked the court to instruct the jury that, if there was a sufficient space left between the opening and the wall for safe passage for the plaintiff, he could not recover. This instruction was refused, and defendant excepted.

The verdict was for plaintiff, and defendant alleged exceptions.

Messrs. Horatio E. Swasey and George R. Swasey, for plaintiff:

The request for a ruling that, upon the whole evidence, the plaintiff was not entitled to recover, was rightly refused.

It was a question for the jury, upon the whole evidence, under proper instructions.

An accident from negligence on private premises is a good ground of action "when the injured party has been induced to come by personal invitation, or by employment which brings him there, or by resorting there as to a place of business or of general resort held out as open to customers or others whose lawful occasion may lead them to visit there."

The instruction asked for,—"that, if there was a sufficient space left between the opening and the right-hand wall for safe passage for the plaintiff, he could not recover,"—required the court to rule, as matter of law, that defendant was not liable.

The single fact assumed by the request was a disputed one upon the evidence, and there were many other facts, circumstances, and con-

siderations affecting the question of defendant's liability, all of which were properly submitted to the jury under instructions which were full and appropriate, and not excepted to.

See *Continental Improvement Co. v. Stead*, 95 U. S. 166 (24 L. ed. 408).

Field, J., delivered the opinion of the court:

The single exception argued by the defendant is to the refusal of the court to rule "that, on the whole evidence, the plaintiff was not entitled to recover under the third count." It appears that estate No. 5 was owned by the wife of the defendant, but had been let to a tenant, who occupied it; that the defendant and his wife boarded and lived with the tenant in the house on the estate; that the defendant was personally supervising repairs which were being made upon the house, and had directed a plank to be removed from the floor of the passageway; and that this had caused a dangerous hole to be opened in the floor, which was left unguarded, and into which the plaintiff fell. There was evidence that the passageway had been constructed, and was maintained, for the purpose, among other things, of affording a back entrance to the house, and was, as the defendant knew, constantly used by the servants of the city of Boston for the purpose of removing the ashes and offal from the house; and that the plaintiff, as such servant, was rightfully using the passageway, on the implied invitation of both the owner and occupant of the house, for this purpose, and was in the exercise of due care. The case, taken most favorably for the defendant, is that he caused to be opened in a private way a dangerous pitfall, into which the plaintiff, while rightfully using the way with due care, fell. The ruling was right.

Exceptions overruled.

Lorren M. BLANCHARD

v.

John R. FITZPATRICK.

A party who delivers goods to another at an agreed price, on credit, the term of which depends upon monthly sales of the same, without condition or agreement for return, parts with his title, and is not entitled to immediate possession of the goods, and cannot replevy them.

(Suffolk—Filed January 7, 1888.)

ON plaintiff's appeal. *Judgment affirmed.*
Defendant, as deputy sheriff of Suffolk County, attached certain goods which formed part of the stock in trade of Fickett & Harriman, by virtue of a writ in favor of Jacob Fullerton and against Fickett & Harriman; and held the goods under that writ when they were replevied by plaintiff.

Plaintiff let Fickett & Harriman have the goods in question at an agreed and fixed price, on a credit the length of whose term depended upon the monthly sales of Fickett & Harriman; that is, on the first day of each month said firm

should pay the plaintiff the agreed and fixed price for all the goods sold by the firm during the preceding month, but should not be required to pay for any of said goods until sold by the firm.

No agreement was made for a return of any of the goods.

Upon this state of facts, the court ordered judgment for the defendant, and plaintiff appealed.

Messrs. Gilbert O. Burnham and Salem D. Charles, for plaintiff:

By the agreed statement of facts, no mention is made of a sale. If there was a sale in fact, it must be an implied one, arising from the actions of the parties.

Whether a delivery under an agreement for the sale of chattels is absolute or conditional depends upon the intent of the parties. To establish that the delivery was conditional, it is not necessary that the vendor should declare the condition in express terms at the time of delivery. It is sufficient if the intent of the parties can be inferred from their acts or the circumstances of the case.

Benj. Sales, 3d Am. ed. p. 290, §321; *Dresser Mfg. Co. v. Waterston*, 8 Met. 17; *Whitwell v. Vincent*, 4 Pick. 449.

The sale and delivery of goods on a credit do not pass the title, provided anything remains to be done by the vendor or vendee which was a part of the contract. It remains a conditional sale until the terms of the contract are fulfilled.

Whitney v. Eaton, 15 Gray, 225.

Where goods are sold at a fixed price, to be paid on a certain day; and delivery is made upon an agreement, express or implied, that until the price is paid the title is to remain in the vendor,—payment is a condition precedent, and, until performance, the property is not vested in the purchasers.

Benj. Sales, 3d Am. ed. § 320, note d; *Blanchard v. Childs*, 7 Gray, 155; *Burbank v. Crooker*, Id. 158; *Hirschhorn v. Canney*, 98 Mass. 149; *Foster v. Ropes*, 111 Mass. 10.

A contract for one party to take goods from the other, and return monthly the amount of sales at the prices charged by the latter, who will furnish the former with all goods in his line,—imports a consignment of the goods for sale, and not a sale of them by the second party to the first.

Walker v. Butterick, 105 Mass. 237; *Benj. Sales*, 3d Am. ed. § 2, note e.

Mr. W. B. French, for defendant.

Field, J., delivered the opinion of the court:

This is an action of replevin, and was submitted to the superior court upon an agreed statement of facts. It is sufficient to say that it does not appear by the agreed statement that the plaintiff, at the time he sued out his writ, was entitled to the immediate possession of the goods replevied. The agreed statement is not as full and clear as might be desired, but it does not appear that any condition was attached to the delivery of the goods by the plaintiff to Fickett & Harriman; and the reasonable construction of the agreed statement is that the goods were sold to Fickett & Harriman on credit, and were to be paid for by them in monthly payments, at an agreed price, when 3 Mass.

they were sold by them. On this construction, an absolute title to the goods passed to Fickett & Harriman when the goods were delivered to them.

Judgment affirmed.

Cornelia A. JOHNSON

v.

Marian B. KNAPP *et al.*

SAME v. Anson GAGE *et al.*

1. In an action for a breach of covenant against incumbrances in a deed, based upon the allegation that the owner of certain other lots had the right to take and convey water to their lots from and through the land conveyed to plaintiff, and to maintain pipes on that land for that purpose, it appeared that the pipe or aqueduct by which the water came upon the plaintiff's land first passed through land known as the W lot; that some years prior to plaintiff's deed, one G had owned both the W lot and the lot subsequently conveyed to plaintiff, and had conveyed the W lot to W (the present owner thereof), with the right of drawing water from the aqueduct, reserving "the privilege of conveying water across the southwest corner of the premises, as now conveyed." The conveyance to plaintiff was made by G's heirs, and included "the same privilege of drawing water and conveying the same through land of said W as enjoyed by said G in his lifetime." Held, that this conveyance to plaintiff necessarily excluded from the grant to him the right appurtenant to the W lot; and hence the existence and exercise, by the owner of the W lot, of the right appurtenant to that lot, were not a breach of the covenant against incumbrances in plaintiff's deed.
2. As the covenant against incumbrances must have been broken, if at all, when plaintiff's deed was delivered, there was no incumbrance unless there was an existing easement in plaintiff's land at that time.
3. A former owner of plaintiff's land, under whom plaintiff claims, had, by an instrument under seal but never recorded, granted to the owners of certain other lots, and their heirs and assigns, the privilege of drawing water in pipes from the land subsequently conveyed to plaintiff. Held, that no right could exist under said grant, in the owner of such other lots, as against the plaintiff, to maintain a pipe on plaintiff's land so as to constitute an easement and incumbrance; since said instrument was not recorded, and there was no evidence that the plaintiff, or those through whom plaintiff's title was derived from the maker of said instrument, had notice of it.
4. Held, on the facts, that the existence of

the right of the owner of certain other lots to take water from and maintain pipes on plaintiff's land by **adverse user** was not made out.

5. Water had flowed to one of the lots in question, known as the "P lot," since 1837, through pipes maintained upon the land subsequently, and in 1880, conveyed to plaintiff. In 1865 one C, who then owned the plaintiff's land, acquired title to the P lot, and owned both estates until he conveyed the latter lot (the dominant estate) to P, by a deed in which there was **no mention of the water or pipe**. *Held*, that it was apparent that the conveyance from C to P was made in view of the fact that the P lot depended for its supply of water upon the pipe on plaintiff's land; and that the **maintenance of such pipe on that land was reasonably necessary to the enjoyment of the P estate**; and that therefore a grant from C to P of all that he owned and was capable of granting in the pipe and water would be **implied**;* that such grant by implication certainly extended to the right to maintain a pipe on plaintiff's land (whether or not C was capable of granting a right to use water taken from land above the plaintiff's land,—the rights to maintain a pipe and to draw water being distinct); and that to this extent there was an **incumbrance on plaintiff's land** at the time of the deed to plaintiff.

6. A power of attorney to grant and convey all the maker's right to and interest in certain real estate, and to make sufficient deeds therefor, either with or without covenants of warranty, with full power to do all acts necessary or proper to be done in the premises,—*Held*, to **authorize the making of a covenant against incumbrances**.

(Franklin—Filed January 7, 1888.)

ON plaintiff's exceptions. *Sustained*. These actions were brought to recover for the breach of covenants contained in certain deeds. The declarations and answers were substantially the same in both actions. The case was heard and determined by the court. Plaintiff derived title to the premises from the heirs at law of Levi Gage. Levi Gage's brothers and sisters were his heirs at law, and were made defendants. The deed of defendants, Marian B. Knapp and others, by which plaintiff derived title to the undivided half of the premises, was executed by Anson Gage, under three powers of attorney, alike in substance, of one of which the following is a copy:

Know all men by these presents that we, Nancy B. Combs and David Combs, husband of said Nancy B. Combs, of Springfield, State of Ohio, do hereby constitute and appoint Anson Gage, of Northfield, in the county of Franklin, and State of Massachusetts, our true and lawful attorney, for us and in our names to grant, bargain, sell, and convey all our right to the, and interest in and unto all the, real es-

tate in the said county of Franklin whereof Levi Gage, late of Orange, in said county, died seized and possessed; and for us and in our names to make, execute, acknowledge, and deliver good and sufficient deeds and conveyances of the same, either with or without covenants of warranty; giving and granting to our said attorney full power and authority to do all acts necessary and proper to be done in the premises, in as full and ample a manner as we might or could do if personally present. And we do hereby ratify and confirm all the acts of our said attorney lawfully done in the premises.

Witness our hands and seals, this 16th day of December, A. D. 1880.

In presence of David Combs, [Seal.]
Nancy B. Combs, [Seal.]
D. Cushing.
E. G. Coffin.

State of Ohio, } ss.
Clarke County }

Be it remembered that on this 16th day of December, A. D. 1880, before me, the subscriber, Clerk of the Court of Common Pleas of said County and State, which is a court of record, personally came the above-named David Combs and Nancy B. Combs, and acknowledged the signing and sealing of the foregoing power of attorney to be their voluntary act and deed for the uses and purposes therein mentioned; and the said Nancy B. Combs, wife of the said David Combs, being at the same time examined by me separate and apart from her said husband, and the contents of said instrument being by me made known and explained to her, then declared that she did voluntarily sign, seal, and acknowledge the same, and that she is still satisfied therewith as voluntary act and deed for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name and affixed my official seal, on the day and year last aforesaid.

Edward P. Forbest, Clerk.
Clarke Com. Pleas, Ohio (and Seal of said County Court).

Upon the facts, the court ruled that neither of the actions could be maintained, and ordered judgment for defendants, and plaintiff alleged exceptions.

The facts are further stated by the court.

Messrs. Conant & Conant, for plaintiff:

Brooks, the then owner of the plaintiff's premises, by indenture from Stephen Emory, in 1880, acquired the right of conveying and drawing water in logs or pipe from a well on Emory's land. A pipe was at once laid from the well to Brooks's dwelling-house.

Such a right may be acquired by grant, and in this case enures to the benefit of plaintiff.

Goodrich v. Burbank, 12 Allen, 462.

In 1887 Brooks sold to French and Town the right to take water from the aqueduct on his premises, which right has ever since been exercised by French and Town and those claiming under them; and this right has been conceded by the successive owners of the Brooks premises, and it nowhere appears that Emory or his assigns ever objected thereto.

This right to take water was not personal to Brooks, but became appurtenant to a part of the Brooks premises.

*See *Root v. Wadhams* (N. Y.), 9 Cent. Rep. 874.

The right Brooks could and did convey, and the same passed, as an appurtenance and a part of the estate and premises, to the plaintiff.

Randall v. Chase, 133 Mass. 210.

Rights of water duly granted, not restricted to any particular tract of land, may be used at any place acquired or designated by the grantee.

De Witt v. Harvey, 4 Gray, 489.

The deed from Carpenter to Pomeroy conveyed a good and valid right to the water, which passed by the deed as an appurtenance to the Pomeroy lot; and no mention was necessary, in the deed, of the aqueduct or water rights.

Philbrick v. Ewing, 97 Mass. 133; *Hollenbeck v. McDonald*, 112 Mass. 247.

A deed of quitclaim and release shall be sufficient to convey all the estate which could lawfully be conveyed by a deed of bargain and sale.

Pub. Stat. chap. 120, § 2; Gen. Stat. chap. 80, § 8; Rev. Stat. chap. 59, § 5.

The right to the water was necessary to the enjoyment of the Pomeroy estate, and at the time of the Carpenter conveyance was annexed to the tract conveyed and passed by the deed.

Carbrey v. Willis, 7 Allen, 364; *Thayer v. Payne*, 2 Cush. 327.

The grant of any principal thing carries with it all the grantor can convey which is necessary to its beneficial enjoyment.

New Ipswich W. L. Factory v. Batchelder, 3 N. H. 190. See *Johnson v. Jordaan*, 2 Met. 240; Washb. Easem. 4th ed. 105; *Wheeldon v. Burrows*, L. R. 12 Ch. D. 49.

Where the owner of an entire estate conveys a portion thereof, the purchaser takes the same with all incidents and appurtenances annexed and belonging to the part conveyed, if the same are necessary to the beneficial enjoyment of the estate granted.

Thayer v. Payne, 2 Cush. 327; *Simmons v. Cloonan*, 81 N. Y. 557; *Vermont Cent. R. Co. v. Hills*, 23 Vt. 681.

Clark has used the water upon his premises openly, continuously, and uninterruptedly from 1862 until 1880, with the knowledge of the successive owners of the Brooks premises, and without asking or receiving permission therefor, claiming the right. Such user is adverse.

Blanchard v. Moulton, 68 Me. 436.

The adverse use of the water of an artificial aqueduct for twenty years thereby gains a right thereto.

Watkins v. Peck, 13 N. H. 360; *Prescott v. White*, 21 Pick. 342; *Cary v. Daniels*, 5 Met. 238; *White v. Chapin*, 12 Allen, 516.

The use of an easement for twenty years, unexplained, will be presumed to be under a claim of right, and adverse, and be sufficient to establish a title by prescription, unless otherwise controlled or explained; and it is incumbent on the owner to prove that the use was under some license, indulgence, or special contract inconsistent with a claim of right by the other party.

White v. Chapin, 12 Allen, 519; *Garrett v. Jackson*, 20 Pa. 381.

If the use tends to impose a servitude on the estate of another, the use is adverse.

Williams v. Nelson, 23 Pick. 141.

Similar easements in land may be claimed by 3 Mass.

different persons at the same time. The use need not necessarily be to the exclusion of others therein.

Washb. Easem. *97.

The unlimited right to the water of Emory's well passed to the plaintiff by the defendants' deed.

No exception was therein made of any right previously conveyed. Both the pipe and the right to the water belong to the plaintiff, and any right to interfere with either, or to diminish the flow of water, is an incumbrance.

An easement to go upon land, and take and conduct water therefrom, is a breach of the covenant in a deed against incumbrances.

Harlow v. Thomas, 15 Pick. 69.

Such a covenant is broken as soon as the deed is made, and a right of action immediately accrues to the grantee in the deed.

Clark v. Swift, 3 Met. 390; *Wetherbee v. Bennett*, 2 Allen, 428.

The covenant against incumbrances is broken if a third person has, at the time of the conveyance, a right to or interest in the land granted.

Spurr v. Andrew, 6 Allen, 420.

Mr. Austin De Wolf, for defendants:

The "privilege" which Brooks acquired from Emory in 1880 is an easement, and so are the several alleged incumbrances, if such incumbrances exist.

Ritger v. Parker, 8 Cush. 145; *Goodrich v. Burbank*, 12 Allen, 461.

These alleged rights being interests in land, could only be acquired by grant.

Washb. Easem. 27.

These grants may be evidenced by prescription or by the production of existing deeds.

Washb. Easem. 32.

Brooks began using water in 1837, and died in 1838, leaving a widow and two minor children, in whom (said children) his real estate vested until April, 1852. This period, from 1838 to 1852, when one or both of these children were minors, cannot be included in the twenty years necessary to acquire a title by prescription. No title by prescription could be acquired before 1871.

Melvin v. Whiting, 13 Pick. 184.

Pomeroy acquired title to the "Pomeroy lot" from Carpenter, who was then, and had been for more than a year, the owner of the "Johnson lot." This unity of title in the Johnson lot and in the Pomeroy lot operated as a merger, and no rights by prescription could be acquired by Mrs. Pomeroy until the expiration of twenty years after 1866. The Clarks began to draw water in 1862. Twenty years had not elapsed since they began to use the aqueduct before the land was conveyed by the defendants to the plaintiff. They therefore had not acquired any rights by prescription in the "Johnson lot" at the time the plaintiff took her title.

Flint began to take water in 1860. He was the owner of the "Flint lot" and of the "Williams lot." He sold and conveyed the Williams lot by deed of warranty in April, 1864. The title thus conveyed by Flint passed by mesne conveyances to the defendants. Flint is estopped from asserting a claim to an easement in the Williams lot.

Carbrey v. Willis, 7 Allen, 364.

If he can claim no easement in one part of the Brooks lot, it is difficult to see how he

can claim one in the other part, when the extinguishment of the part which is in the Williams lot extinguishes that part which is in the Johnson lot.

Colvin v. Burnet, 17 Wend. 564; Washb. Easem. 152, 699.

The use of water by Clark and by Flint was not accompanied by any assertion of the claim of a legal right so to draw and use water, and no right by prescription could be acquired.

Washb. Easem. 150, 164.

If the parties acquired title by deed, it must have been either by express or by an implied grant. There is no express grant; no grant by implication can be claimed in the absence of all grant. Pomeroy is the only party that can claim title by an implied grant.

The easement granted by Emory to Brooks in 1830 was appurtenant to the Brooks homestead, and could not be separated by Brooks from that estate.

Evans v. Dana, 7 R. L. 306; *Smith v. Porter*, 10 Gray, 66; *Dennis v. Wilson*, 107 Mass. 592; *Hankey v. Clark*, 110 Mass. 265; Washb. Easem. 45, 101.

The deed from Brooks to French and Town was never recorded. It does not appear that the subsequent owners of the plaintiff's lot ever knew or had notice of that indenture.

A purchaser of land has a right to rely upon the information furnished him by the registry of deeds, and in the absence of notice to the contrary he is justified in taking that information as true, and acting upon it accordingly.

Earle v. Fiske, 108 Mass. 493.

Nothing is conveyed as an appurtenance which the grantor does not then own.

Philbrick v. Ewing, 97 Mass. 183; *Wells v. Day*, 124 Mass. 88.

The power of attorney authorized the agent to give a warranty deed only of the right and interest of the principals in the estate to be sold. The defendants are not liable upon the general covenants of warranty contained in the deed to plaintiff.

Allen v. Holton, 20 Pick. 458; *Hoxie v. Finney*, 16 Gray, 382; *First Nat. Bank v. Massachusetts I. & T. Co.* 123 Mass. 330.

W. Allen, J., delivered the opinion of the court:

This is an action on the covenant against incumbrances in a deed of land from the defendants to the plaintiff. The declaration alleges a right in each of the owners of four dwelling-houses to take and carry water to his house from and through the land by means of pipes, and to enter upon the land to repair the pipes. When the deed was given an aqueduct or pipe led from a well or spring in other land, through what was called the Williams lot, to the land conveyed to the plaintiff, and through and beyond that, through the Flint lot and the Clark lot, to the dwelling-house upon the Pomeroy lot, and supplied water from the spring to the dwelling-house upon each of the lots. The plaintiff claims that the owners of the Flint, Clark, and Pomeroy lots have severally a right to maintain a pipe on the plaintiff's land, and by it to take water from the plaintiff's pipe. If this right existed as to any of the lots, there was a breach of the covenant against incumbrances.

The right of the owner of the Williams lot

was to take water from the aqueduct on his own land, before it reached the plaintiff's land. There was no right to enter upon the plaintiff's land, or to take water from it. This right which pertained to the Williams lot could not be or work a breach of any covenant in the plaintiff's deed, unless that deed purported to convey to the plaintiff a right in the aqueduct or the water inconsistent with the right appurtenant to the Williams lot. This right had been exercised as appurtenant to that lot since 1863, and was so used at the time of the deed to the plaintiff in 1880. Of course the right to take the same water could not pass as appurtenant to the plaintiff's land, and the fact that it did not pass could not be a breach of any covenant in the deed to the plaintiff. But this is not all; in 1871 Gage owned both the plaintiff's lot and the Williams lot, and conveyed the Williams lot to the present owner, with the right of drawing water from the aqueduct, and "reserved the privilege of conveying water across the south-west corner of the premises, as now conveyed." The conveyance from the heirs of Gage to the plaintiff "includes the same privilege of drawing water and conveying the same through land of said Williams, as enjoyed by said Levi Gage, in his lifetime," thus necessarily excluding from the grant the right appurtenant to the Williams lot.

In 1880 Brooks, under whom the plaintiff claims, bought of Emory the right of carrying water from a well on Emory's land, by logs or pipes, through Emory's land to Brooks's house. In 1887 Brooks, by an instrument under seal but never recorded, granted to French and Town, their heirs and assigns, the privilege of drawing and conveying water in pipes or logs from Brooks's aqueduct "(situated under his horse-shed) to the dwelling-house and barn of Richard French, or to any other person or place." This was the aqueduct which Brooks was using under his grant from Emory. French and Town then owned the Clark and Pomeroy lots, and immediately after the grant to them the pipe was extended to the Pomeroy lot and water has flowed in it to the dwelling-house upon that lot ever since. The pipe crossed the highway from Brooks's land, and through the Livermore lot, the Flint lot, and the Clark lot to the Pomeroy lot. Water was subsequently taken from the pipe on the Flint lot and the Clark lot to supply dwelling-houses upon those lots. The question is whether the owners of either of these houses had a right, as against the plaintiff when she had taken her deed, to maintain a pipe on the plaintiff's land, or to have water flow through it, so as to constitute an easement in the land, and an incumbrance upon the title to it. No such right could exist by reason of the grant from Brooks to French and Town, as that was not recorded; and there is no evidence that the plaintiff, or others through whom her title is derived from Brooks, had notice of it. As to the Flint lot, no claim is made under French and Town.

Plaintiff claims that rights had been acquired by adverse user. The deed to the plaintiff is dated December 28, and acknowledged December 31, 1880. The covenant against incumbrances must have been broken, if at all, when the deed was delivered. Unless there was an existing easement then, there was no

incumbrance. As to the Clark and Flint lots, it does not appear that there was twenty years' use of the water before the deed to the plaintiff. It was first drawn and used on the Clark lot in 1862. In regard to the Flint lot, it is said that water was first drawn from the pipe in 1860, and it has continued to be drawn and used since. If it can be assumed that the water was first drawn from the pipe twenty years before the delivery of the deed, it does not appear that there was an adverse user of it for twenty years.

If drawing and using the water with the knowledge of the owners of the Brooks lot, and without asking or receiving their consent, and without any assertion of a claim of right, would show adverse user, it is not stated, and it cannot be inferred from the facts stated, that such use was continued for twenty years before the delivery of the deed. The facts are not sufficient to show an easement in favor of either of those lots acquired by adverse user.

In regard to the Pomeroy estate, it appeared that water had flowed to it since 1837, but in 1865 Carpenter, who then owned the plaintiff's land, acquired the title to the Pomeroy lot, and continued the owner of both estates until he conveyed to Pomeroy. If an easement in the plaintiff's land had been acquired, it would have been extinguished by the union of the fee of both estates in him. Carpenter, while the owner of both estates, conveyed the dominant estate to Pomeroy by a deed in which no mention is made of the water or pipe; and the question is whether an easement in the plaintiff's land passed by implied grant in the deed from Carpenter to Pomeroy. The easement claimed is the right to maintain a pipe upon the plaintiff's land, and there to connect with the plaintiff's pipe, and to draw from it water which flows to it from the Emory well. At the time of the deed, Carpenter was the absolute owner of both estates, and had all the rights to water from the Emory well which appertained to either estate. When he became the owner of the Pomeroy estate, it had been for more than twenty years supplied with water from the Emory well, through pipes which it had maintained upon the plaintiff's land, then owned by Carpenter; and Carpenter continued to supply the house with water in the same manner until he sold to Pomeroy. At that time the pipe extended from the Pomeroy house into the plaintiff's land, and furnished the supply of water for the house. It sufficiently appears that the conveyance was made and accepted in view of the fact that the Pomeroy house depended for its supply of water upon that which passed through the pipe upon the plaintiff's land, and that the maintenance of the pipe upon that land was reasonably necessary to the enjoyment of the Pomeroy estate; and a grant of the right will be implied. *Grant v. Chase*, 17 Mass. 448; *Parker v. Bennett*, 11 Allen, 888; *Atkins v. Borden*, 2 Met. 457; *Philbrick v. Ewing*, 97 Mass. 138.

It is true that the grant by Emory to William Brooks was limited to the right to take water for the use of the plaintiff's land; and that the right to take water for the use of the Pomeroy house was not appurtenant to the plaintiff's land, and Carpenter, as owner of that land, had no right to grant it; and a grant of it cannot be implied so as to create an easement

in the land. But the right to maintain pipes in the land is distinct from the right to take water from the aqueduct on the land, and is a right which Carpenter could have granted without the right to take the water. The right to take the water could be derived only from the owner of the Emory land; the right to maintain the pipes could be derived only from the owner of the plaintiff's land; and a grant of the latter without a grant of the former may be implied. Carpenter, as owner of the Pomeroy lot, may have had a right to the water from the Emory well, by a grant or prescription, or he may have been using the water without right. In any case a grant of all that he owned, and was capable of granting, in the aqueduct and the water which for thirty years had furnished the water supply of the house which he sold, would be implied.

We think that a grant of the right to maintain the pipe in the plaintiff's land was implied in the deed to Pomeroy. To this extent there was an incumbrance on the land at the time of the deed to the plaintiff.

The power of attorney to Anson Gage, under which the deed from the defendants in the action against Knapp and others was executed, authorized the covenant against incumbrances in the deed.

Exceptions sustained.

James A. PICKERT

v.

Charles N. HAIR.

Thomas PHILLIPS v. SAME.

In an action of tort against a sheriff to recover the value of certain goods claimed to belong to the plaintiff, and which had been attached as the property of one P., the defendant offered to prove, by the attorney who had issued the attachment writ, that the attorney for plaintiff in the present action called on the witness on the day the attachment was served, and stated to witness that P. had told him (plaintiff's attorney) that a certain party other than the present plaintiff was the owner of the attached goods, etc. *Held*, that if it be assumed that such statement of plaintiff's attorney amounted to an admission by him of the fact of ownership of the property, and that there was evidence that, at the time, he had been retained for the plaintiff for the purpose of obtaining a discharge of the attachment, still the evidence offered was incompetent, because the statement was not one which an attorney at law is authorized by virtue of his employment to make on behalf of his client; it was, at most, only made to obtain a discharge of the attachment before the commencement of the present action, and was not made for the purpose of dispensing with any rule of practice, or with proof of any fact, in the trial of the action then brought, or in actions which might be

brought in reference to the attached property.

(Worcester — Filed January 7, 1888.)

ON defendant's exceptions. *Overruled.*

These were actions of tort, tried together, against a deputy sheriff, to recover the value of certain goods attached by him as the property of Rozel F. Pickert and Hattie E. Pickert, his wife. It appeared that in August, 1883, a store was opened in Worcester for the sale of tea and coffee. The name in which the business was conducted was the "Importers Tea Company." The manager of this store was the plaintiff Phillips. Rozel F. Pickert and his wife were indebted to certain New York merchants, who sued their claims, and caused an attachment to be made by the defendant of the stock, etc., of the Importers Tea Company, in Worcester, including money displayed in the show-window to attract attention, claiming that the owners and proprietors of the Importers Tea Company were said Pickert and wife. The plaintiff, James A. Pickert, claimed to be the owner of the attached property, except \$150, and to carry on, and to be the person doing, business as the said company. Thomas Phillips claimed the \$150 not claimed by James A. Pickert, which was part of some \$450, in bills, taken from the show-window.

Evidence for the plaintiffs tended to show that Rozel F. Pickert had organized this business as the agent of his mother, and with his mother's funds, in 1879, had always been the general manager of the stores of the Importers Tea Company, conducting and directing the whole business till the spring of 1883, when his mother sold the business to his brother, James A. Pickert; and that thereafter said R. F. Pickert acted in the same capacity for his brother, who was living in Dakota on a farm, and, as such general manager conducting the business, established the Worcester store.

Evidence for the defendant tended to show that R. F. Pickert and his wife were the real owners of this business and property, and that the sale to James A. Pickert was a pretended transfer and was colorable only; and this issue of true ownership was that which went to the jury.

It was in evidence that the attachment took place on September 6, 1883; that R. F. Pickert came up the same day or evening, and went to consult Mr. John R. Thayer, as counsel.

Defendant called Mr. Henry Bacon, of the firm of lawyers who made the writs on which the attachments were made, and who had charge of the making of the same, and offered his testimony to show that, on the same evening of September 6, Mr. Thayer, who in this case throughout has been, since action brought, the sole counsel for these plaintiffs, came to his (Bacon's) office, and said to him that R. F. Pickert represented to him that a certain party in New York, entirely other than James A. Pickert, and not now claimed to be the owner of the property at all, was the owner of the attached property; that he had come to state the fact, because Pickert wanted to have him (Bacon) write to his clients in New York this fact; and, if they would go to see the owner in New York, they would be satisfied, and relinquish the attachment; which communication Mr. Ba-

con at once made by letter. The name of the alleged owner in New York was given Mr. Bacon, but was not mentioned in making offer by counsel for defendant. To the admission of this testimony the plaintiffs objected, and the court excluded the evidence. The verdicts were for the plaintiffs, and defendant alleged exceptions.

Mr. W. S. B. Hopkins, for defendant:

Mr. Thayer was the attorney of the plaintiffs when he called on the attorney for the defendant, and his statements were admissible in evidence.

An attorney's authority is made out where he afterward becomes attorney of record, and where there is some other evidence to connect his subsequent appearance with his being the chosen attorney of the party at the time he made the admission prior to the suit. The cases which held this are authority for the admissibility of admissions by attorneys made prior to suit.

Marshall v. Cliff, 4 Campb. 133; *Wagstaff v. Wilson*, 4 Barn. & Ad. 339; *Hefferman v. Burt*, 7 Iowa, 320. See *Gainsford v. Grammar*, 2 Campb. 9.

Mr. John R. Thayer, for plaintiffs:

There was no evidence to show that R. F. Pickert had any authority to act as agent in any capacity for Thomas Phillips, to employ counsel for him, or make any statement to bind him.

If Mr. Thayer was counsel for anyone, it was for R. F. Pickert, individually, and not for J. A. Pickert.

If R. F. Pickert undertook to engage Mr. Thayer as counsel for J. A. Pickert, he exceeded his authority as agent.

J. A. Pickert could not be bound by the declaration of R. F. Pickert, as to the ownership of the property engaged in the Importers Tea Company business. It was beyond the scope of his authority.

R. F. Pickert cannot depute another as agent for J. A. Pickert.

Story, Ag. § 13.

Mr. Thayer, even if counsel for J. A. Pickert, could not bind his client by any statement or conversation in his absence, except in relation to the progress and trial of suits.

1 Greenl. Ev. § 186.

The admissions of attorneys of record bind their clients in all matters relating to the progress and trial of the cause. But admissions which are mere matters of conversation with an attorney, though they relate to the facts in the controversy, cannot be received in evidence against his client.

Saunders v. McCarthy, 8 Allen, 42.

Oral admissions made by an attorney out of court, in a conversation had for the purpose of settling a suit, though relating to facts in controversy in the suit, are not admissible as evidence against his client.

Murray v. Chase, 134 Mass. 92; *Treadway v. S. C. & St. P. R. Co.* 40 Iowa, 526; *Parkins v. Harkshaw*, 2 Stark. 239; *Young v. Wright*, 1 Campb. 140; *Petch v. Lyon*, 9 Q. B. 147; *Wagstaff v. Wilson*, 4 Barn. & Ad. 339.

Field, J., delivered the opinion of the court:

It is contended that the evidence offered of what Mr. Thayer said to Mr. Bacon was competent for two purposes: (1) to contradict Mr.

R. F. Pickert, who had testified as a witness for the plaintiffs; and (2) as an admission made by Mr. Thayer, as attorney for the plaintiffs in their actions, and therefore equivalent to an admission by the plaintiffs themselves.

As evidence to contradict the witness Pickert, it was not competent, because it was not testimony of anything R. F. Pickert said, but testimony of what Mr. Thayer said that he said. For the same reason, if the evidence was offered for the purpose of showing that R. F. Pickert, as general manager of the business, made certain statements which are to be regarded as made by him while acting for his principals, within the scope of his employment, and in legal effect the same as if made by his principals, the testimony was not competent to prove that R. F. Pickert ever made the statements. It is not necessary to determine whether evidence that Pickert made the statements to Mr. Thayer would be competent. On the defendant's theory, they were statements made by one agent of the plaintiffs to another; and it is at least doubtful if they were within the scope of the authority given to R. F. Pickert. It is only on the ground that there was evidence that Mr. Thayer, when he had the conversation with Mr. Bacon, was attorney for these plaintiffs, and adopted the alleged statements of Pickert to him as his own, that the argument of the defendant upon the competency of the admissions of an attorney at law, against his client, has any relevancy. We think it very doubtful whether the evidence offered can be regarded as anything more than a statement by Mr. Thayer of what R. F. Pickert represented to him, and wished to have done; but if it be assumed that it contained any admission or representation by Mr. Thayer of the fact of ownership of the property; and if it also be assumed that there was evidence for the jury that, at the time of the conversation with Mr. Bacon, Mr. Thayer had been retained as an attorney at law for these plaintiffs for the purpose of obtaining a discharge of the attachment upon the property,—still we think that the evidence was incompetent, because the statement was one which an attorney at law is not authorized, by virtue of his employment, to make on behalf of his client. The present suits had not then been brought. The information which Mr. Thayer said he had received from R. F. Pickert was given to Mr. Bacon that it might be sent to Mr. Bacon's clients in New York, to induce them to investigate the truth of the statement, and, if satisfied of its truth, to discharge the attachment. The attachment was never discharged. The admission was not made by Mr. Thayer for the purpose of dispensing with any rule of practice, or with the proof of any fact, in the trial of the action already brought, or in the actions which might be brought, in reference to the attached property. It was a conversation relating to a fact in controversy, but not an agreement relating to the management and trial of a suit, or an admission intended to influence the procedure in the pending action, or in any other, if the attachment was not discharged. *Saunders v. McCarthy*, 8 Allen, 42; *Lewis v. Sumner*, 13 Met. 269; *Greenl. Ev.* § 186; *Petch v. Lyon*, 9 Q. B. 147; *Wagstaff v. Wilson*, 4 Barn. & Ad. 399; *Treadway v. S. C. & St. P. R. Co.* 40 Iowa, 526; *Moulton v. Bowker*, 115 Mass. 86; *Parkins* 3 Mass.

v. Hawkshaw, 2 Stark. 239; *Young v. Wright*, 1 Campb. 139; *Watson v. King*, 3 C. B. 608; *Doe v. Richards*, 2 C. & K. 216.

Exceptions overruled.

Charlotte A. CLARK

r.

Town of EASTON.

1. Where a town, without accepting the provisions of Stat. 1871, chap. 158, or of Pub. Stat. chap. 27, § 74, from year to year elects persons to the office of road commissioners, who qualify and publicly act under color of such election, such persons are **road commissioners de facto**, the validity of whose election cannot be inquired into collaterally.
2. Under the statute, the office exists potentially in each town, capable of being filled. If the town fails to accept the Act, but elects persons to the office, it is an irregularity in the election. The persons, however, so elected, who qualify and perform the functions of the office, are discharging the duties of a trust defined by general laws, and as such are **public officers**, for whose acts the town is not responsible.

(Bristol—Filed January 9, 1888.)

ON plaintiff's exceptions. *Overruled.*

This is an action of tort for trespass in repairing and raising the grade of a town way,—the plaintiff alleging that the defendant, in repairing and raising the grade of said town way, deposited upon her close a large quantity of stone, earth, and rubbish, and obstructed a watercourse. The defense is a general denial.

The plaintiff introduced evidence of her title to the close at and previous to the time of the alleged trespass; of the laying out and maintaining of the town way in question, called Centre Street, by the defendant town; and also that in April, 1883, the grade of said street was raised; and that, in doing so, stone, earth, and rubbish were placed upon the plaintiff's land; and that a natural watercourse across the plaintiff's land was obstructed and dammed up, and the water caused to flow back, flooding and injuring the plaintiff's land and depriving her of the use thereof.

It was admitted that the town had never accepted of the provisions of Acts 1871, chap. 158, and Acts 1878, chap. 51.

It appeared that, down to 1879, highway surveyors had been elected or appointed, who had discharged the duties of their office.

At the annual town meeting in 1879, it was voted to choose three road commissioners for the ensuing year to superintend the repairs of highways and town ways. In pursuance thereof three road commissioners were chosen.

It was voted that the compensation of road commissioners be fixed at \$2 per day.

It was voted that all roads authorized or ordered to be built shall be built under the direction of the road commissioners.

From 1879 down to and including the year

1888, when the trespass is alleged to have been committed, three road commissioners were annually elected, who had direction of the building and repair of all roads in the town, and whose annual reports were respectively accepted.

In the by-laws of the town, adopted at its annual meeting March 6, 1882, and approved by the justice of the Superior Court for Bristol County at the March Term, in 1882, § 2 reads in part as follows: "Any person placing any obstruction on any sidewalk or highway of the town without a permit from the selectmen or road commissioners, who shall not remove such obstruction, etc., shall forfeit," etc.

It was also in evidence that the grading of said street and the depositing of earth, etc., and filling up said watercourse, were done under the direction of John O. Dean, acting by and with the consent and approval of his associates, so-called road commissioners. It was also in evidence, and not denied, that all of the bills contracted by these so-called road commissioners for the repair and maintenance of town roads and bridges since 1879, including the grading and repairing of Centre Street as aforesaid, were approved by the town and paid by its treasurer.

In the warrant for the annual town meeting for 1885, the selectmen inserted the following article:

Article 16. To see what action the town will take in relation to an alleged encroachment upon the property of Charlotte A. Clark in grading and repairing Centre Street.

At the meeting held March 5, 1885, pursuant thereto, the town voted that the selectmen be instructed to remove from the land of Charlotte A. Clark the dirt and stones thrown thereupon in the grading and repairing of Centre Street, and also any obstructions in the drain crossing said land, caused by such grading and repairing. Testimony showed that the selectmen of the town neglected and refused to carry out this vote of the town.

Upon the evidence the court ruled, against the objection of the plaintiff, that this action could not be maintained, and directed a verdict for the defendant; and the plaintiff excepted.

Messrs. L. C. Southard and D. F. Buckley, for plaintiff:

It is not in dispute that the acts complained of were done without authority, and were therefore tortious.

It is not in dispute that the acts complained of were done under the direction of three persons who were acting in behalf of the town in some capacity.

It cannot be denied that, unless the acts complained of were done by road commissioners duly and legally elected, and acting as such, the defendant town would be liable for the damages suffered by the plaintiff.

Mayo v. Springfield, 136 Mass. 10; *Deane v. Randolph*, 132 Mass. 475; *Murphy v. Lovell*, 124 Mass. 564; *Hill v. Boston*, 122 Mass. 358, and cases cited; *Thayer v. Boston*, 19 Pick. 518; *Hawks v. Charlemont*, 107 Mass. 414.

The plaintiff contends that it appears, by the evidence in the case, that said three persons were not duly and legally elected road commissioners at the time they did the acts complained of.

The provisions of the statute creating the office of road commissioner are contained in

Acts 1871, chap. 158, § 2, and Acts 1873, chap. 51; but these statutes require that the town seeking to avail itself of these provisions should formally accept them. It appears by the evidence that this was never done.

It cannot be considered that these three persons were road commissioners *de facto*, as no such office existed.

They were not elected as highway surveyors; and by virtue of the provisions of Pub. Stat. chap. 27, § 78, the highway surveyors previously elected hold over until their successors are legally chosen. Therefore, no vacancy existed in the board of highway surveyors at the time the acts complained of were committed; and therefore it cannot be claimed that these three persons were highway surveyors.

The evidence shows that these three persons were put in charge of the streets and highways of the town; and the grading and repairing of the same were committed to their charge; and the work so done by them, including the repairs on Centre Street, was accepted by the town. Therefore it follows that, inasmuch as they were not road commissioners or highway surveyors, they were the agents of the town; at least, it was a question of fact for the jury.

The town ratified the trespass complained of; and, by allowing it to continue, it became liable for maintaining it.

1 Dill. Mun. Corp. p. 460, § 463, and cases cited; *Arlington v. Peirce*, 122 Mass. 272; *Superior County v. Ballou*, 103 U. S. 745 (26 L. ed. 422); *Hildreth v. Lowell*, 11 Gray, 849; *Thayer v. Boston*, 19 Pick. 513.

That a town would be liable for the negligent maintenance, or repair of its drains, or culverts, does not appear to need argument.

Among the powers conferred upon the road commissioners by the statutes are matters concerning streets, ways, bridges, sewers, and drains; and they are exclusively given the powers and liabilities of selectmen as well as those of highway surveyors.

It has been held that selectmen, while exercising these powers, were agents of the town; and we submit that there is no reason why a road commissioner, while exercising the same powers, should not be considered also the agent of the town.

Higginson v. Nahant, 11 Allen, 534; *White v. Phillipston*, 10 Met. 108.

Mr. H. J. Fuller, for defendant:

In 1838, without any vote or special authority from the defendant town, the road commissioners raised the grade of Centre Street, a public highway in said town, and, in so doing, committed the alleged trespasses upon the plaintiff's land.

The road commissioners were public officers elected by the town in obedience to statute requirements; and if, in the performance of their duties as such public officers, they committed trespasses upon the plaintiff's premises, the town is not liable.

Perley v. Georgetown, 7 Gray, 464; *Bigelow v. Randolph*, 14 Gray, 541; *Hafford v. New Bedford*, 17 Gray, 297; *Walcott v. Swampscott*, 1 Allen, 101; *Buttrick v. Lowell*, Id. 172; *Barnes v. Lowell*, 98 Mass. 570; *Fisher v. Boston*, 104 Mass. 87; *Haskell v. New Bedford*, 108 Mass. 208; *Dunbar v. Boston*, 112 Mass. 75; *Hill v.*

Boston, 123 Mass. 344; *McCarthy v. Boston*, 185 Mass. 197.

The town is only liable for the acts of its agents over whom it has control and direction.

Sullivan v. Holyoke, 135 Mass. 273; *Waldron v. Haverhill*, 3 New Eng. Rep. 693, 143 Mass. 582.

The persons by whom, and under whose directions, the trespasses upon the plaintiff's premises were committed, were the road commissioners *de facto*, if not *de jure*, acting under color of an election by the town; and their title to the office cannot be questioned or disputed in this collateral proceeding.

Elliott v. Willis, 1 Allen, 461; *Forster v. Bebee*, 9 Mass. 231; *Bucknam v. Ruggles*, 15 Mass. 108; *Doty v. Gorham*, 5 Pick. 487; *Coolidge v. Brigham*, 1 Allen, 333; *Fitchburg R. Co. v. Grand Junction R. & D. Co.* Id. 552; *Sudbury v. Heard*, 103 Mass. 543; *Petersilea v. Stone*, 119 Mass. 465; *State v. Carroll*, 33 Conn. 449; *Leach v. People*, 86 Alb. L. J. 194, 10 West. Rep. 617.

The town had no authority, by vote, to order the road commissioners to commit trespasses upon the plaintiff's land, and deposit thereon "stone, earth, and rubbish;" and if the commissioners had done so in pursuance of any such vote, the town would not be liable.

Cavanagh v. Boston, 139 Mass. 426; *Spring v. Hyde Park*, 137 Mass. 554; *Cushing v. Bedford*, 135 Mass. 526; *Lemon v. Newton*, 134 Mass. 476.

The liability, if any, rests upon the individuals who perform these acts.

Cavanagh v. Boston, *supra*; *Brigham v. Edmonds*, 7 Gray, 359.

A fortiori the town could not adopt and ratify such illegal acts.

The town had no authority to vote "that the selectmen be instructed to take, in the manner by law provided, so much of said land as may be necessary for the proper construction of said street."

Kean v. Stetson, 5 Pick. 492; *Harrington v. Harrington*, 1 Met. 404.

Morton, Ch. J., delivered the opinion of the court:

This is an action of tort for a trespass upon the plaintiff's land. The trespass consisted in entering upon the land and depositing thereon stone, earth, and rubbish, thereby obstructing a watercourse. The acts of trespass were committed by three persons, acting as road commissioners, in repairing a town way.

It is too well settled to need extended discussion that officers, like surveyors of highways and road commissioners, although they are elected and paid by the town, are public officers; and not agents or servants of the town; and that the town is not responsible for their acts in the performance of their public duties. *Elliott v. Willis*, 1 Allen, 463; *Barney v. Lowell*, 98 Mass. 570; *Sudbury v. Heard*, 103 Mass. 543; *Haskell v. New Bedford*, 108 Mass. 208; *Cushing v. Bedford*, 125 Mass. 526; *McCarthy v. Barton*, 135 Mass. 197. A majority of the court is of the opinion that this principle applies in the case at bar, because the persons who committed the trespass, were acting as public officers, and were road commissioners *de facto* if not *de jure*.

At the annual meeting in March, 1883, the 3 Mass.

town elected three persons as road commissioners, being the same persons who did the acts of trespass complained of. In the year 1879 the town voted "to choose three road commissioners for the ensuing year to superintend the repairs of highways and town ways;" and also voted "that all roads authorized or ordered to be built shall be built under the direction of the road commissioners." In that year, and in every year up to and including the year 1883, the town elected three road commissioners with the same powers and duties. It appeared in the trial of the case at bar that the town had never voted to accept the provisions of Stat. 1871, chap. 158, or of the Public Statutes relating to road commissioners,—Pub. Stat. chap. 27, § 74.

Perhaps it might be held in a proceeding directly against the persons chosen, to test their title to office, that, by reason of the irregularities in the action of the town, they were not legally elected as road commissioners, with all the powers and duties appertaining to that office. But it is a serious question whether, so far as the duties of repairing highways and town ways are concerned, road commissioners thus elected would not be regarded as highway surveyors. The law requires that a town shall, at the annual meeting, elect "one or more surveyors of highways." Pub. Stat. chap. 27, § 78. Suppose a town should elect one person as road superintendent to repair the highways. There would be strong grounds for holding that such person was a surveyor of highways, though called by a different name. But, however this may be, we think that, for the purpose of this case, the persons elected by the town must be treated as road commissioners *de facto*, and that the plaintiff cannot in this suit collaterally inquire into the validity and regularity of their election. They were elected by the town as road commissioners, and accepted; were qualified, and publicly acted as such. They were thus in the position of persons who were holding and publicly exercising the functions of an office known to our laws, by virtue of an election by the town which was *prima facie* valid. In *Fitchburg R. Co. v. Grand Junction R. D. Co.* 1 Allen, 552, it is said in the opinion that the definition of an officer *de facto* is "one who comes in by the forms of law, and acts under a commission or election apparently valid, but, in consequence of some illegality in capacity or want of qualification is incapable of lawfully holding the office." The case at bar falls within this definition. But in a later case it was held that this definition was too narrow, and that a man who has been a constable and continued to perform the functions of the office after his commission had expired, publicly holding himself out as a constable, was an officer *de facto*, whose acts in serving process could not be collaterally called in question; the court adopting in substance the broader definition of an officer *de facto* given by Lord Ellenborough in *Rex v. Bedford Level Corp.* 6 East, 356, as being "one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." *Petersilea v. Stone*, 119 Mass. 465.

It is urged by the plaintiff that the doctrine as to officers *de facto* cannot apply in this case, because there is no such officer as that of road

commissioner in Easton. The argument is that there cannot be an officer *de facto* unless there is a legal office of which he performs the functions. The argument is plausible, rather than sound. A public office is a trust or charge created and defined by the public authority. The statute of 1871, re-enacted in the Public Statutes operating throughout the State, created the office of road commissioner, and defined its powers and duties. Stat. 1871, chap. 154 (Pub. Stat. chap. 27, § 74 *et seq.*) Under the statute the right inheres in each town to elect its citizens to fill the office. The office potentially exists in each town, capable of being filled in a certain manner. As a preliminary to a legal election, the town must first accept the Act. If it fails to do this, it is an illegality or irregularity in the election; but the persons who qualify, and perform the functions of the office, are in the position of persons who are publicly discharging the duties of a charge or trust created and defined by the general laws. The vote of the town accepting the Act does not create the office. That exists by virtue of the general law, and the vote merely puts the town in a position in which it can legally fill the office by an election. The question whether there can be a *de facto* officer when there is not a *de jure* office has been the subject of much discussion and of conflicting decisions. We are inclined to the opinion that there cannot be such a *de facto* officer. But it is not necessary to discuss this question. There is no doubt that there may be *de jure* road commissioners in Easton; and the action of the town in the election of such officers is not legislative, but administrative, in its character. As we have said, it does not create the office, but fills it. In the case before us, the town, year after year, for several years, elected road commissioners. The persons elected went on publicly performing the duties prescribed by the statute, and acting as a board of road commissioners under the sanction of the statute creating that office. All the considerations of public policy, upon which the doctrine as to officers *de facto* is founded, apply in this case as strongly as in any case where there is illegality in the election of officers. We are therefore of opinion that the persons elected as road commissioners in the defendant town in the year 1883 were road commissioners *de facto*, and were public officers, for whose acts the town is not responsible

Exceptions overruled.

John CULLEN

v.

Catharine CAREY.

Plaintiff, by agreement with defendant's testator, permitted him to acquire title and possession to plaintiff's property by means of execution and foreclosure sales; agreeing with testator that he should hold the property, and apply the rents thereof in payment of all his claims against plaintiff, and thereupon should convey the property to plaintiff. Shortly before testator died, he admitted, in presence of defendant, that he had been fully paid out of the

rents. Thereupon plaintiff demanded conveyance of the property. Testator devised all his real estate to defendant, who claimed the property in question under the will. The transaction being free from evidence of fraud, equity will treat it as a mortgage, and decree conveyance.

(Essex—Filed January 9, 1886.)

ON defendant's appeal. *Decree affirmed.*

This was a bill in equity brought to redeem certain real estate, held under a deed absolute, but which was alleged to be in the nature of a mortgage.

The case was referred to a special master, who found that, in the year 1869, Patrick Finn conveyed to plaintiff a certain parcel of land subject to a mortgage to the Essex Company, dated November 27, 1867, on which there was due, at the time of the conveyance, the sum of about \$558; that there was then no building on the land, and that the consideration paid for the deed of the equity of said mortgage, by plaintiff, was \$350; that soon after the conveyance plaintiff proceeded to erect on the land a large tenement house; that Lawrence Carey, the husband of the defendant, was a carpenter, and orally agreed to assist in building a house for plaintiff on the land, and to purchase lumber therefor in Maine, and pay for it and the other materials and labor out of the money which he then owed to the plaintiff, amounting in all to about \$1,350; that pursuant to said agreement Carey purchased lumber in Maine, which was put into the house; he also purchased other lumber elsewhere for the house, and bought and paid for all the lumber which went into the house, and all the other materials except sand; that plaintiff built the cellar and paid for the sand which was used in the building, and also hauled all materials for the building, with his team; that the whole cost of the building, above the cellar, was \$2,508, including the said cost of hauling; that there was an oral agreement between the plaintiff and Carey that the amount due the plaintiff from Carey should be applied in payment of the cost of the building, and that, when the building was completed, the amount due Carey from plaintiff, after deducting the amount due from Carey, was \$1,106; and that the whole value of the property at that time, above the said mortgage, was \$3,300.

Also that on, or a short time prior to, June 1, 1870, it was orally agreed between Carey and plaintiff that plaintiff should make and deliver to Carey a note of \$4,000, of which the following is a copy:

Lawrence, June 1, 1870.

On demand after date I promise to pay Lawrence Carey, or order, \$4,000, with interest annually, for value received.

Witness, A. C. Chadwick. His John X. Cullen. Mark.

—that Carey should bring a suit against plaintiff on the note, on which suit plaintiff should be defaulted; that judgment should thereupon be entered for Carey, who should take out an execution thereon, and cause the same to be levied upon said property; that said property

be sold on said execution; that said Carey should bid in the same, and hold it in his name, but as security for the balance of the amount due him from the plaintiff in this suit, after completing the house as aforesaid; and that, after he had received sufficient rents to pay said balance and all expenses of keeping said property in repair, the amount of the mortgage on said property, interest on money advanced by said Carey, and all taxes, insurance, and charges for managing said property, he should convey said property back to said plaintiff. That this agreement was carried out.

It was also orally agreed that Carey should purchase the Essex Company mortgage, or cause the same to be purchased; that said property should be sold under and by virtue of the power contained in said mortgage; that Carey should bid in the same, and receive from the assignee of the mortgage a deed under the power contained in said mortgage. That this agreement was carried out, and that the amount paid for the mortgage to the Essex Company was \$558 principal, and \$25.17 interest, and was paid by Carey.

That, prior to the aforesaid proceedings, the plaintiff had given Carey possession of the property to hold and manage for him, and he continued in possession thereof until his death, which occurred October 25, 1885. He left a will dated June 13, 1885, in which all his real estate was devised to the defendant in this case, who is the executrix of said will, and who has, since the probate of said will, been in possession of the property, and received the rents and profits thereof, under a claim of title under said will.

He also found that plaintiff claimed said property, and, in substance, demanded of said Carey a conveyance of it to him, his last demand on Carey being made a few days before Carey's death, in the presence and hearing of the defendant. That it was admitted, and agreed to by both parties, that the receipts by Carey and defendant, from the rents and profits of the property, had been sufficient to pay all that was due him from the plaintiff after the completion of the house, and interest thereon, and all expenditures made by him or the defendant on the premises, and all charges which he or the defendant could justly claim should be allowed him or her.

The court decreed that defendant convey the premises to plaintiff, and defendant appealed.

Mr. N. P. Frye, for defendant:

The bill, upon its face, shows that there was no agreement in writing, and the master's report so finds. Consequently the whole bill is demurrable.

Walker v. Locke, 5 Cush. 92; *Slack v. Black*, 109 Mass. 499; *Ahrend v. Odiorne*, 118 Mass. 268.

The bill was not demurred to, but special matter was pleaded in the answer,—to wit, the Statute of Frauds, statutory redemption, and laches,—and insisted upon. Consequently the defendant is to have the same benefit therefrom as if she had pleaded the same or demurred to the bill.

Stat. 1888, chap. 223, § 3; Rules S. J. Ct. No. 13; Rules Sup. Ct. No. 13.

The bill being demurrable, the plaintiff can have no relief or discovery.

Walker v. Locke, 5 Cush. 92; *Ahrend v. Odiorne*, 118 Mass. 261; *Emery v. Bidwell*, 1 New Eng. Rep. 231, 140 Mass. 275.

No writing passed between the parties. According to the report everything was done orally. Consequently there was no valid contract.

Pub. Stat. chap. 78, § 1; *Browne*, Fr. § 129; *Boyd v. Stone*, 11 Mass. 342; *Sanborn v. Sanborn*, 7 Gray, 142; *Titcomb v. Morrill*, 10 Allen, 15; *Peirce v. Colcord*, 118 Mass. 372; *Dowling v. McKenney*, 124 Mass. 478.

Equity grants no relief in contracts which cannot be maintained in equity.

Walker v. Locke, 5 Cush. 92; *Peirce v. Colcord*, 118 Mass. 372; *Ahrend v. Odiorne*, 118 Mass. 261; *Emery v. Bidwell*, *supra*.

The bill calls for specific performance, but, according to Bispham's Equity, 2d ed. § 383, specific performance of an oral contract will not be decreed against the Statute of Frauds, unless (1) there has been a part performance; (2) where fraud has prevented the putting of the contract in writing; (3) where the contract has been admitted in the answer, and the statute not pleaded.

But in this case there appears to be no part performance, no attempt to put any contract in writing; fraud is not an element in the case, all contracts are denied, and the statute is properly pleaded.

The Statute of Frauds bars specific performance (*Peirce v. Colcord*, 118 Mass. 374); and even had there been a part performance, the statute is a bar (*Kidder v. Hunt*, 1 Pick. 828; *Thompson v. Gould*, 20 Pick. 138; *Adams v. Townsend*, 1 Met. 485; *Jacobs v. Peterborough & S. R. Co.* 8 Cush. 223; *Glass v. Hubbert*, 103 Mass. 24, 35; *Ahrend v. Odiorne*, 118 Mass. 268; *Barnes v. Boston & M. R. Co.* 130 Mass. 388).

The plaintiff made no attempt to redeem, as provided in Gen. Stat. chap. 103, § 44; Pub. Stat. chap. 172, § 32.

Stale demands are not to be favored in equity.

Bisph. Eq. 2d ed. § 260; *Andrews v. Sparhawk*, 13 Pick. 400; *Furnham v. Brooks*, 9 Pick. 212, 214; *Atty-Gen. v. Federal Street Meeting-House*, 3 Gray, 63; *Boston & M. R. Co. v. Bartlett*, 10 Gray, 384; *Dodge v. Essex Ins. Co.* 12 Gray, 71; *Williams v. Hart*, 116 Mass. 518; *Royal Bank v. Grand Junction R. & D. Co.* 125 Mass. 490.

No trust can be declared in favor of the plaintiff; for no trust can arise by implication of law against the Statute of Frauds. The pleadings show none declared on, and the report shows that there was nothing in writing. Trusts in land cannot be implied in law, and are not provable orally.

Walker v. Locke, 5 Cush. 90; *Bartlett v. Bartlett*, 14 Gray, 277; *Titcomb v. Morrill*, 10 Allen, 15; *Slack v. Black*, 109 Mass. 499; *Peirce v. Colcord*, 118 Mass. 372; *Hassam v. Barrett*, 115 Mass. 256.

Fraud, accident, or mistake must exist, to show that an absolute deed is a mortgage.

Bisph. Eq. § 155; *Hassam v. Barrett*, 115 Mass. 256.

The mere nonperformance of the subsequent and distinct agreement which is within the Statute of Frauds does not constitute fraud.

Ahrend v. Odiorne, 118 Mass. 268.

And there can be no fraud or legal wrong in

the breach of a trust, from which the statute withholds the right of judicial recognition.

Campbell v. Dearborn, 109 Mass. 140.

Mr. J. C. Sanborn, for plaintiff:

When conveyances are made apparently absolute on their face, but in fact made as security for some indebtedness existing or created by the transaction, they constitute a mortgage, and parol evidence is competent to show that such deeds were given as security and as mortgages. Courts of equity will so construe them, and protect the rights of parties and give effect to their intention.

Campbell v. Dearborn, 109 Mass. 180; *Stinchfield v. Milliken*, 71 Me. 567; *Reed v. Reed*, 75 Me. 264; *Herron v. Herron*, 91 Ind. 278; *Landers v. Beck*, 92 Ind. 49; *Carr v. Carr*, 52 N. Y. 251; *Jones, Mort.* §§ 241, 282, 285, 324; *Shear v. Robinson*, 18 Fla. 379.

Whether the conveyances in such cases are made upon execution sales, or under the power contained in a mortgage, can make no difference. Parol evidence is admissible to show that such deeds were given as security for some indebtedness existing, or some indebtedness created by the transaction, as well as those made between private parties.

Logue's App. 104 Pa. 136; 1 *Jones, Mort.* §§ 331, 337.

The facts found by the master furnish all the elements necessary to construe the instruments as given for security, and as mortgages, and show the intention of the parties.

1 *Jones, Mort.* § 329; *Campbell v. Dearborn*, 109 Mass. 180.

It is well settled that the admission of parol evidence to show that the conveyances were given as security, and therefore were mortgages, was not in contravention of the Statute of Frauds.

Jones, Mort. § 323; *Carr v. Carr*, 52 N. Y. 251; *Campbell v. Dearborn*, *supra*; *Reed v. Reed*, 75 Me. 264.

The decree was such as is usual in such cases,—that the defendant convey the premises to the plaintiff.

1 *Jones, Mort.* § 342.

Morton, Ch. J., delivered the opinion of the court:

It was held in *Campbell v. Dearborn*, 109 Mass. 180, that, although a deed be given which is absolute in form, yet the grantor may prove by parol testimony that it was understood and agreed by both parties to be given as security for a debt; and that, upon such proof, a court of equity will treat the deed as a mortgage. This is decisive of the case at bar.

For some reason, which does not appear to be fraudulent, the plaintiff did not directly convey the estate in question to the defendant's testator; he permitted the latter to obtain a judgment upon a debt in part fictitious, and to thus get a title by a levy upon the execution, and also to foreclose by a sale under an existing mortgage. But the substance of the transaction was the same as if a deed had been directly given by the plaintiff. Both parties agreed that the title thus obtained was to be held solely as security for the debt of the plaintiff to the defendant's testator, and a court of equity will treat the transaction, according to its real nature, as a mortgage.

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The defendant does not stand in the position of an innocent purchaser, as she contends. She took as a general devisee under the will of her husband, and, besides, is shown to have had notice of the nature of the transaction.

Decree affirmed.

Sarah S. LANE

v.

Charles F. CHADWICK.

The consignee of goods sent C. O. D. has no such title or right of possession in the goods as will entitle him to maintain an action of replevin against the carrier for their nondelivery.

(Dukes—Filed January 9, 1888.)

ON plaintiff's exceptions. *Overruled.*

This was an action of replevin to recover certain goods contained in two boxes which had been delivered to the defendant, a common carrier, by the consignor, to deliver to the plaintiff upon the payment of C. O. D. charges. At the trial in the Superior Court, without a jury, before Hammond, J., the court found for the defendant, and the plaintiff alleged exceptions.

The material facts are stated in the opinion.

Messrs. P. H. Hutchinson and C. G. M. Dunham, for plaintiff:

Defendant, having the duty of agency to collect the price of the goods, superadded to the obligation to transport and deliver them, should have offered plaintiff a reasonable opportunity to ascertain whether the goods she had ordered were in the boxes, or not, before she parted with the price thereof.

Mr. H. M. Knowlton, for defendant:

To maintain replevin, the plaintiff must have both the right of property and the right of possession in the goods replevied.

Gates v. Gates, 15 Mass. 310; *Wade v. Mason*, 12 Gray, 335.

The consignee of goods sent C. O. D. has neither right of property nor right of possession in the goods till he has paid for them; the sale is not completed, and, until the money is paid, the goods belong to the consignor.

Merchants Nat. Bank v. Bangs, 102 Mass. 291, 294.

There was no tender of the money, even, that was not accompanied with a demand that the defendant was not bound to comply with, viz.: to deliver, not the boxes,—which he was ready to do,—but certain articles of medicine named in a bill shown the defendant, and which the defendant never assumed or agreed to deliver to the plaintiff. His only contract was with reference to the two boxes. To concede the right, to a C. O. D. consignee, of unpacking boxes that are nailed up, and testing and counting and assorting the contents, would enlarge the duty of a common carrier to a degree that there is no warrant for in law.

Morton, Ch. J., delivered the opinion of the court:

To maintain replevin, the plaintiff must show that, at the time she sued out her writ, she was entitled to the immediate and exclu-

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ive possession of the goods replevied. *Oolias v. Evans*, 15 Pick. 63; *Wade v. Mason*, 12 Jay, 335. The goods in suit were delivered to the defendant, who is a common carrier, by the consignor, in Boston, to be transported to the plaintiff. They were in two boxes, securely nailed up, and were accompanied by an itemized bill. The defendant was instructed to deliver the goods to the plaintiff upon the payment of the bill by her in cash. The delivery to the carrier was not a delivery to the plaintiff. He was not her agent, but the agent of the consignor. *Merchants Nat. Bank v. Bangs*, 102 Mass. 291. Until he delivered the goods to her, no title or right of possession would pass to her, and it is immaterial whether he rightfully or wrongfully refused to make the delivery. At the time she replevied the goods she had no title or right of possession.

Exceptions overruled.

Charles D. COOK *et al.*

v.

Frederick H. HOLBROOK *et al.*

A conveyance made on the meritorious consideration of blood or affection, to a child, or as a settlement to a wife, is not, as matter of law, fraudulent and void as to existing creditors. Whether it is so or not depends upon all the circumstances of the transaction. If made when a person is deeply indebted, it furnishes *prima facie* evidence of fraud, but this may be rebutted or controlled; and the question of fraud is not one of law, but of fact for the jury.

(Suffolk—Filed January 9, 1888.)

ON plaintiff's exceptions taken upon the trial of issues found for the jury in an equity case. *Overruled.*

The suit was brought under Pub. Stat. chap. 151, § 3, to reach and apply, in payment of defendant Holbrook's debt to plaintiffs, certain real estate conveyed by Holbrook to defendant Russ in trust for Holbrook's children.

It was in evidence that the conveyance attacked was made July 22, 1884; that Holbrook was at that time indebted in the sum of not far from \$20,000; that he made a general assignment of his property to Russ about September 5, 1884, in which the real estate was not mentioned; that said real estate was assessed for about \$3,000; that when the general assignment was made, Holbrook's creditors had not changed materially since July 22, either in the persons to whom he was indebted, or in the amount of his indebtedness; that his property afterwards, as sold, produced a sum of between \$11,000 and \$12,000. There was no evidence as to the amount of assets which Holbrook had on July 22, or how much they had changed between that date and September 5.

The following issues: (1) Was said conveyance fraudulent and made with intent to defeat, delay, or defraud his creditors? (2) Was the fact of such insolvency of said Holbrook known to the defendant Russ at the time said

conveyance was made?—were framed and submitted to the jury, with instructions as to the legal meaning of the word "fraud," and the distinctions which exist between what the law terms fraud, and the common understanding of the word in morals, which were not excepted to.

Both issues were answered in the negative, and plaintiffs alleged exceptions.

The plaintiffs requested the following ruling, which the court refused to give:

"Fraud, in a voluntary conveyance, such as this is shown to be, so far as concerns existing debts, is an inference of law."

Mr. Henry Baylies, for plaintiffs:

The ruling asked is framed in words designed to limit it to the case before the court: "A voluntary conveyance, such as this is shown to be," *i. e.*, a voluntary conveyance by one deeply indebted, and whose assets were insufficient to pay his debts; a conveyance which, in fact, hindered and delayed the plaintiffs from collecting their debt.

The intent is a conclusion of law.

Bump, Fr. Conv. 2d ed. 266; *Marden v. Babcock*, 2 Met. 99, 104; 1 Story, Eq. Jur. §§ 359, 361, 363; *Norton v. Norton*, 5 Cush. 524, 528, 529; *Parkman v. Welch*, 19 Pick. 231, 236.

The province of the jury to whom the issue is submitted, whether a voluntary conveyance is fraudulent as against existing creditors, is to ascertain the facts and circumstances attending such conveyance; and then the law, in view of the facts and circumstances, determines the intent and character of the conveyance.

In such case the court should instruct the jury that, if they should find as facts that the conveyance was voluntary; the defendant was at the time deeply indebted; that, soon after, his assets equaled less than 50 per cent of his indebtedness; and that these plaintiffs were in fact hindered and delayed by such conveyance in securing their debt,—then the law declares the conveyance fraudulent, and they must so find, whether he intended fraud or not.

Norton v. Norton, 5 Cush. 524, 528, 529; *Bump*, Fr. Conv. 26; *Gunn v. Butler*, 18 Pick. 248, 251, 252; *Winchester v. Charter*, 12 Allen, 609.

13 Eliz. chap. 5, is common law in this Commonwealth.

The duty of the jury to find the facts, and the duty of the court to declare the intent, are distinct duties.

Bump, Fr. Conv. p. 26; 2 Kent, Com. 12th ed. 442, note a.

The attempts made in New York "to reduce fraud in all cases to a matter of actual intent" are pronounced by the editor of 1 American Leading Cases, page 39, as "opposed to all principle and authority, to common justice, and to common sense, * * * and cannot be successful until the respective functions of the judge and jury are changed."

Chancellor Kent says (1 Story, Eq. Jur. § 359): "The conclusion to be drawn from the cases is that, if the party is indebted at the time of the voluntary settlement, it is presumed to be fraudulent in respect to such debts (that is, those actually due); and no circumstance will permit these debts to be affected by the settlement, or repel the legal presumption of fraud."

and further, in substantially the same words of the ruling asked and denied in this case (§ 361): "Fraud is a voluntary settlement, was an inference of law, and ought to be so, so far as it concerned existing debts."

Mr. Seth J. Thomas, for defendants:

"Whether a voluntary conveyance is fraudulent in any given case is a question of fact for the jury, to be determined in view of all the circumstances."

Winchester v. Charter, 102 Mass. 272, 276.

"Whatever may be the law in regard to voluntary conveyances to others, a conveyance made on the meritorious consideration of blood or affection, to a child, or as a settlement to a wife, is not *per se* fraudulent and void as to existing creditors. Whether it is so depends upon the circumstances of the case and the actual or presumed intent of the grantor."

Draper v. Buggee, 133 Mass. 258, 262.

Norton, Ch. J., delivered the opinion of the court:

The object of this suit is to reach and apply, in payment of the plaintiffs' debt, certain real estate conveyed by his debtor, one Holbrook, to the defendant Russ. The conveyance was a voluntary one made, by said Holbrook for the benefit of his children, to the defendant as trustee; and the plaintiffs were pre-existing creditors. The court gave instructions to the jury as to the legal meaning of fraud which would invalidate such a conveyance; which were not excepted to, and are presumed to be appropriate. The plaintiffs requested the court to rule that "fraud in a voluntary conveyance, such as this is shown to be, so far as concerns existing debts, is an inference of law." The refusal to give this ruling presents the only question before us. There is some confusion and contradiction in the adjudged cases as to the effect of a voluntary conveyance by a debtor upon the rights of his creditors, but the law is well settled in this Commonwealth that a conveyance made on the meritorious consideration of blood or affection, to a child, or as a settlement to a wife, is not, as matter of law, fraudulent and void as to existing creditors. Whether it is so or not depends upon all the circumstances of the transaction. If made when a person is deeply indebted, it furnishes *prima facie* evidence of fraud, but this may be rebutted or controlled; and the question of fraud is not one of law, but of fact for the jury. *Lerow v. Wilmarth*, 9 Allen, 382; *Winchester v. Charter*, 12 Allen, 606; *Draper v. Buggee*, 133 Mass. 258. The ruling requested was therefore properly refused.

Exceptions overruled.

Catherine KAVANAUGH

Morris KAVANAUGH.

A wife presented a petition to the probate court, under Pub. Stat. chap. 147, § 33, alleging that her husband had failed to furnish her with suitable support, and that she, for justifiable cause, was living apart from him, and praying the court for an order prohibit-

ing her husband from imposing any restraint on her personal liberty, and for an order concerning her support. The husband was at the time under guardianship as a spendthrift by a former decree of the probate court. The guardian was not made a party to the wife's petition. The probate court decreed "that, until the further order of the court, said husband be, and hereby is prohibited from imposing any restraint on the personal liberty of said petitioner; and that said guardian pay to her for her support, from income of estate of said [husband], the sum of \$3 per week, provided one third of the net income of the property of said ward, in the hands and control of said guardian, shall amount to as much as that sum etc. Held, that that part of the decree which required the guardian to pay money to the petitioner should be reversed; and that part which prohibited the husband from imposing any restraint on the liberty of the wife should be affirmed.

(Hampden—Filed January 9, 1886.)

ON reservation for the consideration of the full court. *Decree of Probate Court affirmed in part and reversed in part.*

This was an appeal from a decree of the Probate Court of Hampden County, reserved by Holmes, J., for the consideration of the whole court.

The petition to the probate court was filed by Catherine Kavanaugh, representing that she was the lawful wife of Morris Kavanaugh, and that her husband failed to furnish suitable support for her, and praying for an order prohibiting her husband from imposing any restraint on her personal liberty, and also for such further order as the court deemed expedient concerning her support.

It was agreed by the parties that, at the time of the institution of the petition, the respondent was under guardianship as a spendthrift by former decree of the probate court of said county. The guardian, James H. Loomis, was not made a party to the proceedings, but before the decree was made on this petition, said Loomis made the following indorsement upon the petition, viz.:

I, James H. Loomis, guardian of said Morris Kavanaugh, hereby waive further notice, and request that a hearing and decree be had forthwith.

James H. Loomis.

January 8, 1886.

It was further agreed that the respondent be remained under guardianship to the time of the agreement as to the facts.

The judge of the probate court ordered "that, until the further order of the court, said husband be, and hereby is, prohibited from imposing any restraint on the personal liberty of said petitioner; and that said guardian pay to her for her support, from income of estate of said Morris, the sum of \$3 per week, provided one third of the net income of the property of said ward, in the hands and control of said guardian, shall amount to as much as the

sum; but if it shall amount to less than that sum, then said guardian shall pay to the petitioner such proportion of \$3 per week as one third of said net income shall amount to."

From this order respondent appealed, alleging the following reasons:

1. That the court had no authority to decree a payment or payments of money by the respondent, he being at the time of the institution of these proceedings, and at the time of said decree, unable to pay said money or to comply with said decree, by reason of being under guardianship as a spendthrift by former decree of said probate court.

2. That the guardian was not made a party to the proceedings.

3. That the court had no authority to decree a payment of money by the respondent to the petitioner, he being, by order and decree of this court, unable to pay.

4. That the court had no authority to make a decree ordering the guardian to pay money as decreed.

5. That the court had no authority to order a conditional or fluctuating decree.

6. That the court did order a conditional, or fluctuating, and uncertain and indefinite, decree.

7. That the court only has authority to make a definite decree in this case, if any, for a fixed time of payment.

Mr. E. H. Lathrop, for respondent:

The statute (Pub. Stat. chap. 147, § 38) does not contemplate such proceedings as the matter at bar when the respondent is legally divested of the power of compliance with the decree of the court.

The guardian has the right, and it is his duty, to properly support the wife and the husband out of the estate of the husband.

Pub. Stat. chap. 139, §§ 29, 30.

It is the duty of the guardian to see that the ward is protected in all legal proceedings against him.

Fiske v. Lincoln, 19 Pick. 476; Pub. Stat. chap. 139, § 29.

Mr. W. W. McClench, for petitioner:

The probate court had sufficient authority under the statutes to make such a decree. Pub. Stat. chap. 147, §§ 31-36, are intended to provide for married women abandoned by their husbands, etc. The probate court found that the petitioner came within the class of women mentioned in the statute as entitled to relief. There is no section or provision of the statute exempting spendthrifts from its operation, and § 33, in terms, provides that the court, upon the petition of a wife, may make such further order for the support of the wife as it deems expedient. In this petition the husband was prohibited from imposing restraint on the petitioner, and then, as the only way of providing for her support, the guardian was ordered to pay her certain sums of money.

Under the rule that "that is certain which may be made certain," the decree of the court cannot be said to be conditional, fluctuating, uncertain, or indefinite, to the extent of invalidating the decree and depriving the petitioner of her support. In view of the intent of the Legislature in enacting Pub. Stat. chap. 147, the court had authority to make such a decree as would furnish support to the petitioner; and 3 Mass.

if, from all the circumstances of the case, and the evidence before it with reference to the property and income of the respondent, the court was unable to fix a definite and precise allowance, then it had the right to order the guardian to make payments to the wife, which might vary in amount according to the condition of the estate.

Field, J., delivered the opinion of the court:

The jurisdiction of probate courts to entertain petitions brought under Pub. Stat. chap. 147, § 33, is distinct from their jurisdiction over the appointment of guardians for spendthrifts. Pub. Stat. chap. 139, §§ 1, 8; Stat. 1874, chap. 205; Stat. 1880, chap. 64; Stat. 1887, chap. 332, § 3.

It happens that the proceedings in this case, and in that for the appointment of the guardian, were had before the probate court of the same county, because the residence of the respondent continued to be in the same county (Pub. Stat. chap. 147, § 34; Id. chap. 139, § 1); but they are independent proceedings. The guardian properly appeared for and represented his ward in this petition; but the guardian was not a party to it, and no decree could be made against him. Pub. Stat. chap. 139, § 29; *Hicks v. Chapman*, 10 Allen, 463; *Rollins v. Marsh*, 128 Mass. 116.

The decree cannot be considered as an attempt by the probate court to compel the guardian "to apply the income and profits" of the ward's estate, "so far as may be necessary to the comfortable and suitable maintenance and support of the ward and his family," under Pub. Stat. chap. 139, §§ 30, 38. Other objections have been taken to this decree, the most important of which are that the decree is conditional and indefinite, and that no decree for the payment of money could be made against a person under guardianship as a spendthrift, because, by the guardianship, he is divested of all control over his property.

There are manifest reasons why, if a decree for the payment of money be made against the ward, it should not be enforced by an attachment of his person. *Blake's Case*, 106 Mass. 501.

Whether, in a proceeding like this, a decree for definite sums of money to be paid in the future can be rendered against the ward, which may be enforced by an execution to be levied upon his property, or which the guardian can be compelled to satisfy, if he have sufficient estate in his hands, by an action on his bond; or whether the amount of the ward's property which should be devoted to the support of the wife must be determined by the probate court, under any jurisdiction it may have to control the guardian in the management and disposition of the ward's estate and the income and profits thereof, — are questions of some difficulty, which need not now be decided. That part of the decree of the probate court which requires the guardian to pay money to the petitioner must be reversed; and that part of the decree which prohibits the husband from imposing any restraint on the personal liberty of the wife, until the further order of the court, must be affirmed.

Order accordingly.

Margaret A. CLIFFORD

v.

ATLANTIC COTTON MILLS.

1. Although one may sometimes be liable in tort, notwithstanding the fact that the danger was attributable in part to the concurrent or subsequent intervening misconduct of a third person, the general tendency has been to look no farther back than the last wrongdoer, especially when he has complete and intelligent control of the consequences of the earlier wrongful act.
2. A landlord will not be liable for the use of the premises in such a way as to do harm, merely because there was a manifest possibility of their being used in such a way. The liability will stop with the tenant, whose intervening wrong is the immediate cause of the damage. In such cases it cannot matter whether the wrong on the part of the tenant is an act which makes the premises a nuisance, or an omission which allows them to become so. It is as much his duty to act in the latter case as it is to abstain in the former. In either, as against the public, the landlord, unless he has assumed the duty himself by covenant, has a right to rely upon the tenant managing the premises in his occupation in such a way as to prevent their being a nuisance.
3. Where the defendant's house was not a nuisance in itself, but was certain to become so at times by the mere working of nature alone, unless the tenant cleared the roof of accumulated snow, or took other steps to prevent it from accumulating, and it appears that the tenant could have done this by using reasonable care, the landlord is not liable for an injury to one passing on the highway, from the fall of snow from the roof.

(Essex—Filed January 9, 1888.)

ON plaintiff's exceptions. *OVERRULED.*

The action was brought to recover damages for personal injuries.

The evidence tended to prove that defendant was owner of a block of houses, three stories high, abutting on a public street, and constructed with a steep slate roof slanting toward the sidewalk of the street, the ridge pole of the house being parallel therewith; and that there was nothing to prevent the snow from falling off upon the sidewalk. Plaintiff was injured, while passing along the street, by a quantity of snow falling from the roof upon her, and she brought suit against defendant as owner of the building, although it was at the time occupied by a tenant under a lease. The court found for defendant, ruling that, as matter of law, he was not liable, and plaintiff alleged exceptions.

Mr. John M. Stearns, for plaintiff:

A man has no right to construct his roof so that it will inevitably, at certain seasons of the year, collect snow and ice, that is liable to fall upon the land or person of his neighbor; and a

traveler by has the same right to protection although he owned the sidewalk in fee simple.

Ball v. Nye, 99 Mass. 582; *Shipley v. Fifty Associates*, 101 Mass. 253.

And no other proof of negligence on his part is necessary.

Ball v. Nye, *supra*; Washb. Easem. 390.

A tenant's responsibility is confined to the premises which they respectively and exclusively occupy.

Shipley v. Fifty Associates, 106 Mass. 194, 200.

The lease in this case reserved to the landlord a right to enter, view, and make repairs, hence he had control of the roof. A fault in the original construction is considered intentional on the part of the landlord, and he is liable for an injury from it. Although premises are occupied by a tenant, the act of letting is continuance of the nuisance.

Larue v. Farren Hotel Co. 116 Mass. 6; *Rowell v. Prior*, 12 Mod. 635; *Dalay v. Savage*, 4 New Eng. Rep. 863, 145 Mass. 38; *McDonough v. Gilman*, 3 Allen, 264; *Kirby v. Boylston Market Asso.* 14 Gray, 249; 1 Add. Tort. Wood's ed. § 140.

It is not in the power of the landlord to assign over his premises so as to escape liability for damages from an existing nuisance, more especially when he grants it over reserving rent. 1 Add. Torts, Wood's ed. § 222.

If a landlord is in possession of part of a premises, or is bound to repair, he is responsible.

Larue v. Farren Hotel Co. *supra*.

A landlord is liable for damages from premises which are, from their construction, dangerous, although occupied by a tenant, unless the tenant has agreed with his landlord to put the premises in proper repair; and that the tenant may be also liable is no defense to the landlord.

Dalay v. Savage, *supra*.

Messrs. D. & C. & C. G. Saunders, for defendant.

The occupier, and not the landlord, is bound as between himself and the public, so far as to keep the leased buildings in repair that they may be safe to the public, unless there is an express agreement on the part of the landlord himself to repair.

Lonell v. Spaulding, 4 Cush. 277; *Oakham v. Holbrook*, 11 Cush. 299; *Kirby v. Boylston Market Asso.* 14 Gray, 249; *Milford v. Holbrook*, 9 Allen, 17, 21; *Lauritt v. Fletcher*, 10 Allen, 120; *Com. v. Watson*, 97 Mass. 562; *Stewart v. Putnam*, 127 Mass. 403; *Cunningham v. Cambridge Sav. Bank*, 138 Mass. 480.

Even where there is an agreement on the part of the landlord himself to make repairs, the only ground upon which he is held liable to a third party for his neglect so to do is to avoid circuity of action, he being ultimately liable to the tenant for any damages suffered by the latter.

Lonell v. Spaulding, *supra*; *Nelson v. Liverpool Brewery Co.* L. R. 2 C. P. D. 311.

There is a class of cases in which the landlord has been held liable on the ground that a nuisance existed on the premises at the time of letting, and that, by letting them in that condition, he has authorized the continuance of the nuisance. To this class belong—

Dalay v. Savage, 4 New Eng. Rep. 868, 145

Mass. 88, and *Joyce v. Martin*, 4 New Eng. Rep. 796.

In the case of *Shipley v. Fifty Associates*, 101 Mass. 251; *S. C.* 106 Mass. 194, it was not necessary for the court to pass upon the question whether the owners were at fault, because a roof so built that snow and ice would be likely to fall from it was in itself a nuisance; or whether the tenants were liable because they had failed to remove the ice and snow before it had accumulated sufficiently to endanger persons on the street below; for the case found that the roof had not been demised, but was under the conclusive control of the owners. In the later case of *Leonard v. Storer*, 115 Mass. 86, the court passed upon this precise question, and ruled that the fault was on the part of the tenants for not removing the snow, and so keeping the building safe.

These cases seem to fall within the principle of *Rich v. Basterfield*, 4 C. B. 788, rather than that of *Dalay v. Savage*, and *Joyce v. Martin*, *supra*; that is, the roof as built is not in itself a nuisance, but it may or may not be so used by the tenant as to become such. In that event the occupier, and not the owner, is responsible for damage arising from such use.

See *Owings v. Jones*, 9 Md. 108; also *Woods v. Naumkeag Steam Cotton Co.* 134 Mass. 357.

Holmes, J., delivered the opinion of the court:

This is an action for injuries done to the plaintiff by the fall of snow from the roof of the defendant's house into the highway. The whole house was let at the time to a tenant, and the only difference between this case and *Leonard v. Storer*, 115 Mass. 86, is that there the tenant had agreed to make all needful repairs, while in the case at bar there was no contract on either side, but the landlord reserved the right to enter the premises to repair the same, or to ascertain if the same were properly used, etc. This difference cannot affect the result, because the damage was not caused in either case by a want of repairs, but by the original character of the structure; and therefore the presence or absence of a covenant to repair has nothing to do with the question, and because the landlord's reservation of a right to enter, in the lease before us, did not include the control of the roof, which the landlord was held to have had in *Kirby v. Boylston Market Assn.* 14 Gray, 249; *Shipley v. Fifty Associates*, 101 Mass. 251, 254; *S. C.* 106 Mass. 194, 200. See *Larue v. Farnen Hotel Co.* 116 Mass. 67. See also *Lowell v. Spaulding*, 4 Cush. 277; *Payne v. Rogers*, 2 H. B. 350.

It may be that the tenant had a right to put a guard upon the roof in *Leonard v. Storer*, but if so, his right was independent of his covenant to repair, and the tenant had the same right in the present case. *Boston v. Worthington*, 10 Gray, 496, 500. See *Swords v. Edgar*, 50 N. Y. 28, 36; *Coupland v. Hardingham*, 3 Camp. 398. On the other hand, if the landlord had the right to put up a guard, in the present case, during the tenancy, it is not clear that he did not have it also in the other. In either case, of course, a guard might have been put up before the lease was made. The decision in *Leonard v. Storer* was on the ground that

"it does not appear that" (the tenant) "might not have cleaned the roof of snow by the exercise of due care, or that he could not, by proper precautions, have prevented the accident." The same is true here.

There is no doubt that a man sometimes may be liable in tort, notwithstanding the fact that the danger was attributable in part to the concurrent or subsequently intervening misconduct of a third person. *Elmer v. Locke*, 135 Mass. 575, 576; *Lane v. Atlantic Works*, 111 Mass. 136; *Walker v. Cronin*, 107 Mass. 555; *Newman v. Zachary*, Aleyn, 3; *Scott v. Shepherd*, 2 W. Bl. 892; *S. C.* 3 Wils. 407; *Dixon v. Bell*, 5 Maule & S. 198; *Clark v. Chambers*, L. R. 3 Q. B. D. 327; *Winmore v. Greenbank*, Willes, 577. See 21 Am. L. Rev. 765, 769; *Lynch v. Knight*, 9 H. L. C. 577, 590, 600; *Lumley v. Gye*, 2 El. & Bl. 216. See 1 Hale, P. C. 428; *Riding v. Smith*, L. R. 1 Exch. Div. 91, 94. But the general tendency has been to look no further back than the last wrongdoer, especially when he has complete and intelligent control of the consequences of the earlier wrongful act. See, for example, 111 Mass. 141; *Hastings v. Stetson*, 126 Mass. 329; *Clarke v. Morgan*, 38 L. T. N. S. 354; *Carter v. Towne*, 103 Mass. 507.

In the case of landlords who have given up to the tenant control of the premises in the matter out of which the damage arises, this court has never gone further than to hold them liable when the use from which the damage or nuisance necessarily arises was plainly contemplated by the lease. *E. g.*, *Jackman v. Arlington Mills*, 137 Mass. 277; *Harris v. James*, 45 L. J. Q. B. D. 545.

It is true that, if the nuisance exists when the premises are let, the landlord can be held, although the tenant may be liable also to the person injured; for the landlord is taken to have contemplated the premises remaining in the condition in which he let them. *Dalay v. Savage*, 4 New Eng. Rep. 863, 145 Mass. 38, 41; *Todd v. Hight*, 9 C. B. N. S. 377; *Swords v. Edgar*, 50 N. Y. 28, 34; *Joyce v. Martin*, 4 New Eng. Rep. 796.

But courts have differed when the nuisance, existing at the time of the lease, was due to want of repairs, and the tenant had covenanted to make repairs. *Pretty v. Bickmore*, L. R. 8 C. P. 401; *Groinell v. Earner*, L. R. 10 C. P. 658; *Swords v. Edgar*, *supra*. And the landlord will not be liable for the use of the premises in such a way as to do harm, merely because there was a manifest possibility of their being used in such a way. The liability will stop with the tenant whose intervening wrong is the immediate cause of the damage. *Mellen v. Morrill*, 126 Mass. 545; *Rich v. Basterfield*, 4 C. B. 783; *Grandy v. Jubbers*, 5 B. & S. 78, 90; 9 B. & S. 15, 16; *Nelson v. Liverpool Brewery Co.* L. R. 2 C. P. D. 311; *Edwards v. New York & H. R. Co.* 98 N. Y. 245. In such cases it cannot matter whether the wrong on the part of the tenant is an act which makes the premises a nuisance, or an omission which allows them to become so. It is as much his duty to act in the latter case as it is to abstain in the former. In either, as against the public, the landlord, unless he has assumed the duty himself by covenant, has a right to rely upon the tenant managing the premises in his occupation in such a way as to prevent their being a nuisance. *Stewart v.*

Putnam, 127 Mass. 408, 406; *Lowell v. Spaulding*, 4 Cush. 277; *Russell v. Shenton*, 8 Q. B. 449; 1 Chitty, Pl. 7th ed. 94.

The defendant's house was not a nuisance in itself. If it was, half the householders in Boston are indictable at the present moment. It was certain to become so at times by the mere workings of nature alone, unless the tenant cleaned the roof or took other steps to prevent it. But, so far as appears, the tenant could have done so by using reasonable care. If he could, it was his duty to do so, and the landlord was not liable, for the reasons which we have stated.

Exceptions overruled.

Isaac FENNO

v.

Clarence H. GAY.

A note payable "on demand, after date," is not a time note, but is an ordinary demand note, on which an action may be brought immediately after it is given, without demand; and hence the six years' limitation against an action on such note **begins to run on**, and includes, the **day of its date**.

(Suffolk—Filed January 16, 1888.)

ON plaintiff's exceptions. *Overruled.*

This was an action of contract upon a promissory note, a copy of which and the indorsement thereon is as follows:

\$550.

Boston, May 20, 1880.

On demand, after date, I promise to pay to the order of John Everitt five hundred and fifty dollars. Payable with interest. Value received.

C. H. Gay.

(Indorsed) Pay Isaac Fenno or order.

John Everitt.

The writ is dated and the action was commenced May 21, 1886.

The defendant's answer set up that the action was not commenced within six years next after the cause of action accrued.

Trial by jury was waived, and the court ruled that the action was not commenced within six years next after the cause of action accrued, and found for the defendant upon that ground only, and plaintiff alleged exceptions.

Mr. E. O. Shepard, for plaintiff:

The Statute of Limitations is the only defense set up. In computing the six years "next after" a day, that day is excluded according to the general rule.

Paul v. Stone, 112 Mass. 27; *Bemis v. Leonard*, 118 Mass. 508.

Hitchings v. Edmonds, 132 Mass. 338, is not the same as the case at bar, and the decision there is not necessarily in conflict with that which the plaintiff here contends for. The construction of the note given in the decision of that case was not necessary, and may be regarded as argument only.

It may be well held that a note payable "on demand, after date," is not a note "payable on time." It is not the same as "one day after date I promise," etc., nor is it payable upon

condition of making a demand. It is an ordinary demand note, supplemented by the agreement that the maker shall not be compelled to pay it until the day after its date.

In construing a contract, every word and clause shall be taken into consideration, and have an effect given to it, if possible.

Atwood v. Cobb, 16 Pick. 220. See *Bigelow v. Willson*, 1 Pick. 485, 494; *Heywood v. Perrin*, 10 Pick. 228, 230; *Franklin Sav. Inst. v. Reed*, 125 Mass. 365.

The words "after date," in the note in the case at bar, qualify and control the words "on demand." They are not a memorandum at the bottom of the note, like the cases above cited, but are in the body of the note,—a part of the contract; and by their manifest intention and legal effect the defendant was not bound to pay the note until May 21, 1880, the next day after its date.

Mr. F. T. Benner, for defendant:

The note was a demand note, and suit might have been brought on it immediately on the day of its date, without demand.

Hitchings v. Edmonds, 132 Mass. 338. See *Presbrey v. Williams*, 15 Mass. 198.

The latter case is not disturbed by *Paul v. Stone*, 112 Mass. 27, and is not inconsistent with the decision in *Bemis v. Leonard*, 118 Mass. 502.

Per Curiam:

It was held in *Hitchings v. Edmonds*, 132 Mass. 338, that a promissory note payable "on demand after date" is not a note payable on time, but "is an ordinary demand note, payable at once on demand, on which an action could have been brought immediately after it was given, without any demand." This is decisive of the case at bar. An action might have been brought on the note in suit at any time on May 20, 1880, after it was given. It follows that this suit, commenced May 21, 1886, was not brought within six years after the cause of action accrued, and that the Statute of Limitations is a bar.

Exceptions overruled.

Francis E. HOWES

v.

David H. NEWCOMB.

1. Pub. Stat. chap. 192, § 32, providing for a lien upon domestic animals for charges for their keeping, creates rights in derogation of the common law, and is to be construed strictly.
2. The party claiming a lien under the statute is bound to prove that the animals were brought to his premises, or put in his care, by or with the consent of the owner.
3. A mortgagor of animals is not the owner within the meaning of the statute.
4. Consent will not be inferred from the fact that the mortgagee leaves the property with the mortgagor, where the property is such as is usually cared for by the owner.

5. A general clause in a mortgage upon horses and wagon, which provides that any lien of third persons affecting the property may be discharged before rendering the surplus to the mortgagor, does not imply consent to subject the horses to a lien for keeping.

(Hampden—Filed January 10, 1888.)

ON defendant's exceptions. *Overruled.*
Action of replevin.

The bill of exceptions is as follows:

It appeared in evidence at the trial that one Thompson, the owner, April 26, 1886, mortgaged a quantity of personal property to the plaintiff, consisting of the stock, tools, and fixtures in Thompson's meat, fish, and vegetable market, in Springfield; also the two horses, one wagon, three single harnesses, and a business sleigh, described in the writ and then "used in connection with said business." The mortgage was duly put in evidence [and a copy thereof was annexed to the exceptions].

The plaintiff relied on said mortgage as entitling him to the possession of the property.

It appeared that the mortgage was given to secure the payment of a promissory note, given by Thompson to plaintiff, of even date with the mortgage, for the sum of \$325, and interest, and for other purposes as set forth therein. The note and mortgage were dated April 26, 1886, and the mortgage was duly recorded April 27, 1886.

Thompson, from the date of said mortgage to about October 12, 1886, carried on the business of buying and selling meats, fish, and vegetables, and the horses in question were used in the business in the delivery of goods.

Plaintiff, among others, furnished Thompson with meats to be kept and sold in said market.

The defendant was in the employ of Thompson in the market, as a salesman, also peddling fish, and keeping books during the whole time. The horses were kept at defendant's barn, about one mile and a half from the market, during the whole time, and were there when the mortgage was made, although it did not appear that plaintiff then or afterwards, prior to Thompson's disappearance, knew where they were kept. Defendant furnished the grain and hay eaten by the horses during the whole time, and claimed that Thompson owed him therefore the sum of about \$30. It appeared that defendant and Thompson had a settlement May 8, 1886, when defendant was paid for keeping the horses to that date, by Thompson; and it is for the keeping after that date that the defendant claims a lien.

Thompson absconded on or about October 12, 1886, and has never returned. Before he left he put all the property described in the writ into the custody and care of defendant, and directed him to notify the plaintiff of his leaving, which he did.

Evidence was offered tending to show a detention of the horses by the defendant, prior to November 6, 1886, the same being detained by the defendant on the ground that he had a lien thereon for the expense incurred by him in keeping them as aforesaid.

It did not appear that the defendant had

taken any steps provided in the statutes, towards the enforcement of his lien, except as herein set forth.

Defendant asked the court to rule (that he had a lien upon the horses for their keeping, as against the plaintiff's mortgage, both for the time intervening between the first interview, October 12, and the date of plaintiff's writ, November 6, 1886, and also for the whole time he kept them for said Thompson).

The court declined so to rule, and found for the plaintiff as respects the horses in question; and the defendant excepts.

Mr. A. M. Copeland, for defendant:

If the defendant had a lien upon the horses at the time the replevin writ was served, plaintiff cannot prevail.

Fowler v. Parsons, 3 New Eng. Rep. 445, 143 Mass. 401.

It was not necessary that defendant should have taken any other steps toward enforcing the lien than detaining the horses under the claim. It was simply a question of the right of immediate possession.

In *Fowler v. Parsons*, *supra*, no other steps toward enforcing the lien had been taken.

Plaintiff had no right to possession without first discharging, or offering to discharge, the lien. This he did not do.

Under the reservation of possession contained in the mortgage, the right to immediate possession was withheld from plaintiff; it had not passed to him at the date of his writ.

The case does not find that there had been a breach of the conditions of the mortgage, unless Thompson's absconding was such breach. But the case does not find how much, if anything, was actually due on the obligations secured by mortgage. The note may have been paid, and only the account for goods furnished left unpaid.

Thompson's mortgage did not pass to plaintiff the full and complete rights usually acquired by a mortgagee of personal property. There was something more to be done, to wit: a breach of the conditions, acted upon by plaintiff. This seems to have been recognized as law in *Goodrich v. Willard*, 2 Gray, 203.

At the time the mortgage was given, Thompson had no right of possession as against defendant. Thompson never had possession of the horses from the time he first placed them in defendant's care until they were taken by plaintiff's writ; nor had Thompson the right of possession as against defendant, except at the instant of settlement, May 8, 1886. But the horses remained in the keeping of defendant, so the right was instantly lost again.

See *Gibbs v. Childs*, 3 New Eng. Rep. 205, 143 Mass. 108.

When these horses were placed in defendant's care and keeping, they were the absolute property of Thompson, they were placed in the defendant's care by the owner, and came within the exact provision of the statute.

Pub. Stat. chap. 192, § 32.

The horses were in defendant's possession in such a way as gave him a lien for their keeping, at the time the mortgage was given. Such possession never changed. Although it does not appear affirmatively that plaintiff knew where they were, yet presumably he did know. The horses remained in our possession

and care with plaintiff's consent,—implied consent, at least.

We say this case does not materially differ from the case of *Hammond v. Danielson*, 126 Mass. 295.

So far as the case at bar is concerned, the mortgage covers two horses described in the mortgage, "as now used in connection with said business" (Thompson fish and meat business). The mortgagor, by the terms of the mortgage, reserved the right of and retained possession of the horses, subject to our lien. It was the manifest intention of the parties to the mortgage that the horses should continue to be used in connection with the business, and should be fed and properly cared for, not merely for the benefit of the mortgagee, but for that of the mortgagor also, by preserving the value of the security and affording a means wherewithal to pay off the mortgage debt. In this case the property consists of two horses; in *Hammond v. Danielson*, it was a hack.

In *Storms v. Smith*, 187 Mass. 201, the court distinguished between that case and *Hammond v. Danielson*. We think our case comes within the distinction.

This mortgage contains a power of sale. Among the provisions for the disposition of the money arising from such a sale is one for discharging "any claims or liens of third parties affecting the same." We cannot conceive for what purpose that provision was made, unless it was contemplated that Thompson might so deal with the property as to subject it to liens, if necessary.

Mr. Willmore B. Stone, for plaintiff:

The lien claimed in this case is that created by Pub. Stat. chap. 192, § 32. It did not exist at common law, and can only attach in case the horses in question were placed in the care of the defendant by, or with the consent of, the owner.

Irrespective of the statute condition, a lien on personal property cannot be created without the consent or authority of the owner.

Buxton v. Baughan, 6 C. & P. 674; *Globe Works v. Wright*, 106 Mass. 207.

The plaintiff had no knowledge as to where the horses were kept until informed by the defendant, after the disappearance of the mortgagor, and he then made a demand on defendant for them, who refused to give them up, on the ground that he had a lien thereon for the expense incurred by him in keeping them from May 8, 1886.

The only evidence, if any, of consent on the part of the plaintiff, is that to be inferred from the terms of the mortgage itself; and, without such consent in the mortgage, express or implied, the defendant cannot maintain a lien against plaintiff.

Hammond v. Danielson, 126 Mass. 294; *Storms v. Smith*, 187 Mass. 201.

The decision of this case essentially depends on whether it shall be held to be within the principle of *Hammond v. Danielson*, or *Storms v. Smith*, *supra*. The terms of the mortgages are similar in the three cases. In *Storms v. Smith* the property mortgaged was household furniture, but the necessity of its being stored somewhere, coupled with the fact that the mortgagor was entitled to use the same until default in the condition of the mortgage, was not

deemed sufficient evidence of the consent of the mortgagee to its being stored with the defendant, with whom the mortgagor had placed it.

This case would seem to be identical in principle with that of *Storms v. Smith*, *supra*; unless, indeed, the proper construction of the phrase "now used in connection with said business" can be said to bring it within that of *Hammond v. Danielson*, *supra*. In *Hammond v. Danielson* the hack had been used, and become in need of repairs in order to be further used in the manner stipulated in the mortgage, and the plaintiff would have taken it with the additional value of the cost of the repairs. But in the case at bar the horses must be fed and cared for, whether in use or not in connection with mortgagor's business, and no additional value came to the plaintiff by reason of anything furnished them by the defendant.

At common law, it was said that a bailee had a lien on goods bailed to him in those cases only, where an additional value had been conferred by him on the chattels, either directly by the exercise of personal labor and skill, or indirectly by the intermediate use of any instrument over which he had control; and perhaps this is the test to be applied in this class of cases.

Jackson v. Cummins, 5 M. & W. 342; 8 C. 8 Jur. 486. See also *Williams v. Allsup*, 10 C. B. N. S. 417; *The Scio*, L. R. 1 Adm. & Ecc. 353, 355.

If defendant is not entitled to a lien for the first period mentioned, namely, up to the time when the plaintiff demanded the horses of him, then, as he held them against the will of the plaintiff from that time up to November 6, 1886, he cannot maintain a lien for the latter period.

Buxton v. Baughan, and *Globe Works v. Wright*, *supra*; *Hollingsworth v. Dow*, 19 Pick. 228.

The plaintiff had a right to rely on the notice which the recording of his mortgage gave to all the world, and defendant is charged with knowledge of the mortgage, and took the horses to keep subject to the claim which plaintiff had.

Storms v. Smith, *supra*.

Unless defendant was prepared to impeach the title of the plaintiff, he should have surrendered the horses and taken his remedies against his bailor.

Bissell v. Pearce, 28 N. Y. 252, 259; *Sargeant v. Usher*, 55 N. H. 287, 293.

Knowlton, J., delivered the opinion of the court:

The horses sought to be replevied are claimed by the plaintiff under a mortgage of unquestioned validity, and by the defendant under an alleged lien for their board, founded on Pub. Stat. chap. 192, § 32. This section provides that "persons having proper charges due them for pasturing, boarding, or keeping horses or other domestic animals brought to their premises, or placed in their care, by or with the consent of the owners thereof, shall have a lien on such horses or other domestic animals for such charges." It creates rights in derogation of the common law, and is to be construed strictly. *Rogers v. Currier*, 13 Gray, 128. To maintain a lien under it, one must show that he has pastured, boarded, or kept the animals claimed, and that they were brought to his premises, or placed in his care.

by, or with the consent of, their owner. These are matters of fact to be established by evidence. The only exception taken was to the refusal to rule, as requested, that the defendant "had a lien upon the horses for their keeping, as against the plaintiff's mortgage, both for the time intervening between the first interview, October 12, and the date of the plaintiffs' writ, November 6, 1886, and also for the whole time he kept them for said Thompson;" and the question is whether the case shows such facts that the judge ought to have made this ruling as a matter of law.

The bill of exceptions does not purport to be a full report of the evidence or facts of the case. It does not even state that it presents all the facts or evidence bearing upon the legal question raised. If we assume—what, in a case of this kind, in the absence of an express statement, should not ordinarily be assumed in favor of an excepting party,—that we have all the facts touching the existence of the lien claimed, can there be no proper interpretation of them other than as creating a lien? The defendant was bound to prove that the horses were brought to his premises or put in his care by, or with the consent of, the owner. This fact is not found. Are the others which appear in the exceptions equivalent to it in law? Is it impossible properly to draw inferences from the others, inconsistent with the existence of this?

The mortgagor was not the owner within the meaning of this statute, but the plaintiff was. It is not contended that the plaintiff expressly agreed to the horses being placed in the defendant's care. But undoubtedly an implied consent will answer the requirements of the law; and, in every case of this kind, the inquiry is whether such implied consent is found. That depends, when animals are left with a mortgagor by a mortgagee, not only upon the terms of the express contract relating to them, but also upon all the circumstances surrounding the transaction, indicating the expectation of the mortgagee as to the management of them by the mortgagor. If, from these, the mortgagee may be presumed to have understood that the mortgagor would take them to a stable-keeper to be boarded, and no objection was made, such consent should be implied. Otherwise it should not. It should be kept in mind that the purpose of a mortgage is to furnish security, and that the property is usually left with the mortgagor for his convenience, with an understanding that nothing shall be done or permitted by him to impair the security. An agreement which will defeat the purpose of the transaction should not be inferred or implied against a mortgagee without cogent evidence. A mortgage of horses, given to secure performance of an act in the distant future, is worthless if the mortgagor may create a lien upon them by putting them out to be boarded. It is true the mortgagee must know they are to be fed, and that it will cost something to feed them. But that in itself is immaterial. The real question is whether he has reason to believe and does believe that they are to be boarded at a livery stable, or kept by any one else than the mortgagor. It is doubtless true that, outside of the largest cities, a very small part of the horses or cattle in Massachusetts are boarded out by their owners. Keeping them in the personal care of

the owner or of his servants, upon his own premises, or in barns where he hires privileges and furnishes his own fodder, is the rule. And one acquiring an interest in horses used in a common kind of business in the interior of the State, and leaving them with their owner, would naturally suppose, in the absence of any agreement to the contrary, that they were to be kept by him, and not taken elsewhere to be boarded. If, on the other hand, he should know, at the time of taking the mortgage, that his mortgagor kept his horses at a boarding-stable, or that he was engaged in a business in which men generally hire their horses boarded, and he should leave them with him without directions, he would be held to consent to their being so kept.

The question before us differs from that raised in *Hammond v. Danielson*, 126 Mass. 294. In that case the mortgage was upon a hack which the mortgagee left in the possession of the mortgagor to be used in his business; and the question was whether consent was to be implied that it should be taken to a mechanic for repairs in the ordinary way, so as to become subject to a lien. The use agreed to naturally caused wear, and a consequent necessity for repairs; and, inasmuch as these repairs could hardly be procured otherwise than by putting it in the shop of a mechanic, the court held that it must be deemed to have been taken there with the mortgagee's consent. Not merely the making of repairs was necessary to the preservation of it in the use to which the mortgagee permitted it to be put, but the making of them by a person other than the mortgagor, under such circumstances as would ordinarily create a lien at the common law. The keeping of mortgaged horses is necessary to the preservation of the security, but it may be, and commonly is, done by the person who owns them in his business; and it seldom necessitates their being taken away or put in the custody of another.

The case at bar is like *Storms v. Smith*, 187 Mass. 201. In that case, as in this, the effort was to establish a lien for keeping property; and the question in that case was whether the mortgagee impliedly consented to the storage of it, for pay, by one to whom the mortgagor delivered it. In that case, as in this, the mortgagor might keep it in his personal charge in a building which he owned or procured for that purpose, or he might put it into the custody of another. It was decided that the mortgagee could not be presumed to have consented to its being left by the mortgagor, for storage, with one who was to keep it for pay and claim a lien upon it. It is said in the opinion: "The mortgagee had given no authority other than what was to be implied from his allowing the mortgagor to remain in possession of the mortgaged goods, coupled with the fact that it was necessary that the goods should be stored somewhere to prevent their destruction. If these circumstances were enough to support the defendant's claim, every mortgagor in possession of perishable goods would have power to create a paramount lien upon them." And, referring to the record of the mortgage, it is said of the claimant, "If storage was necessary, he was chargeable with notice that the plaintiff had a right to judge for himself where it should be

if his interest was to be charged with the cost." A charge for keeping goods is the same in kind as a charge for keeping living animals. Each is for the use of the place occupied by the property, and for care and supervision. The only difference is that, from the nature of the property, care and supervision of animals involves feeding them, and is on that account more costly. Perhaps this is a reason why consent to it as a charge upon mortgaged property should be less readily implied against a mortgagee.

In the case at bar no fact appears bearing upon the question of implied consent of the plaintiff to the mortgagor's hiring the horses boarded, except his taking a mortgage, to secure payment of a note for \$325, upon the horses and other articles used in the business of the mortgagor as a buyer and seller of meats, fish, and vegetables, and his leaving the property in the mortgagor's possession. It did not appear that, "when the mortgage was made, * * * or afterwards, prior to Thompson's disappearance, he knew where the horses were kept." And knowledge that they were kept in the defendant's barn would not, upon the facts stated, have shown that he was boarding or keeping them, within the meaning of the law. He does not appear to have been engaged in the business of boarding horses. He "was in the employ of said Thompson in the market, as a salesman, also peddling fish, and keeping books during the whole time." The horses were kept at his "barn, about one and a half mile from the market;" and he "furnished the grain and hay eaten by them." Thompson absconded about October 12, 1886, and * * * before he left he put all the property described in the writ into the custody and care of the defendant." We have assumed that the defendant had the horses in his "custody and care" as a keeper for hire, before that date, and that he did not merely sell Thompson hay and grain and let him room in the barn. But if this was so, there is nothing to show that it was apparent at the time, and it is not clearly stated in the bill of exceptions.

The provision in the power of sale authorizing the mortgagee to discharge, from the proceeds, "any claim or lien of a third person affecting the property," before rendering the surplus to the mortgagor, has little significance as affecting this particular claim of lien: first, because it was a general clause printed in the blank, to cover any state of facts that might arise; and, secondly, because in this mortgage a great variety of property was conveyed, and among other things wagons used in the business, which might need to be taken to a shop for repairs. Putting upon all the facts the interpretation most favorable to the defendant, we cannot say that Thompson had the implied consent of the plaintiff to subject the horses to a lien, or that the judge should have ruled, as a matter of law, that the defense was made out. If this were to be held a valid lien, it would seem to follow that everyone taking a mortgage upon horses used in a business like that of a provision dealer, and leaving them with the mortgagor, must be deemed to impliedly consent to an arrangement for the destruction of his security. Such a result would be incon-

sistent with the liberal policy of our law in relation to mortgages of personal property.

Exceptions overruled.

BOSTON & MAINE R. R.

v.

Robert W. CHIPMAN.

A coupon-ticket book containing notice that the coupons are to be detached by or in the presence of the conductor, and will be accepted for passage only when accompanied by the ticket, is in the hands of a purchaser, evidence of a valid and reasonable contract, the conditions of which are not waived by sometimes allowing passengers to pay their fares with coupons without showing their books.

(Suffolk—Filed January 12, 1888.)

ON report. Judgment for plaintiff.

This was an action of contract. The case was tried before a single justice, without a jury, upon an appeal by the defendant from a judgment rendered in favor of the plaintiff by the Municipal Court of the City of Boston.

At the trial in the superior court the following facts were admitted by both parties. The plaintiff operated a railroad, and established reasonable rates for the transportation of passengers thereon. The established fare between Boston and Melrose Highlands for those paying their fare upon the train is twenty-nine cents; and such fare is a reasonable fare. It transported the defendant, and demanded his fare for such transportation.

The plaintiff had previously sold to defendant and many others, books containing coupons, the material parts of such books and coupons being as follows:

The outside cover of the book bore the inscription, "Boston and Melrose Highlands;" on the inside of the cover was printed the following:

"One-hundred-ride ticket, Boston & Maine Railroad, good for one ride, and an additional ride for each coupon attached, between Boston and Melrose Highlands, continuous passage. Coupons to be detached by conductor only.

(1200)

D. T. Flanders,

Gen. Ticket Agent."

Each coupon was of the form following:

B. & M. R. R.

(1200)

Not good if detached.

Upon the third page of the cover was printed:

Notice to Passengers.

Passengers will please take notice that the coupons attached hereto are to be detached by or in the presence of the conductor, and will be accepted for passage only when accompanied by this ticket.

This book, with coupons entitling the owner to one hundred rides between Boston and Mel-

rose Highlands, was sold at a price less than that of one hundred separate single tickets between the same places.

When the conductor of the train on which defendant was transported demanded of defendant his fare, the latter tendered for such fare a coupon which he had detached from a book, then in his possession, similar to that described above. The conductor declined to receive this coupon as fare, unless the defendant would exhibit the book from which he had detached the coupon; but offered to receive it in payment of fare if the defendant would exhibit such book. This the defendant declined to do, and refused to pay his fare in any other manner, and has not paid it, unless the tender above described amounts to payment.

The defendant offered evidence tending to show that, for a long time next prior to March 20, 1886, it had been the custom for passengers, including the defendant, to detach coupon tickets and pay their fare therewith, without showing their books to the plaintiff's conductor, he not having demanded to see said books. The defendant had so paid his fares for a long time next prior to said March 20, without objection or warning not to detach the coupon, and without being requested to exhibit his book; and, at the time referred to, other passengers on the same car gave coupons detached by them in payment of their fares, and the same were received without objection, and without being requested to show their books. This evidence, thus offered by defendant, was excluded, and defendant duly excepted to such exclusion.

Upon these facts the judge found for plaintiff, and reported the case for the consideration of the Supreme Judicial Court.

Mr. E. R. Anderson, with **Messrs. William S. Stearns, John Haskell Butler, and William H. Stearns**, for defendant.

Mr. S. Lincoln, for plaintiff:

Carriers of passengers have a right to attach reasonable regulations and conditions to their contracts of transportation; and rules providing that coupons shall be invalid unless detached by the conductor, and other similar conditions, are, reasonable. The condition made by plaintiff in this case was properly brought to the notice of the defendant, both by the language printed upon the ticket and the acts of the conductor.

Louisville, N. & G. S. R. Co. v. Harris, 9 Lea, 180; *S. C.* 42 Am. Rep. 668; *Norfolk, etc. R. Co. v. Wyor*, 26 Am. & Eng. R. R. Cas. 284. See also *Cresson v. Philadelphia & R. Co.* 11 Phila. Rep. 597; *Cooper v. London, B. & S. C. R. Co.* L. R. 4 Exch. Div. 88; *Ripley v. New Jersey R. R. & T. Co.* 31 N. J. L. 388; *Downs v. New York & N. H. R. Co.* 86 Conn. 287; *Boston & L. R. Co. v. Proctor*, 1 Allen, 287; *Burke v. South Eastern R. Co.* L. R. 5 C. P. D. 1; *Woodard v. Eastern Counties R. Co.* 30 L. J. M. C. 196.

Per Curiam:

The contract, of which the book and the coupons therein sold to the defendant by the plaintiff are the evidence, is a reasonable and valid one. Under it the plaintiff's conductor was not required to accept, as the defendant's fare, a detached coupon; and had, at least, the

right to demand that he should produce and show the book. There was no evidence which would justify the finding that the plaintiff had rescinded or waived any of the conditions or terms of the contract.

Judgment for plaintiff.

GILBERT & BARKER MFG. CO.

v.

Bazalda BUTLER.

1. A contract to put a gas machine and pipes into a building, which, without fault of either party, is destroyed before the work could be finished, is thereby dissolved.
2. Where plaintiff is prevented from full performance of his entire contract by fault of defendant, recovery may be had for work and material furnished thereunder at the time the contract is dissolved.

(Hampden—January 10, 1888.)

ON defendant's exceptions. *Overruled.*

This is an action of contract upon an account annexed, and upon a count for work and materials. The answer is a general denial, and alleges that whatever work was performed or furnished, and whatever material was furnished, were performed and furnished under an entire contract for a specific price; and denies that plaintiff performed said contract. The case was tried before the court, without a jury, and the following facts were found: The defendant owned a lot of land in Belcher-town, upon which was a building which he had converted into a barn and bowling-alley, and he contracted with a builder to construct for him a hotel building on said land. By the terms of this contract, said builder, for an entire sum, was to perform and furnish all the labor and materials required for the completion of said hotel building above the foundations. After making said contract, and while the same was in process, the defendant made a written contract with the plaintiff for the piping of the hotel, barn, and bowling-alley, and the apparatus for lighting the same. The hotel, barn, and bowling-alley were piped by the plaintiff.

The plaintiff had supplied all the material, except that required for filling the weight-case, and had done all the work called for by its contract, except filling said case and hanging the same, and attaching the pulleys and cords, by means of which the air pump was to be worked. When, in the progress of its work, this point was reached, the defendant not having built the frame to which the weight case was to be hung, and not being then prepared to build the same, the plaintiff left the work, intending to fill and hang the weight-case, and attach the necessary cords and pulleys, when it should have occasion to send a man to the premises to start up the machinery on the completion of the hotel. This was understood by the plaintiff and defendant, and was not objected to by either. When the plaintiff's work was thus suspended, it left said case in the cellar of the hotel, and said cords and pulleys were placed

in a box and left by it in said barn, where they have ever since remained. The said frame was finished by the defendant in about one week after the plaintiff suspended work as aforesaid; and about two months thereafter, without the fault of either the plaintiff or the defendant, the hotel building was entirely destroyed by fire, and with it all the work and material which the plaintiff had put into the same, except the air pump and mixing regulator, which were more or less injured. The said holder, and the piping in the ground, barn, and bowling-alley, were uninjured. At the time of said fire, said hotel building had not been completed by the builder, nor accepted by the defendant, and the defendant had never occupied any part of the same, and had never made any use of the work or materials of the plaintiff. The plaintiff had not then completed its contract, but had acted in good faith with the intention of fully performing the same had it not been prevented by said fire. Its failure to complete it was due to no fault of the defendant or of the plaintiff, but such failure was due entirely to said fire; and there had been no unreasonable delay on the part of plaintiff in performing said contract.

Upon these findings of fact the defendant asked the court to rule that the action could not be maintained.

The court declined so to rule, and ruled that the plaintiff was relieved from its obligation to complete said contract, by reason of the destruction of said hotel building, and that, for the work and materials furnished for and affixed to the premises the plaintiff was entitled to recover, and gave judgment for the plaintiff; to which rulings and refusals the defendant excepted.

Mr. C. L. Gardner, for defendant:

The gas machine and piping for which the plaintiff seeks to recover were furnished under an entire contract and for a specific price.

This contract the plaintiff failed to perform, and is not entitled to recover unless the destruction of defendant's hotel relieved it from its obligation to perform said contract.

The legal effect of the plaintiff's contract is not unlike that of the builder's, and subjects the plaintiff to the same obligations and the same risks.

What these are has been determined in the following cases, which seem clearly to support the position of the defendant:

Adams v. Nichols, 19 Pick. 275; *Mill Dam Foundry v. Hovey*, 21 Pick. 441; *Lord v. Wheeler*, 1 Gray, 282; *Wells v. Calnan*, 107 Mass. 514.

All the apparatus and materials furnished by the plaintiff, except the piping (which possibly was so situated that it could not have been removed), remained personal property. The plaintiff was authorized to remove them at any time, and substitute therefor other apparatus and materials. They were the property of the plaintiff, and were wholly subject to his control.

Adams v. Nichols, *supra*; *Holbrook v. Chamberlin*, 116 Mass. 155; *Taft v. Stetson*, 117 Mass. 471; *Towne v. Fiske*, 127 Mass. 125.

They were therefore subject to the plaintiff's risk.

Adams v. Nichols, *supra*.

Even if said apparatus and materials were not personal property, they were capable, as well after the fire as before, of being removed and appropriated by the plaintiff; and, being its property and not the property of the defendant, the latter should not be held responsible for their value.

The case most favorable to the plaintiff is *Cleary v. Sohler*, 120 Mass. 210; but there is at least one important difference between that case and the case at bar. In the case referred to, the court follows the decision in *Wells v. Calnan*, *supra*, and in the latter case the distinction is made between a contract to construct a building and a contract to make repairs upon a building already constructed. In the case at bar, if what the plaintiff furnished under its contract did not remain personal property down to the time of the fire, as contended by the defendant, no part of it—so far, at least, as the hotel building was concerned, was in the nature of "repairs."

Mr. Gideon Wells, for plaintiff:

The judgment of the court upon the facts found was in accordance with the decision of this court in—

Cleary v. Sohler, 120 Mass. 210; *Lord v. Wheeler*, 1 Gray, 282.

All the materials called for had been furnished, and the work substantially completed.

The complete execution of the contract was rendered impossible by no fault of the plaintiff.

The labor and materials of the plaintiff have been put upon, and fixed to, the premises of the defendant, and he has received substantial benefit therefrom.

By the terms of the contract it was the duty of the defendant to furnish a building into which the plaintiff could put his apparatus and piping, and the case finds that the plaintiff's failure to fully perform his contract was due to the fact that defendant failed to maintain the building in proper condition to receive the work.

Niblo v. Binase, 1 Keyes, 476; *S. C.* 3 Abb. N. Y. App. 875; *Ransom v. Clark*, 70 Ill. 654; *Whelan v. Ansonia Clock Co.* 27 Hun, 557; *Garretty v. Brazell*, 84 Iowa, 100.

The fact that one of the buildings was being constructed by contract cannot be material. It was the defendant's property, so far as completed. His contract with the plaintiff was based upon his ownership of it, and right to control its use. By his contract he undertook to have and maintain the building to receive the plaintiff's work and material.

W. Allen, J., delivered the opinion of the court:

The plaintiff made a contract with the defendant to furnish certain fixtures and appliances in and about a building that the defendant was to have erected, for which the defendant agreed to pay a specific sum. The plaintiff performed its contract only in part, and this action is not upon the contract, but in general assumpsit for labor and materials furnished in such part performance. If it appears that the nonperformance of the contract by the plaintiff was caused by the fault of the defendant, and that, without the fault of the plaintiff, the contract has been rescinded or put an end to, so that nothing more can be done under it.

and no action will lie upon it, this action can be maintained. The contract provided for furnishing the machinery and appliances for supplying a hotel, and a barn and bowling-alley near it, with gas. The plaintiff was to furnish and put in place an air-pump, a mixing regulator, a tank or gas-generator, and pipes and fittings to distribute the gas about the buildings. The defendant was to do all the earth-work, mason-work, and the carpenter-work that was required. So far as the work to be done by the defendant was a condition precedent to work to be done by the plaintiff, the contract implied that the defendant should have it seasonably done, so as not to delay the plaintiff after it had been notified that the buildings were ready, and had commenced work under the contract.

The plaintiff had put the holder or gas-generator into the defendant's land, and the pipes in the hotel and in the barn and bowling-alley, and the air-pump and mixing regulator in the cellar of the hotel, and had completed everything required of it by the contract except filling the weight-case and attaching the pulleys and cords by which the air-pump was worked. The case, pulleys, and cords were provided, and everything was furnished in accordance with the contract, except fitting and hanging the weight-case. The plaintiff was prevented from doing that, and from completing the work under the contract, by the neglect of the defendant to furnish the frame to which the case was to be hung. Not only was the frame not ready, but the defendant was not then prepared to build it. The plaintiff left the work unfinished solely because the breach, by the defendant, of his contract to furnish the carpenter-work, made it impossible for the plaintiff to finish his work at that time. The plaintiff did not rescind the contract, if it had the right to do so. The work was substantially all done. The hotel was not completed. When it should be completed, the plaintiff would have occasion, though it was not required by the contract, to send a man to the premises to start up the machinery, and the same man could attend to filling and hanging the weight-box and attaching the cords and pulleys. The defendant intended to do this, and it was understood by both parties that it would be done. The hotel was destroyed by fire before it was finished, and before the plaintiff had notice that the frame was ready. The destruction of the building without the fault of either party absolved both parties from the obligation of the contract, and rendered further performance of it by the plaintiff impossible; it worked a virtual dissolution of the contract. It is hardly necessary to cite authorities, or to adduce arguments, to sustain the proposition that, if the plaintiff had furnished labor and materials under an entire contract which it had not fully performed at the time the contract was dissolved, and if such nonperformance was owing to the fault of the defendant, the plaintiff can maintain an action for the labor and materials. *Ravens v. Clark*, 70 Ill. 656; and *Garretty v. Brazell*, 34 Iowa, 100, are in point.

There is no question that the fault of the defendant prevented the completion of the plain-

tiff's work at some time before the fire; and it must be taken to have been the cause of the incompleteness of the work at the time of the fire, unless some fault of the plaintiff intervened as a contributing cause. The plaintiff could not be in fault unless he was under obligation to perform the contract and had an opportunity to complete the work. If the breach of contract by the defendant was such as to give the plaintiff a right to rescind the contract, and he exercised that right, he would be under no obligation to further perform the contract, and could not be in fault in not doing so. If the circumstances were such that he could not, or if he did not, rescind the contract, but continued under its obligation, the fact would remain that he would have fully performed the contract but for the fault of the defendant; and that fault would remain the cause of the nonperformance until the plaintiff should be in fault. The plaintiff could be in no fault in not completing the work, until it had notice that the defendant had finished the frame. Although the frame was, in fact, ready two months before the hotel was burned, the plaintiff had no notice of it. It had no reason to suppose that the defendant had rendered it possible to finish the work; and we need not consider what would have been the effect of notice before that time, from the defendant, that he had performed the condition precedent, with a request to the plaintiff to complete the work. The plaintiff was not in fault in not insisting upon a speedy performance of the contract by the defendant, and in agreeing to a postponement. The defendant had already broken his contract, and prevented the plaintiff from completing its part, and obliged it to suspend its work; and it could not perform the little that remained until the defendant had performed his part. At what time that should be done was immaterial. It might be more desirable and convenient for both parties that it should not be done until the building was finished, so that the machine could be put in use. The defendant's work was a condition precedent to the plaintiff's, and, if they mutually agreed that both should be postponed for a time, their relations were not changed, nor the fact altered that the failure of the defendant to finish his work prevented the plaintiff from performing his contract. Without deciding that, if there had been no fault in either party, the destruction of the building before the plaintiff had fully performed its contract would give it a right to recover for what it had furnished under it (see *Lord v. Wheeler*, 1 Gray, 282; *Cleary v. Sohler*, 120 Mass. 210; *Wells v. Calnan*, 107 Mass. 514; *Appleby v. Meyers*, L. R. 2 C. P. 651), we decide that, as the plaintiff had been prevented from performing its contract by the fault of the defendant, and without the fault of the plaintiff, the contract remained unperformed at the time it was dissolved by the burning of the building. The plaintiff can recover for the labor and materials furnished under the contract, although the completion of the work had been further delayed by the consent of both parties, and without the immediate fault of either.

Exceptions overruled.

BOSTON SAFE DEPOSIT & TRUST CO.,
Trustee,
v.
George MIXTER.

1. A will gave the residue of testator's estate, real and personal, to his four children, "to be divided equally between them, share and share alike, to them, their heirs, and assigns forever." A codicil directed that all the property and estate given to one of said four children in the will should be paid to a certain trust company, to be held by it, in trust for the benefit of said child, to be invested by the company; and that, at the death of such child, the estate so left in trust should be divided among her children, etc. *Held*, that this codicil was in law equivalent to a **direct gift to the trust company as trustee**; that its effect was to give to such company as trustee all the property and estate given to testator's said child by the will, viz., one quarter of the personal estate absolutely, and an undivided one quarter of the real estate in fee; and that the intent was to give such trustee the legal title to both such real and personal estate, with power to sell and convey the same, in order to carry out the purposes of the testator.
2. The caption of the order of notice of a petition to the probate court for leave to the trustee to sell the undivided fourth of the real estate held in trust used the words "heirs at law, next of kin, and all other persons interested in the real estate." *Held*, that this was a sufficient compliance with Pub. Stat. chap. 141, § 21, which provides that such notice is to be "given, in such manner as the court may order, to all persons who are or may become interested in such estate, and to all persons whose issue, not then in being, may become so interested."
3. The right of a trustee to sell trust real estate at private sale is not limited to one year after the granting of license to sell. Pub. Stat. chap. 142, § 18, is not to be construed as imposing such limitation.

(Suffolk—Filed January 10, 1888.)

ON defendant's appeal. *Judgment affirmed.* This suit was brought to recover the purchase money of real estate. Plaintiff and defendant entered into an agreement by which plaintiff agreed to sell, and defendant agreed to buy, the real estate in question, provided plaintiff could give a good title thereto. Defendant denied that plaintiff could give a good title and refused to pay the purchase money; whereupon this suit was brought. It was submitted to the court on an agreed statement of facts, and the court ordered judgment for plaintiff; whereupon defendant appealed.

The facts are further stated by the court.

Mr. Joshua D. Ball, for defendant:

The plaintiff, as trustee, got, under the will of William Mixter, whatever title it had to the

real estate in question. Having qualified as trustee under the will, it applied to the probate court for leave to sell and convey the real estate in question.

Pub. Stat. chap. 141, §§ 20, 21, pp. 794, 795.

The decree of the probate court authorizing a sale was made July 21, 1885; the written agreement by plaintiff to sell and defendant to buy was made October 29, 1886, and the deed was tendered November 9, 1886.

Plaintiff could not make a good title in fee, for the reasons:

1. That the will of William Mixter gave to the plaintiff, as trustee, an estate only during the life of his daughter, Mrs. Fanny L. Howard.

2. That if the trustee took only a life estate, the probate court could not authorize a sale of anything more than the trust estate, which was a life estate, and could not affect the rights of the remaindermen.

3. That the statute authorizing the probate court to decree a sale and conveyance of an estate held in trust provides that, if it appears to the court "that the estate which is the subject of the petition may be held in trust for, or that a remainder or contingent interest therein may be limited over to, persons not ascertained or not in being, notice shall be given, in such manner as the court may order, to all persons who are, or may become, interested in such estate, and to all persons whose issue, not then in being, may become so interested," etc. (Pub. Stat. chap. 141, § 21); and that such notice was not given.

4. That the sale, if made more than a year after the decree, must be at public auction, and not by private contract.

Plaintiff, as trustee, took only an estate during the life of Mrs. Howard, and her children or their representatives are to take the remainder if they survive her, the remainder being contingent.

The codicil does not provide that at her death the plaintiff shall divide, but that the estate left in trust shall be divided. All the purposes of the trust could be accomplished if the trustee took only such life estate. A fee in the trustee was not essential to the execution of the trusts. The usual rule in respect to property given in trust is, that the trustee takes an estate commensurate with the purposes of the trust, and nothing more.

Perry, Tr. § 812; *Smith v. Thompson*, 2 Swan, 386; *Doe v. Williams*, 2 Mees. & W. 749, 756, 757; *Curtis v. Price*, 12 Ves. Jr. 60; *Packard v. Marshall*, 138 Mass. 302; *Moore v. Stinson*, 4 New Eng. Rep. 654, 144 Mass. 504; *Doe v. Considine*, 18 U. S. 6 Wall. 453, 460-472 (18 L. ed. 869).

One provision of the statutes is that "no sale of real estate made by an executor, administrator, guardian, trustee, or other person by license of court, and no title under such a sale, shall be avoided for the reason that the deed was not delivered within one year after the license, or on account of any irregularity in the proceedings, if it appears * * * fourth, that the premises were sold by public auction in accordance with the notice, and are held by one who purchased them in good faith."

Pub. Stat. chap. 142, § 18, pp. 790, 800.

Before this provision was enacted, a trustee

was not in so many words bound to sell, if at private sale, within one year from the date of the decree or license, and, if the trustee sold after the lapse of one year, to sell at public auction. At that time, however, an executor, or administrator, or guardian could sell only within the year, and could sell then only at public auction. And the Legislature by this provision, probably overlooking the fact that a trustee was not then, in so many words, limited to a sale within a year, or to a sale at public auction, put executors, administrators, guardians, and trustees, in so many words, in the same category, and provided that a sale by neither should be avoided, if made after the lapse of a year, if certain things enumerated had been done.

See, for previous legislation, Gen. Stat. chap. 402, § 47; Stat. 1860, chap. 60, § 1; Stat. 1864, chap. 137, § 1.

Mr Henry G. Nichols, for plaintiff:

The plaintiff could convey a title in fee to said real estate.

The trust company has a fee in the property left in trust for Fanny Louise Howard, a daughter of the testator, and under the license of the probate court could convey the same.

"Every devise shall be construed to convey all the estate which the testator could lawfully devise in the lands mentioned, unless it clearly appears by the will that he intended to convey a less estate."

Pub. Stat. chap. 127, § 24, pp. 750, 751.

The intention of the testator in this case was plainly to convey a fee; and certainly there is nothing in the will to show a contrary intention.

The trustee takes, by the terms of the codicil, the same interest that the daughter would have taken under the will. That interest was an undivided fourth part in fee. By the language of the codicil, therefore, the plaintiff has a fee, and, by the license of the court, could, and offered to, convey the same.

But, whatever the language of the instrument creating the trust, "its nature and duration are governed by the requirements of the trust. If that requires a fee-simple estate in the trustee, it will be created, though the language be not apt for that purpose."

Young v. Bradley, 101 U. S. 782 (25 L. ed. 1044); *Keith v. Copeland*, 138 Mass. 303, 304.

The direction of the will is, that at the decease of the testator's daughter the "estate so left in trust shall be divided among her children," etc. When it is considered that the real estate in question was only a small portion of the "estate so left in trust," it certainly seems to have been the evident intention of the testator that the whole trust estate should be divided by the trustee. If this construction be the true one, it will hardly be contended that the trustee did not take a fee.

Nars v. Russell, 8 Gray, 86; Perry, Tr. § 315.

And it is the intention of the testator, as gathered from the whole will, that must govern in the construction.

Perry, Tr. § 316.

The words in the codicil, "If my said daughter shall leave no children living at her decease, then I direct that said sum so left in trust with said corporation shall be paid, one third to her husband, if living, but not to his heirs, if deceased; and the balance of said estate so left in

trust shall be equally divided," etc.—the words, "sum so left in trust," are evidently used interchangeably with "estate so left in trust," and indicate plainly the testator's expectation that the proceeds of the estate devised by him were to be divided. It follows that the trustee took a fee.

Perry, Tr. § 320, note 2.

The lapse of a year after license to sell before the agreement was made, is immaterial. There is no statute requiring a trustee to sell within a year. The statute expressly names executors, administrators, and guardians, and says nothing about trustees.

Pub. Stat. chap. 142, p. 798, § 8.

Trustees may be authorized to sell whenever the sale shall appear "necessary or expedient."

Pub. Stat. chap. 141, p. 794, § 20.

Executors and guardians are allowed to sell only for certain specific purposes set forth in the statutes.

Pub. Stat. chap. 134, § 1, and chap. 140; Stat. 1886, chap. 187.

In the case of trustees, no provision is made as to the manner of sale; it may be at public or private sale, and no limit is made of the time within which a purchaser must be found.

Except for Pub. Stat. chap. 142, § 18, pp. 799, 780, no question could arise. That section provides that "no sale of real estate made by an executor, administrator, guardian, trustee, or other person, by license of court, and no title under such a sale, shall be avoided for the reason that the deed was not delivered within one year after the license," etc. It is submitted that the addition of trustees in this section raises no implication that the word "trustees" is to be supplied in the statutes authorizing executors, administrators, and guardians to sell, for the reason that the reasons for, and purposes of, a sale by trustees are entirely different from those in the case of executors, administrators, and guardians.

No case can be found in which this court has held that the provision limiting the time within which a license to sell must be carried out applies to trustees.

The notice was sufficient.

Pub. Stat. chap. 141, p. 795, § 21.

If the notice is given in the manner ordered by the court, it binds all persons who could be in any way affected by notice given in the manner ordered. In this case, notice was by publication; and it is submitted that, even if the notice had not in terms run to any person, it would have been sufficient.

Stat. 1864, chap. 168; *Re Davis*, 14 Allen, 24.

Morton, Ch. J., delivered the opinion of the court:

William Mixter, by the third clause of his will, bequeaths to each of his children, George, Mary Ann, Fanny Louise, and Samuel Jason, the interest or income of \$20,000, to be paid to each at least annually, or as often as the income shall be received; said principal sum to be paid into the hands of trustees, and by them invested; and, at the decease of either of the children, "said principal sum of \$20,000, the income of which is given to the child deceased, shall be divided among the heirs at law of the deceased child." By the sixth clause he gives the residue of his estate, real and personal, to

his four children, "to be divided equally between them, share and share alike, to them, their heirs and assigns forever."

There can be no doubt that each of the four children, under this clause, would take an absolute estate in one quarter of the residue. But he afterwards made a codicil which provides as follows: "Whereas I have given to my daughter, Fanny L. Howard, wife of Daniel W. Howard, in my said will, the income of \$20,000, and also a certain portion of my remaining estate, I now order and direct that all the property and estate so given my said daughter in addition to said income, in said will, shall be paid to the Boston Safe Deposit & Trust Company, an incorporated institution in the city of Boston, to be held by said corporation in trust for the benefit of my said daughter, Fanny L. Howard, to be invested by said corporation as shall seem prudent and safe; and that the net income thereof shall be paid to my said daughter, Fanny L. Howard, at least semi-annually, said income to be paid to my said daughter personally, or upon her order or receipt in writing, free from the interference or control of her husband or any creditors; my intention being that the use of said income shall not be anticipated by assignments; and at the decease of my said daughter, I direct that said estate so left in trust shall be divided among her children, or the representatives of any deceased child, equally, share and share alike; giving to each child, and the representatives of any deceased child, one share. If my said daughter shall leave no children living at her decease, then I direct that said sum, so left in trust with said corporation, shall be paid,—one third to her husband, if living, but not to his heirs, if deceased, and the balance of said estate so left in trust shall be equally divided among her brothers and sisters, share and share alike."

This codicil is not in form a direct gift to the plaintiff as trustee, but it is in law equivalent to such a gift; and the first question in this case is whether, under the codicil, the plaintiff took an estate in fee in that portion of the real estate, namely, one undivided quarter, which would have come to the said Fanny under the sixth clause of the will, or only an estate for the life of said Fanny.

The will and codicil are not drawn with technical skill, but we think there is no difficulty in ascertaining the intentions of the testator. The sixth clause contemplates that the residue will consist of real and personal estate. Under it, if unchanged, the daughter Fanny would take one quarter of the personal property absolutely, and one undivided quarter of the real estate in fee. The object of the codicil was to change the disposition of this share of said Fanny in the residue, by putting the legal title in trustees, to give her the income during her life, and to provide for the division of the trust fund after her death. It gives to the plaintiff, as trustee, "all the property and estate so given my said daughter," implying that the trustee was to take the same property and estate which the daughter would take under the sixth clause. The codicil deals with the trust fund, which might at first consist of both real and personal estate, as a single fund, subject to the same disposition. It directs that,

at the decease of the daughter, "said estate so left in trust shall be divided among her children;" and that, if she leave no children, "said sum so left in trust with said corporation shall be paid, one third to her husband," and "the balance of said estate so left in trust shall be equally divided among her brothers and sisters." In these provisions he is clearly dealing with the whole trust estate as a single fund, and they imply that the trustee is to make the division according to his directions. It must do this so far as the fund consisted of personal property, and there is nothing to indicate that he intended that there should be any difference as to that part of the fund which at his death was real estate. The whole estate held in trust was "to be invested by said corporation as shall seem prudent and safe," which implies that the trustee may find it prudent to change the investments. The testator does not directly or by implication give any vested legal estate to those who under the codicil will be the distributees at his daughter's decease. He imposes upon the trustee the duty of dividing and transferring the fund after her death. Looking at the whole will, it seems to us reasonably clear that he intended to give to the trustee the legal title to both the real and personal estate, with the power to sell and convey the same, and that such a title in the trustee is necessary in order to enable it to carry out the purposes of the testator. *Sears v. Russell*, 8 Gray, 56; *Packard v. Marshall*, 138 Mass. 301.

The trustee, taking this view of the will, applied to the probate court for leave to sell the undivided fourth of the real estate held by it in trust; and the court ordered and decreed that the estate so held in trust be sold at private sale, and the proceeds reinvested, and be held upon the same trusts under which the real estate was held. The defendant contends that a valid sale cannot be made under this decree, because the notice given of the petition was insufficient.

We can see no force in this claim. Upon such a petition, notice is to be "given, in such manner as the court may order, to all persons who are or may become interested in such estate, and to all persons whose issue, not then in being, may become so interested." Pub. Stat. chap. 141, § 21. The caption of the order of notice issued by the court did not follow the words of the statute; but the words used, "heirs at law, next of kin, and all other persons interested in the real estate," embrace and describe all living persons who are or can become interested, or whose issue may become interested, and were sufficient.

The defendant further contends that a good deed cannot now be given by the trustee because more than a year has elapsed since the license to sell was given. The statutes do not provide that a license to a trustee to sell real estate shall not be in force more than a year. Trustees may be licensed to sell, either at public or private sale, when it appears to be necessary or expedient. Pub. Stat. chap. 141, § 20. As a general rule executors, administrators, and guardians can be licensed to sell only at public auction. Pub. Stat. chap. 134, §§ 1-11; chap. 140, §§ 1, 3, 18. In Pub. Stat. chap. 142, which contains many provi-

sions relating to sales by executors, administrators, guardians, and trustees, it is provided in § 8 that "no license for a sale by an executor, administrator, or guardian shall be in force for more than one year after the granting thereof;" but there is no equivalent or similar provision in our statutes as to sales by trustees. Section 18 provides that "no sale of real estate made by an executor, administrator, guardian, trustee, or other person by license of court, and no title under such a sale, shall be avoided for the reason that the deed was not delivered within one year after the license, or on account of any irregularity in the proceedings, if it appears: first, that the license was granted by a court of competent jurisdiction; second, that the person licensed gave a bond which was approved by the judge of the probate court, if a bond was required upon the granting of the license; third, that the notice of the time and place of sale was given according to the order of the court; and fourth, that the premises were sold at public auction in accordance with the notice, and are held by one who purchased them in good faith."

The defendant argues that this statute, by implication, prohibits a trustee from making a sale, after the lapse of a year from the granting of his license, except at public auction. No such implication is necessary or justifiable. This provision is a re-enactment of the Statute of 1864, chap. 137. It is an enabling, and not a disabling, statute. It was not intended to cut down the powers of executors, administrators, guardians, or trustees, but to cure any formal and unimportant irregularities in their actions in making sales. It was not designed to create irregularities, but to remedy them. It cannot fairly be construed as providing that, if a trustee does not sell within a year,—which he is not bound to do,—it shall be an irregularity which can be cured only by a sale at auction. Most of the provisions are pertinent as applied to executors, administrators, and guardians, but have no application to trustees, who ordinarily are not required to give bond, or to sell at public auction, or to give any notice of the time and place of sale. It is not improbable that the word "trustee" was inadvertently used in the statute. But, however this may be, we cannot think that it was the intention of the Legislature to make, in this indirect way, so important a change in the other provisions of the statute as to require trustees to sell within a year, or otherwise to sell at public auction.

Upon the whole case, therefore, we are of opinion that the deed which the plaintiff has tendered to the defendant will convey a good title in fee; and, in accordance with the stipulation in the case stated, judgment was rightly entered for the plaintiff in the superior court.

Judgment affirmed.

Joseph B. MOORS

v.

Ferdinand A. WYMAN *et al.**

1. The unqualified indorsement and de-

*For other cases arising out of the assignment of F. Shaw & Bro. to F. A. Wyman, defendant in this case, see Bank of America v. Shaw, 2 New Eng. Rep. 572; Casco Nat. Bank v. Shaw, 4 New Eng. Rep. 978; Importers & Traders Nat. Bank v. Shaw, Id. 344.

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livery for value of a bill of lading transfers title to the goods; but indorsement to an agent to enable him to obtain the goods from the carrier does not transfer title.

2. The custody of a mere agent to hold is possession by the principal.
3. A private sale of goods pledged as security for advances will, in the absence of proof to the contrary, be deemed to have been lawfully made.
4. When the holder of an equity of redemption makes such improvements upon the property as are necessary to preserve it from destruction, he is presumed to make them in the interest of the equity.

(Suffolk—Filed January 9, 1888.)

BILL in equity for account of sales, reserved for the consideration of the full bench, on the pleadings, master's report, and stipulations. *Decree for plaintiff.*

The facts sufficiently appear in the opinion of the court.

Messrs. Robert M. Moore, Jr., and Norton & Hamlin, for plaintiff:

The plaintiff was the owner of the letter-of-credit hides. As such he might trust them to others, he might give them out of his hands in any form, and his right of possession would remain.

De Wolf v. Gardner, 12 Cush. 19; *Fifth Nat. Bank of Chicago v. Bayley*, 115 Mass. 228; *Libby v. Ingalls*, 124 Mass. 503; *Moors v. Kidder*, 8 Cent. Rep. 675; *Farmers & M. Nat. Bank v. Logan*, 74 N. Y. 568; *Dows v. National Exch. Bank*, 91 U. S. 618 (23 L. ed. 214).

Even if the court should not adopt this view of plaintiff's rights, the securities held by plaintiff had the qualities both of a mortgage and of a pledge. The plaintiff had both the title and possession.

Casey v. Cavaroc, 96 U. S. 475 (24 L. ed. 788).

The plaintiff never parted with his title, nor did he give up possession, except for temporary and special purposes, and upon the express agreement that his lien on the hides should not be impaired.

Even if plaintiff's rights were simply those of pledged, he did not lose them, either by allowing the hides to go to the tanneries, or by permitting Wyman to sell some of them under the agreements above referred to.

Thacher v. Moore, 134 Mass. 164; *Kellogg v. Tompson*, 2 New Eng. Rep. 170, 142 Mass. 76; *Way v. Davidson*, 12 Gray, 465; *Macomber v. Parker*, 14 Pick. 497; *Jones v. Baldwin*, 12 Pick. 315.

In the case of the letters of credit on the Bank of Montreal, the original contract was between the Shaws and Watson & Lang, agents. But Watson & Lang indorsed the bills of lading to plaintiff, who was liable under his guaranty to them; and thereafter he dealt with the goods the same as he did with those bought on the Morton, Rose, & Co. credits.

As it appears by the master's report that the plaintiff has fully settled both with Morton, Rose, & Co. and the Bank of Montreal, the plaintiff had the right to sell the imported hides

which arrived after Shaw's failure, and to sell at private sale.

The brokers employed were reputable; all reasonable exactions were made to obtain fair prices; fair prices were obtained for the hides sold; and the usual method of selling hides was by brokers.

The plaintiff is not answerable for a loss on the imported hides, in that they did not sell for enough to cover the cost. He had the right to sell them, and he sold them for all that they were worth.

A mortgagee or pledgee is entitled to charge reasonable compensation for his services in selling the security.

Varnum v. Meserve, 8 Allen, 161.

Upon similar grounds a mortgagee in possession is entitled to commissions on rents received.

Gibson v. Crehore, 5 Pick. 146; *Gerrish v. Black*, 104 Mass. 400; *Montague v. Boston & A. R. Co.* 124 Mass. 247; *Adams v. Brown*, 7 Cush. 220.

Messrs. G. W. Morse and J. C. Lane, for defendant Shaw:

The defendants claimed that the lien on said hides was lost by permitting the pledgors to have possession thereof, and the subsequent taking possession of the same by the assignee and trustee for creditors, and by the attaching officers.

To render a pledge valid as a security, there must be, not only a delivery to the pledgee, but also continued possession thereof by him. If he relinquish possession, the pledge no longer exists.

Bonney v. Amee, 8 Pick. 238; *Kimball v. Hildreth*, 8 Allen, 187; *Homes v. Crane*, 2 Pick. 610.

See also *Walker v. Staples*, 5 Allen, 34, in which the pledgee left the property in custody of the pledgor, with authority to let, limited by particular instructions; and it was held that the possession of the pledgor must be regarded as absolute and unqualified, notwithstanding the limitation.

In *Whitaker v. Sumner*, 20 Pick. 399, a pledgor made an assignment for creditors. The pledgee transferred the notes secured by the pledge, without assigning the latter, and caused the pledge to be attached in a suit on the note, the indorsers not knowing of the pledge; and it was held that the lien was waived.

See also Jones, Pledges, §§ 1, 4, 23, 40.

In *Thompson v. Dolliver*, 132 Mass. 103, a bill of parcels was made to the defendants, purporting to transfer property, and on its face said to be for security for indorsed notes and cash. "A bill of parcels given as collateral security only, under which the articles transferred are at once delivered, has all the characteristics of a pledge."

It is a well-settled principle that a delivery back of the possession of the thing pledged terminates the pledgee's title.

Jones, Pledges, § 40.

A pledgor in possession can give a good title to a bona fide purchaser.

Id. § 47, and cases cited.

It undoubtedly is the law that, under such circumstances, the lien is not lost as between the original parties. But the extent of the de-

fendant's claim in this case is that the lien was lost when the possession passed from the pledgors—F. Shaw & Bros.—to third parties; first, their assignee for the benefit of creditors; and second, to attaching creditors,—at one time or the other.

Thus in *Way v. Davidson*, 12 Gray, 467, in which the pledgee entrusted the pledgor with the note pledged for a special purpose, but, the pledgor not returning it, a suit for conversion was maintained.

Bodenhammer v. Newsom, 5 Jones, L. (N. C.) 107; *Martin v. Reid*, 11 C. B. N. S. 730; *McComber v. Parker*, 14 Pick. 507; *Kimball v. Hildreth*, 8 Allen, 168; *Thayer v. Dwight*, 104 Mass. 257; *Black v. Bogert*, 65 N. Y. 601; *Collins v. Buck*, 63 Me. 456; *Beeman v. Lawton*, 87 Me. 544; *Day v. Swift*, 48 Me. 368; *Eustman v. Avery*, 23 Me. 248; *Mosher v. Smith*, 67 Me. 172; *Shaw v. Wilshire*, 65 Me. 495; *Cassey v. Cavaroc*, 96 U. S. 467 (24 L. ed. 783); *Thacker v. Moors*, 134 Mass. 156.

The effect of these original contracts between F. Shaw & Bros. of Boston and the Bank of Montreal cannot be varied by other evidence.

Black v. Bachelder, 120 Mass. 171; *Myrick v. Dame*, 9 Cush. 248; *Baldwin v. Dow*, 130 Mass. 416; *McFarland v. Boston & L. R. Co.* 115 Mass. 63; *Atwood v. Cobb*, 16 Pick. 231; *Hagwood v. Perrin*, 10 Pick. 228.

It is argued that, when the bills of lading for these letter-of-credit hides were indorsed to Moors in form,—no agency of Moors being expressed,—he thereby acquired a title different from and independent of the title which the Bank of Montreal, or their agents in New York had before held. But to this it might be sufficiently replied that in the first place an attempt by the agents of the Bank of Montreal, in New York, to convey to Moors a better title than they had, must be nugatory.

A bill of lading, even when in terms running to order, is not negotiable like a bill of exchange, but a symbol or representative of the goods themselves; and the rights arising out of the transfer of a bill of lading correspond, not to those arising out of the indorsement of a negotiable promise for the payment of money, but to those arising out of a delivery of the property itself under similar circumstances.

Stollenwerck v. Thacher, 115 Mass. 234; *Brown v. Babcock*, 3 Mass. 31.

"Bills of lading, though *prima facie* evidence of absolute property in him to whom they are indorsed *bona fide* and for valuable consideration, are nevertheless capable of being explained."

Low v. De Wolf, 8 Pick. 107; *De Wolf v. Gardner*, 12 Cush. 26.

The possession of an agent does not give him authority to deal with personal property as the principal might.

Nickerson v. Darrow, 5 Allen, 419.

The transfer of property by such agent, by way of pledge for his own debt, passed no title, because the absolute legal title was not in him, nor within his authority to sell,—because not a sale, but a pledge.

Michigan State Bank v. Gardner, 15 Gray, 374.

If a bill of lading is indorsed in blank, and delivered by the owner to his agent for a special purpose, a person getting possession of it with

the agent's assent, but not the owner's, acquires no title to the goods as against the owner.

Stollenwerk v. Thacher, *supra*.

The consignee named in the bill of lading does not acquire title from the mere fact that he is so named.

Pratt v. Parkman, 24 Pick. 42; *First Nat. Bank v. Crocker*, 111 Mass. 168. See also *Sloun v. Merrill*, 135 Mass. 17; Jones, Pledges, §§ 229, 230.

There was no dispute in the testimony that Moors requested Wyman to tan said hides, personally, both before and after the bill was filed, and that Wyman complied with that request so far as he could.

If Wyman is to be held accountable to the plaintiff at all in regard to letter-of-credit hides, and is to be credited for tanning the same, he should receive credit for what the tanning was fairly worth,—a *quantum meruit* or *quantum valuit*; and the master finds the actual cost of tanning is 7 cents a pound.

When the failure took place, Wyman did not become bound by the contracts of the Vanceboro firm (or of the Boston firm). It was not his duty to assume their debts and obligations, but merely to liquidate and divide their assets among their creditors. He therefore was not bound to tan the hides in the possession of the Vanceboro firm for nothing.

If these delivery orders had been given to another dealer in leather, he might have been obliged to pay for tanning the same in order to get the leather from the tanneries to sell; and it must be that, in settling with Moors, he would then have a right to deduct from the proceeds of the leather these charges for tanning which he had paid.

Forbes v. Boston & L. R. Co. 133 Mass. 154; *Massachusetts L. & T. Co. v. Fitchburg R. Co.* 3 New Eng. Rep. 415, 148 Mass. 318; *Clark v. Dearborn*, 103 Mass. 335.

The pledgee of personal property may, after the debt becomes due, sell without a judicial process, upon giving reasonable notice to the debtor to redeem.

Parker v. Branker, 22 Pick. 46.

A sale of a naked pledge can only be made at public auction, with notice to the pledgor of the time and place.

Washburn v. Pond, 2 Allen, 474.

The defendants object to the commission allowed, because in most cases, if not all, the sales were improperly and illegally made.

If a commission is allowed in respect to any sale, it should be merely a fair compensation for making the sale; and it appears from the evidence that the regular and usual charge of a broker for making such sales would be 1 per cent.

As to the loss on the sale of the hides, it appears that the same were sold for \$40,750.96 less than their actual cost, although the defendants claimed that the real loss was a greater sum.

It further appears, from the above-mentioned fact, that sales were often made before the drafts were due; that Moors forced the sales.

The defendants claim that the loan-account agreements did not operate to give the plaintiff a lien as general collateral on the letter-of-credit hides which were pledged to the Bank of Montreal, to secure the indebtedness to said bank.

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Brown v. New Bedford Inst. for Sav. 187 Mass. 268; *Hathaway v. Fall River Nat. Bank*, 181 Mass. 14; *Neponset Bank v. Leland*, 5 Met. 259; *Jarvis v. Rogers*, 15 Mass. 339.

A pledgee has no right to retain the pledge, after payment of the debt, as security for other demands.

Merrifield v. Baker, 9 Allen, 29.

In the absence of any agreement to the contrary, property pledged as security for a debt reverts to the original owner on the payment.

Fisher v. Brown, 104 Mass. 259.

These defendants, in their answers, claimed that the plaintiff's bill is multifarious.

"A bill is multifarious which embraces distinct matters affecting distinct parties who have no common interest in the distinct matters."

Metcalf v. Cady, 8 Allen, 587; *Sanborn v. Dwinell*, 185 Mass. 286; *Keith v. Keith*, 8 New Eng. Rep. 520, 148 Mass. 262; *White v. Curtis*, 2 Gray, 467; *Cambridge Water Works v. Somerville D. & B. Co.* 14 Gray, 193; *Pope v. Leonard*, 115 Mass. 286; *Pope v. Salamanca Oil & Ref. Co.* Id. 290; *Dinmock v. Bizby*, 20 Pick. 268; *Carter v. Treadwell*, 3 Story, 51.

The plaintiff here combines claims of his own with claims as to which he was agent of a third party.

Robinson v. Guild, 12 Met. 828; *Coleman v. Barnes*, 5 Allen, 377; Dan. Ch. 8d Am. ed. p. 348.

Messrs. E. R. and Samuel Hoar, for defendant Wyman:

The hides which arrived under letters of credit, after the failure, should have been sold at public auction.

The plaintiff claims, as the foundation of his case, that Wyman was bound to carry out the contracts of the Shaws; but, in dealing with these hides which arrived after the failure, he himself repudiated the contract with the Shaws, did not allow Wyman to stand in their place, took possession of the hides, and sold them as he saw fit at private sale.

The plaintiff undertakes to charge, as a commission to himself, the sum of 5 per cent for making these sales, in addition to the commission paid by him to brokers, claiming it as a banker's commission.

If the plaintiff saw fit to make the sales through brokers, who were paid for making them, and if he had a right so to do, and there was no agreement that he should have any commission, it is difficult to see on what ground he could make such a charge.

The master should have allowed the defendant Wyman to charge and deduct, in his account, the commission of 5 per cent for the benefit of his trust upon all sales made by him of merchandise claimed by the plaintiff. It is found in the stipulation that the defendant Wyman testified that 5 per cent was the usual commission for the services performed by him in the sale of leather, and there was no evidence to control this testimony.

The master has disallowed certain amounts which Wyman has charged for tanning, which amounts are stated in two separate items.

Most of these hides came from the tanneries of the Vanceboro firm; and it is to be noticed here that the defendant Wyman was trustee of the Vanceboro firm under a separate assignment, and for the benefit of separate creditors.

He was also trustee, under another assignment, for the benefit of the creditors of the Boston firm, and the master's disallowance leaves the condition of affairs as follows: The money of the Vanceboro trust belonging to the creditors of the Vanceboro firm is expended for the beneficial interest of the plaintiff in tanning the plaintiff's hides, and 7 cents a pound is the amount thus expended.

As to all the other lots of hides, the master has allowed the defendant Wyman 4 cents a pound for tanning, although he finds that the actual cost was 7 cents a pound.

The stipulation also finds that no price or limit of price for tanning was fixed between the plaintiff and either firm of F. Shaw & Bros., as to letter-of-credit hides.

The defendant Wyman, as trustee of the Vanceboro firm, or as trustee of the Boston firm, has expended the money of his trust in the protection and preservation of the property of the plaintiff, and has added to its value by the contribution of time, labor, and materials thereto, at an actual expense to his trust of 7 cents a pound. That expenditure could certainly be allowed to Wyman in the accounts.

Holmes, J., delivered the opinion of the court:

This is a bill in equity brought by a creditor of the Boston firm of F. Shaw & Bros., consisting of Fayette Shaw and Brackley Shaw, against that firm; against another firm in Vanceboro, Maine, of the same name, consisting of the above-named Shaws, and Thaxter Shaw; and against Ferdinand A. Wyman, to whom both firms have made voluntary assignments for the benefit of creditors. As the objections to the jurisdiction are now waived, and as the assets in controversy have been converted into money, and a large part of the plaintiff's claim has been paid, since the filing of the bill, leaving only certain items of the account in dispute, only such of the facts need be stated as are necessary in order to settle these disputed items.

The plaintiff, Moors, made advances to the Boston firm in several ways.

1. Under what is called the loan-account agreement, by indorsing their notes, etc., in Boston, taking as security bills of parcels of specified hides, which the Vanceboro firm were tanning for the Boston firm, and which were delivered by the Boston firm to, and held by, Thaxter Shaw, as agent for the plaintiff, with the consent of the Vanceboro firm. The Vanceboro firm agreed that the cost to Moors should not exceed 4 cents per pound, and in fact all charges for tanning were paid by the Boston firm to the Vanceboro firm. By the Boston firm's agreement, Moors had power in case of default, or if in his opinion the collateral did not afford a margin of 25 per cent above the amount unpaid, to sell at public or private sale without notice; and it was further agreed that all collateral security held by Moors for the Boston firm's account, whether under that contract or otherwise, might be taken and applied as general security for all existing or subsequent indebtedness. This account has been paid off in great part since the filing of the bill.

2. The plaintiff issued to the Boston firm letters of credit on Morton, Rose, & Co., of

London, under which the firm bought hides, taking bills of lading to the plaintiff's order by agreement, the plaintiff having a lien on the goods, bills of lading, and policies of insurance, with authority to take possession and dispose of them at his discretion for his security or reimbursement. Before the defendants' failure, the practice was for the plaintiff to indorse the bill of lading to the Boston firm, they signing a contract by which they received the hides as his agents, and agreed, as such agents, to send the hides to specified tanneries of theirs in Maine or New York, and to deliver to the plaintiff, upon demand, the identical leather into which the hides should be manufactured: the plaintiff not to be chargeable with any expense thereon. The intention of the agreement was stated to be to protect and preserve unimpaired the plaintiff's lien. After the failure, the plaintiff took possession of the hides as they arrived, and sold them through reputable brokers for fair prices. The plaintiff has paid Morton, Rose, & Co. the whole amount due them.

3. The plaintiff obtained letters of credit for the Boston firm, drawn upon the bank of Montreal by the agents of the bank, the Boston firm giving the bank an agreement similar to that with Moors last mentioned, with authority to the agents to take possession of the goods, and dispose of the same at discretion, and to charge all expenses, including commissions for sale and guaranty. Upon arrival of the hides, the agents of the bank indorsed the bills of lading to Moors, who before the failure indorsed them to the Boston firm under the same form of agreement as stated with regard to bills of lading under the Morton, Rose, & Co. credit. The hides arriving after the failure were sold by him in like manner as before stated. The plaintiff has paid the bank the whole amount due to it.

It is argued for the Shaws that Moors received the indorsed bills of lading as agent of the Bank of Montreal, and that, however this may be, he has lost his right in all hides received by him, under any bills of lading, before the failure, and turned over to the Boston firm as Moors' agents; but upon the record before us, we must take it that Moors received the hides, as the master's report implies that he did, on his own behalf. The agents of the bank looked to him for payment, and they have been paid. The bank had a title, whether absolute or qualified does not matter. See *De Wolf v. Gardner*, 12 Cush. 19; *Forbes v. Boston & L. R. Co.* 138 Mass. 154, 156; *Moors v. Kidder*, 8 Cent. Rep. 675. Moors got this title by indorsement, and had a similar title originally, under the Morton, Rose, & Co. bills of lading. His indorsement of the bills of lading to the Boston firm, as his agents, did not release this title. It was not a conveyance in form, and, being made only for the purpose of enabling him to get the goods from the carriers, it was not a conveyance in substance or effect. See *Moors v. Kidder*, *supra*; *Pratt v. Parkman*, 24 Pick. 42, 47; *Low v. De Wolf*, 8 Pick. 101, 107.

Neither did Moors lose his rights by giving the custody of the hides to the Shaws. They expressly agreed to hold as Moors' agents, and the general rule is perfectly well settled that

the custody of a servant or of a mere agent to hold is the possession of the master or principal. The only difficulties that have arisen have been due to the failure to distinguish accurately between such servants or agents and bailees who hold in their own name (*Hallgarten v. Oldham*, 135 Mass. 1, 9), or, in the case of pledges, between a delivery to the pledgor for his own purposes, and entrusting him with the custody on behalf of the pledgee (*Kellogg v. Thompson*, 2 New Eng. Rep. 170, 142 Mass. 72, 79). It might be argued that policy requires an exception to be made in favor of a *bona fide* purchaser for value from the general owner having the seeming possession of the goods, as against a person whose security depended upon possession, and who had made the owner his custodian. But the Massachusetts cases tend to show that there is no such exception, in the absence of fraud. *Kellogg v. Thompson*, and *Moors v. Kidder*, *supra*; *Thacher v. Moors*, 134 Mass. 156, 165. At all events there is nothing in the case to warrant our making one, even assuming that all parties before us are not concluded by the express agreement of the Shaws that the plaintiff's rights should remain. There is nothing in Wyman's position, as to proceeds in his hands, to diminish the rights which Moors had as against the Shaws; nor do his counsel argue that there is, so far as the question of possession is concerned.

The plaintiff has charged a commission of 5 per cent on the hides sold by him, of which rather more than nine tenths in value were imported under the Morton, Rose, & Co. credit, the rest under that of the Bank of Montreal. The defendants deny his right to sell at private sale, and more particularly deny his right to charge any commission. We see no reason to doubt that the sale was lawful, and we are of opinion that the plaintiff should be allowed the sum which the master has found to be a reasonable compensation for the services actually rendered by him, viz.: 2½ per cent upon the gross sales, or \$5,080.66. The argument is strong that the loan-account agreement authorizing the plaintiff to apply all security to any indebtedness imports an application in the manner and with the incidents there set forth, one of which was a charge of 2½ per cent commission. All of the facts tend to the conclusion that a commission was to be charged. See, further, *Varnum v. Meserve*, 8 Allen, 150, 161.

It is admitted that there was due to the plaintiff on April 1, 1886, the sum of \$61,448.87, as found by the master. Adding the commission, the amount is \$66,529.53. By the master's findings the defendant Wyman had in his hands on the same date \$89,533.34 proceeds of the plaintiff's security, or more than enough to pay what remains due, unless Wyman has a right to make certain charges which have been disallowed by the master.

The first of these is a charge of 5 per cent commission for sales made by Wyman. The master found no agreement to that effect with the plaintiff, and rightly disallowed the charge. There is no reason why a debtor selling his own property to pay his debt should charge his creditor for doing so, and there is no reason why Wyman in this respect should stand in a better position than the Shaws. So far as the sales were made by agreement, the agreement ex-

cluded the right to make a charge. It is at least a fair inference that he made the other sales, if rightful, on the same footing.

Mr. Wyman's second charge is for tanning the hides which were on hand at the time of filing the bill, and which were mostly in the process of tanning, and could not be removed without serious injury. The master finds that there was no agreement or understanding between the plaintiff and Wyman that the latter should make any charge to the plaintiff for tanning.

One item of \$43,298.64 was charged for leather which Wyman agreed to deliver to purchasers, as Moors' agent, and the proceeds of which in money he further agreed to deliver to Moors as soon as received; his contract expressly stating that Moors was not to be chargeable with any expenses incurred thereon. It will be seen that this agreement follows the form of the original contract of the Boston firm as to letter-of-credit hides, with such change only as was required by the fact that Wyman received the purchase money for the leather in the first place. We think that the master was plainly right in disallowing this charge.

The only remaining item is \$36,710.43, being the difference between 4 cents a pound, allowed by the master, and 7 cents, the actual cost of tanning. Of this sum, according to the statement of Wyman's counsel, \$13,972.89 was for tanning loan-account hides, for which the Vanceboro firm agreed that the cost to Moors should not be more than 4 cents. In the absence of agreement to the contrary, the master was warranted in finding that, as to these hides at least, Wyman proceeded on the terms of the contract, and could not charge more than 4 cents, if entitled to charge anything. There was nothing to preclude such a finding in the fact that Moors took possession of the bill-of-lading hides arriving after the failure. He had a right to do so, and if he had not had, we could not say, as matter of law or fact, that his doing so imported a repudiation of the distinct contract relations as to the loan-account hides in the tannery.

There is left, then, only \$22,737.54 in dispute, which might be deducted from the amount in Wyman's hands, and yet leave enough to pay the plaintiff. As to this sum we think that the allowance of 4 cents was sufficiently favorable to the defendants, and, if it were necessary to go further in order to secure the plaintiff's rights, we should have some difficulty in finding a warrant for making any allowance at all. The hides were bill-of-lading hides, which by the original agreement were to be manufactured into leather without any expense to Moors or the bank. Such bill-of-lading hides as Wyman did make an agreement about, he undertook to deal with in the same way. On these facts alone the argument against his right to charge is strong. But, further, bearing in mind that these hides were to be tanned and held by the Boston firm, and that the Vanceboro firm had nothing to do with them, if that fact be material, it is to be observed that, when the holder of the equity of redemption in property, or of a kindred interest, makes improvements upon it necessary to preserve it from destruction or great loss, he may be presumed to make such improvements in the in-

terest of the equity, for the purpose of at least diminishing the claim upon his general funds not pledged, and, if possible, of obtaining a surplus. Undoubtedly it was for the interest of the creditors of the Boston firm that the hides should be tanned rather than be spoiled. The principle is the converse of that which allows a mortgagee to charge for reasonable improvements. *Merriam v. Goss*, 189 Mass. 77, 82. There are obvious objections to allowing the holder of the equity to create a lien superior to an existing mortgage. Even if the Vancaboro firm were concerned, it would not necessarily change our opinion upon the matter, in view of the circumstances of this case.

Decree accordingly.

William I. BOWDITCH *et al.*

Charles E. RAYMOND *et al.*, Assignees, etc.

Plaintiffs' lease to defendants' assignors provided that, in case lessees should, during the term, **make an assignment** for the benefit of creditors, plaintiffs might lawfully enter upon and **expel lessees from the premises**, relet the same, and **hold lessees for any loss** arising from such reletting. Lessees made an assignment; **plaintiffs entered** under terms of the lease before lessees had made their first **publication of insolvency**. Assignees filed disclaimer of lease. **A claim against lessee's estate** for breach of covenant in the lease to pay rent is **not a debt absolutely due** within the terms of the statute; **nor** is such a claim **provable** as damages arising from surrender of the lease, the same having been terminated by re-entry before first publication of notice.

(Suffolk—Filed January 16, 1888.)

ON report. *Judgment for defendants.*

This was an appeal from a decision of the superior court affirming a decision of the court of insolvency, disallowing a claim offered by the plaintiffs against the insolvent estate of McDewell & Adams.

The case was heard in the superior court, before Mason, J., without a jury, upon an agreed statement of facts. He found for defendants, and reported the case for the determination of the supreme judicial court.

Plaintiffs, as trustees of the estate of John J. Dixwell, made an agreement to lease certain premises to McDewell & Adams, and in accordance therewith a lease was signed by the parties, March 30, 1883, the material portions of which were as follows:

"To have and to hold the said premises hereby demised unto the said McDewell & Adams, and their representatives, November 1, 1884, during the full term of ten years thence next ensuing. Yielding and paying the rent or sum of \$10,000 yearly, by equal monthly payments at the expiration of each and every month hereafter during said term; the first payment thereof to be made on December 1, 1884, now next ensuing.

The lessees, for themselves and their representatives, hereby covenant with the lessors, their representatives and assigns, that they will, during the said term, and for such further time as the said lessees, or any other person or persons claiming under them, shall hold the said premises or any part thereof, pay unto the lessors, their successors, heirs, or assigns, the said monthly rent, upon the day hereinbefore appointed for the payment thereof, and also all the taxes and water taxes and assessments, whatsoever, whether in the nature of taxes now in being or not, which may be assessed upon, or payable for or in respect of, the said premises, or any part thereof, during the said term. *** Provided always, and these presents are upon this condition, that if the said lessees, or their representatives or assigns, do or shall neglect or fail to perform and observe any or either of the covenants contained in this instrument, which on their part are to be performed, or if the said lessees shall be declared bankrupt or insolvent, according to law, or if any assignments shall be made of their property for the benefit of creditors, then, and in either of said cases, the lessors, or those having their estate in the said premises, lawfully may, immediately, or at any time thereafter and whilst such neglect or default continues, and without further notice or demand, enter into and upon the said premises, or any part thereof in the name of the whole, and repossess the same as of their former estate, and expel the said lessees and those claiming under them, and remove their effects, without being taken or deemed guilty of any manner of trespass, and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant; and thereupon the lessors may, in their discretion, relet the premises at the risk of the lessees, who shall remain for the residue of said term responsible for the rent and taxes herein reserved, and shall be credited with such amounts only as shall be by the lessors actually realized."

At the time of the signing of the lease, the premises were in the possession of Chickering & Co., under a lease. Chickering & Co. sublet to McDewell & Adams for the remainder of their term, and possession was taken under that lease. October 15, 1884, McDewell & Adams made an assignment of their property to Raymond & Ring, who took possession of their goods, and continued the business on the demised premises. On November 1, 1884, Charles P. Bowditch, one of the plaintiffs, went upon the premises for the purpose of making an entry under the lease of March 30, 1883. On December 1, 1884, the keys were handed to Bowditch. The superior court found, as facts, that on November 1, 1884, Raymond & Ring were in possession of the premises; that neither McDewell & Adams nor Raymond & Ring ever entered upon the premises under the lease of March 30, 1883; that upon, and from and after, December, 1, 1884, plaintiffs were in possession of the premises. The premises were afterwards relet at a reduced rental, to other parties, for the entire period of the lease.

On December 2, 1884, McDewell & Adams filed a voluntary petition in insolvency. On December 26 Raymond & Ring were chosen assignees of the insolvents, and an assignment

in due form of law was executed to them. The assignees filed a disclaimer of the lease. On July 24, 1885, the insolvents received their discharge in insolvency.

At a meeting of the creditors of McDowell & Adams, plaintiffs presented a claim for the entire rent of the premises which would accrue during the whole term under the lease, less certain credits for rent paid and the amount realized by the release of the premises. The right to prove such claim against the estate of McDowell & Adams was denied by the insolvency court.

Mr. J. B. Warner, for plaintiffs:

McDowell & Adams are, and will remain, liable upon their covenant.

The stipulation in a lease by which the lessor may re-enter for breach of condition, relet the premises at his discretion, and hold the lessee for any loss of rent, has been found in the usual forms of lease for a generation.

Way v. Reed, 6 Allen, 364.

It has been suggested that the entry was made the day before the term began, in order to show that all rights of possession were completely terminated before insolvency.

But even before the term actually began, the lessees had an interest, *interesse termini*, which, though not an estate, is recognized by the law as something more than a contract, which the holder could assign or sublet, and on which he could bring ejectment if possession were unlawfully withheld.

Taylor, Land. & T. § 176; Comyn, Dig. *Assignment* (A), *Estates* (G, 14); Shep. Touch. *267; Co. Litt. 46 b, 51 b; *Whitney v. Allaire*, 1 N. Y. 305, 311.

The lessee's obligation to pay rent springs from his covenant, and is wholly independent of possession, being complete though he never enters or even gives notice that he will not occupy.

Taylor, Land. & T. *supra*; *Becar v. Fluen*, 64 N. Y. 518; *Birkhead v. Cummins*, 33 N. J. L. 44.

The lessor has so little concern with the lessee's possession that, according to the weight of authority in this country, he is not even obliged to clear the premises of previous tenants.

Taylor, Land. & T. *supra*; *Gazzelo v. Chambers*, 73 Ill. 75; *Gardner v. Keteltas*, 8 Hill, 330.

The only defense, therefore, which a tenant could have, based on the fact that he had never gone into possession under his lease, would be some wrongful act of the landlord which prevented his taking possession, and which entitled him to repudiate the lease; *i. e.*, something tantamount to an eviction by unlawful act of the lessor.

Taylor, Land. & T. *supra*; *Spencer v. Burton*, 5 Blackf. 57.

No actual possession was taken by plaintiffs until December 1, 1884, long after the term had begun; and whether they were there, one or both, or whether doing business on their own account or as clerks, or whether not there in person at all, but allowing possession to be held by their assignees, is immaterial.

Taylor, Land. & T. *supra*; *Benson v. Bolles*, 8 Wend. 175; *Bacon v. Brown*, 9 Conn. 334; *Howard v. Ellis*, 4 Sandf. 369; *Kendall v. Carland*, 5 Cush. 74.

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If there had been anything which would have entitled the lessees to repudiate the lease, they were bound to do it, if at all, promptly; but, so far from this, they expressly recognize the lease in their schedules, as do the assignees in their disclaimer; and these admissions of the lease, and of the debt under it, are competent evidence.

Heywood v. Heywood, 10 Allen, 105; *Fellows v. Smith*, 180 Mass. 378.

The term included the day, November 1, on which the entry was made.

Although the arbitrary rule has been adopted that, in computing time, the day from which it is to be reckoned is to be excluded (*Atkins v. Sleeper*, 7 Allen, 487; *Bemis v. Leonard*, 118 Mass. 502; *Bigelow v. Willson*, 1 Pick. 485), yet this rule is always stated as applying only where there is nothing to indicate the intention of the parties; but when there is any, even the slightest, indication, the true intention must govern.

Kendall v. Kingsley, 120 Mass. 94; *Butler v. Fessenden*, 12 Cush. 78; *Stewart v. Griswold*, 134 Mass. 391; *Pugh v. Leas*, 2 Cowp. 714; *Isaacs v. Royal Ins. Co. L. R. 5 Exch. 296*.

That the intention in this case was to include the designated day seems established from the provision in the instrument itself.

The right of proof in insolvency, before statute of 1879, is governed by the following language: "Debts due and payable from the debtor at the time of the first publication of the notice of issuing the warrant may be proved and allowed against his estate at any meetings; and all debts at that time absolutely due, although not payable, may be proved and allowed as if payable, with a discount or rebate of interest when no interest is payable by the contract."

The word "debts" in this statute is to be construed liberally, in order to accomplish the two grand objects of the Act, namely, of relieving the debtor who surrenders his property, and of distributing that property among his creditors.

The statute is highly equitable in its character, and has always been administered avowedly upon equitable principles.

See *Lothrop v. Reed*, 18 Allen, 294, 297; *Barber v. Mann*, 4 Met. 302; *Gray v. Bennett*, 3 Met. 522; *Brown v. Lamb*, 6 Met. 203.

A claim for rent not yet accrued was considered as not provable, either under our law (before the amendment of 1879) or under the national bankruptcy law.

The nature of a claim for rent was discussed by Shaw, Ch. J., in *Bordman v. Osborn*, 23 Pick. 295.

See *Savory v. Stocking*, 4 Cush. 607; *Ex parte Houghton*, 1 Low. 554; *Treadwell v. Marden*, 123 Mass. 390; *Deane v. Caldwell*, 127 Mass. 242; *Stowell v. Richardson*, 3 Allen, 64; *French v. Morse*, 2 Gray, 111; *Riggin v. Maguire*, 82 U. S. 15 Wall. 549 (21 L. ed. 232).

In this class of cases not only is there no debt now payable, but there is no present liability, and total uncertainty whether there will ever be any. As pointed out in *Riggin v. Maguire*, *supra*, the covenant cannot be reduced to present or probable value.

In the light of these cases the lessees are now liable, absolutely, to a fixed monthly payment, which, though still alluded to as rent,

should, for the purposes of this discussion, be designated as a sum equal to the former rental. The obligation does not depend upon occupation, nor is it liable to be terminated by eviction.

Our insolvency system provides the machinery, through a jury trial, by which just such questions as this may be dealt with (*Lothrop v. Reed, supra*); and we ask only to have this contract treated as any other contract, and damages estimated, as was done in the case just cited, since the stipulation of the parties fixing the lessee's liability follows exactly the principles which the law would have applied without it.

Whitney v. Boardman, 118 Mass. 242; *Abbott v. Stearns*, 139 Mass. 168, 172.

It would seem strange indeed, considering the purpose of our Insolvent Act, and the equitable principle on which it is to be administered, if such a claim as this must be left hanging over the debtor because his liability cannot be measured.

The plain way is to treat the claim, as it is, simply one upon a contract to pay money in installments, subject to deduction by the application of the proceeds arising from an article of marketable value; and the whole thing is disposed of by deducting the present market value of the lease, and making the necessary rebates of interest.

In *Re Clancy*, 10 Nat. Bankr. Reg. 215, a claim for future rent under the covenants of a lease was allowed, in view of the facts that the leased premises had been taken by right of eminent domain, and that the tenant had been awarded a gross sum therefor, his liability for rent still continuing. The controlling fact there,—namely, that what was rent in name was no longer dependent on occupation,—is the decisive consideration here.

But the statute of 1879, chap. 245 (Pub. Stat. chap. 157, § 26), provides that the assignee may elect either to accept and hold under said lease or to disclaim the same; and if he elects to disclaim, the lessor, or those having his estate in the premises, may prove such damages, if any, as are caused by such surrender, as a debt against the estate of the debtor.

The whole spirit and purpose of this Act require the most liberal and equitable interpretation.

No amendment was needed in order to give to the assignee full rights over leasehold property held by the insolvent. The assignee always had the alternative, either to assume such a lease and be bound by its provisions, or to disclaim it and be free from all liability.

Hoyt v. Stoddard, 2 Allen, 442; *Com. v. Franklin Ins. Co.* 115 Mass. 278; *Abbott v. Stearns*, 139 Mass. 168; *Ex parte Houghton*, 1 Low. 554.

The statute is one which certainly presents many doubtful questions, especially when it is considered that the disclaimer works a technical surrender, which involves all the consequences of an abandonment by consent of parties.

See *Abbott v. Stearns*, 139 Mass. 168.

From the decisions upon the English statute (Act 1869 (32 and 33 Vict.), chap. 71, § 23), we shall get abundant light for the interpretation of our own.

The decisions under that statute, in so far as

they settle what the trustee may disclaim, will meet the argument of the defendants here, that the right to prove is limited to such cases as admit of disclaimer.

In *Ex parte Dyke*, L. R. 22 Ch. Div. 410, there was a lease with elaborate provisions, by which the lessor, on the expiration or prior termination of the lease, was to have the right to the hay and straw at feed prices, and the tenant was to have the right to remove the cottage which he had erected, etc. The tenant filed a petition in bankruptcy September 5, 1881. On October 13 trustees were appointed. On October 14 the landlord terminated the lease for breach of condition. On November 14 the trustees disclaimed the lease.

The principal question was whether the rights of the landlord and tenant were to be regulated by the provisions of the lease applicable to its termination, or whether the lease was to be considered as surrendered by the disclaimer, and therefore as if it had never been. By the English law, the disclaimer would relate back to the appointment of the trustees, and this raised the question whether the trustees could, on November 14, disclaim a lease which the landlord had chosen to terminate, in accordance with its terms, on October 14. The Master of the Rolls, Sir G. Jessel, says: "The question is wholly immaterial, because the lease actually vested in the trustees, certainly for a day; and they are entitled to disclaim it, and they have disclaimed. I do not intend to confine my observations to this particular case, and say that it is absolutely necessary that the lease should have actually vested in the trustee on his appointment; because it is quite possible that a lease might have come to an end before his appointment, and that it still might be allowable for him to disclaim it."

See also *Ex parte Paterson*, L. R. 11 Ch. Div. 903; *Re Maughan*, L. R. 14 Q. B. Div. 956; *Ex parte Corbett*, L. R. 14 Ch. Div. 122; *Re Tickle*, 3 Morrell, Bankr. Rep. 126; *Ex parte Walton*, L. R. 17 Ch. Div. 748; *Hill v. East & W. I. Dock Co.* L. R. 9 App. Cas. 448.

The damage provable under the English law is measured by the difference between the rent reserved and the diminished rent which the lessor is now obliged to take,—exactly the measure adopted by the parties to this lease.

Ex parte Lynoi, C. & I. Co. L. R. 7 Ch. App. Cas. 28; *Ex parte Blake*, L. R. 11 Ch. Div. 572.

Stat. 1884, chap. 293, provides that "equitable liabilities shall be deemed to be debts provable against estates in insolvency, and against estates of deceased persons represented insolvent; and all proceedings in respect to the proof of any such equitable liability, whether by way of appeal or otherwise, shall be the same in all respects as if it were a debt upon which an action at law might have been brought."

It had already been the practice of this court to resort to general equitable considerations in administering the statute (*Washburn v. Tidale*, 3 New Eng. Rep. 404, 143 Mass. 376; *Franklin County Nat. Bank v. First Nat. Bank*, 138 Mass. 515; *Abbott v. Stearns*, 139 Mass. 168); but this recent Act is directed explicitly to the matter of proof, and should be given weight in considering a claim the result of excluding which would be highly inequitable.

Messrs. W. G. Russell and E. B. Hale, for defendants:

The right of the lessors, after putting an end to the lease, to hold McDowell & Adams responsible for the rent reserved during the remainder of the term, is not a claim which is provable against their assignees in insolvency.

Unless plaintiffs can show some difference in principle between a claim for future rent under a lease which has been terminated, and a like claim under a subsisting lease, the case is already decided against them.

Deane v. Caldwell, 127 Mass. 242.

The ground upon which a claim for future rent under a subsisting lease is rejected is, that our insolvent law allows no debts to be proved except such as are "absolutely due" at the time of first publication, or, in the case of certain enumerated contingent claims, at the time of proof; and that rent, which accrues from time to time, and depends upon occupation, cannot be due *in solido* beforehand, as it is never payable if the lessee is evicted.

Bordman v. Osborn, 23 Pick. 295; *Ex parte Houghton*, 1 Low. 557; *Deane v. Caldwell*, 127 Mass. 244.

In the present case, the liability of the lessees under a clause which provides that "the lessors may, at their discretion, relet the premises at the risk of the lessees, who shall remain for the residue of said term responsible for the rent and taxes herein reserved, and shall be credited with such amounts only as shall be by the lessors actually realized,"—is subject to uncertainty.

The statute plainly contemplates that the discharged insolvent may be burdened with many liabilities which cannot be proved against his estate. The section defining the claims which are provable ends as follows: "No debt other than those above mentioned shall be proved or allowed against the estate."

Pub. Stat. chap. 157, § 26.

The following cases of unprovable claims will serve to indicate the variety of liabilities from which the insolvent is not discharged, and at the same time to illustrate the objections to which the present claim is exposed: *Loring v. Kendall*, 1 Gray, 303 (liability of surety on a probate bond before breach); *French v. Morse*, 2 Gray, 111 (covenant against incumbrances not paid off by covenantee until after the commencement of bankruptcy proceedings); *Morton v. Richards*, 13 Gray, 15 (promise by new partnership to pay old debts, not taken up by promisee until after insolvency of promisor); *Stowell v. Richardson*, 3 Allen, 64 (liability of an indorser upon a promissory note not maturing before time for proof expires; although the statute expressly covers the case of a debtor liable for a debt in consequence of having indorsed a promissory note); *Bangs v. Lincoln*, 10 Gray, 600 (individual liability of stockholders for debts of a manufacturing corporation, under Rev. Stat. chap. 88, § 16, which provided that in certain cases the members should be "jointly and severally liable for all debts and contracts made by such company").

Ex parte Lake, 2 Low. 544.

Plaintiffs cannot prove under Stat. 1879, chap. 245, § 1.

Pub. Stat. chap. 157, § 26.

To show the utter impossibility of applying

that statute to the present case, it is only necessary to revert to the fact that the lease in question, so far as it gave any property to the lessees, was wholly at an end before the beginning of insolvency proceedings. There remained in them on the 2d of December nothing but a bare liability.

There has never been a moment since the beginning of insolvency proceedings that the lessees have had a beneficial interest in this contract.

See *Nichols v. Eaton*, 91 U. S. 716 (23 L. ed. 254); *Ex parte Piercy*, L. R. 9 Ch. App. Cas. 33.

Perhaps a claim like this, and sundry other claims, might well have been made provable under the Insolvent Act of 1888. The court, however, cannot extend that Act to any cases for which it has not in terms provided.

Morton v. Richards, 13 Gray, 18.

The main object of the Act was not to clear the insolvent debtors, but its object equally was to define the rights and duties of the assignee.

As the law stood before 1879, the assignee might, by mere entry, make himself liable for the rent for the remainder of the term, or until he assigned.

Mason v. Smith, 131 Mass. 510; *Hoyt v. Stoddard*, 2 Allen, 442; *Com. v. Franklin Ins. Co.* 115 Mass. 278. See *Ex parte Walton*, L. R. 17 Ch. Div. 751.

There are very substantial differences between the English statutes and our own; and it is obvious that any decision concerning the proper scope of the English Acts can be of little use in the construction of our own. The difference between the Act of 1869 and that of 1883 as to the right of disclaimer, for example, would seem to be very trifling; and yet it was apparently upon this difference that the court rested its decision in the case of *Re Maughan*, L. R. 14 Q. B. Div. 956, Field, J., intimating that, under the earlier Act, there would have been no right of disclaimer.

The entry was made in this case November 1, 1884. The term of the lease,—"from the 1st day of November, 1884, during the full term of ten years thence next ensuing," began, without doubt, on November 2.

Atkins v. Sleeper, 7 Allen, 487.

The provision in the lease that the lessors, under certain circumstances, may enter upon the premises, can have no sensible application to that period before the beginning of the lease, when the lessees have no occupation or right of occupation under the lease, and cannot be expelled, and cannot waive a trespass.

See *Johns v. Whitty*, 3 Wils. 127.

But, although the plaintiffs could not re-enter under the lease, their conduct amounted to an unequivocal refusal to admit the lessees into possession; and the latter had a right to treat such conduct as putting an end to the lease.

If possession is withheld by the lessor, or one under his authority, he (the lessee) may at his option entirely repudiate the contract, or bring an action for damages against the landlord for breach of the agreement.

Taylor, Land. & T. 7th ed. § 176; *Trull v. Granger*, 8 N. Y. 115; *Clark v. Butt*, 26 Ind. 286; *Coe v. Clay*, 5 Bing. 440; *Cibel & Hill's Case*, 1 Leon. 110; *Wood, Land. & T.* p. 880.

But there was an end of the lease by surrender on the 1st day of December, even if it had not been terminated before. On that day the premises had been vacated, the keys surrendered and accepted; and the court has found as a fact, which is not objected to, that the plaintiffs were in possession of the premises on that day. That these facts put an end to the tenancy there can be no doubt.

Deane v. Caldwell, 127 Mass. 242, 248; *Amory v. Kannoffsky*, 117 Mass. 351; *Ex parte Houghton*, 1 Low. 554, 558.

Morton, Ch. J., delivered the opinion of the court:

Under our insolvent law, prior to the Statute of 1879, chap. 245, no debts, with certain exceptions not material to this case, were provable, unless they were debts "absolutely due" at the time of the first publication of the notice of issuing the warrant. It has accordingly been repeatedly held that future rent, to accrue under a lease in which the insolvent debtor is lessee, cannot be proved. *Savory v. Stocking*, 4 Cush. 607; *Treadwell v. Marden*, 123 Mass. 390; *Deane v. Caldwell*, 127 Mass. 242; *Ex parte Houghton*, 1 Low. 554.

The principle of these cases is that such rent is not a debt absolutely due at the time of the first publication. The lease may be terminated by the eviction of the lessee or otherwise, and no rent may ever accrue or become due. The lessor's claim is a contingent one. It is not contingent merely as to amount, but the very existence of the claim depends upon a contingency. *Bordman v. Osborn*, 23 Pick. 295.

In the case before us, the lease contains the provision that, if the lessees shall be declared bankrupt or insolvent, or shall make an assignment for the benefit of their creditors, the lessors may enter and expel the lessees; "and thereupon the lessors may, at their discretion, relet the premises at the risk of the lessees, who shall remain, for the residue of said term, responsible for the rent and taxes herein reserved, and shall be credited only with such amounts as shall be by the lessors actually realized." The plaintiff contends that under this provision the liability of the lessees arises solely from their covenant, and that the amount to be paid by them is not technically rent, as the provision does not contemplate that they are to occupy the premises. But, however this may be, the sums to be paid partake of the character of rent so largely that they come within the same principle. The covenant is to pay the rent reserved, reduced by such sum as the lessors might receive from the new lessees, if they should relet the premises. At the first publication of notice, there was a contingency, not merely as to the amount of liability, but as to whether it would ever attach or arise out of the covenant. The lessors, in their discretion, might not relet the premises, but resume possession of them. It may be that the lessees will be evicted by a paramount title, in which case it cannot be doubted that the liability of the original lessees would be terminated, or fail to attach. It may happen that the new lessees will pay as large a sum as the rent and taxes reserved in the lease, in which event no liability would arise under the covenant. Or the premises might be de-

stroyed by fire, and thus the liability of the lessees be terminated. The existence of any debt in the future depends upon contingencies, and therefore the plaintiff's claim cannot be proved under our insolvent law prior to the statute of 1879. In the bankrupt court of this district it has been decided that a claim under a like clause in a lease could not be proved in bankruptcy. *Ex parte Lake*, 2 Low. 544.

The next question is, What is the effect of Stat. 1879, chap. 245, § 1, re-enacted in Pub. Stat. chap. 157, § 26? The part of the statute which is of importance in this case is as follows:

"When any of the property of a debtor consists of a lease or agreement in writing, whereby he is liable for the rent therein reserved, or for the use and occupation of premises as therein stipulated, the assignee at any time may, and at the request in writing of either the debtor, or of the lessor, or of those having his estate in the premises, shall, within twenty days after such request, by a written instrument filed with the records of the case, elect either to accept and hold under said lease or agreement in writing, or to disclaim the same; and if he elects to disclaim, such lease or agreement in writing shall thereupon be deemed to have been surrendered as of the day on which said disclaimer was so filed, and the debtor, provided he obtains his discharge in insolvency, shall be discharged from all liability under or by reason of said lease or agreement in writing, whether the assignee does or does not disclaim the same as aforesaid; and the lessor, or those having his estate in the premises, may prove such damages, if any, as are caused by such surrender, as a debt against the estate of the debtor."

The objects of the statute were to define the rights and duties of assignees, when they found a part of the property of the debtor to consist of a lease or other instrument, under which he was liable for rent, or use and occupation; and to give them the right to accept or disclaim such property, as the interests of the estate required: to enlarge the effect of the debtor's discharge, by making it a bar to his liability under such lease or agreement; and to give to the lessor thereunder the correlative right to prove his damages, if it is disclaimed and surrendered. All parts of the statute refer to the same case, where there is property of the debtor consisting of a lease or an agreement for use and occupation. In other words, the provisions as to the discharge of the debts and the proof by the lessor apply only to the case where there is an existing lease or agreement which the assignee can accept or surrender. The lessors can prove only such damages as are caused "by such surrender." In inquiring whether the statute applies to the case at bar, we are met with this difficulty: Before the first publication of notice, the lessors had entered upon the premises and expelled the lessees, and thus practically terminated the lease. The lessees had no longer any rights in the premises; they could not occupy them; they could not re-enter; the only interest they had in the matter was a bare liability, under their covenant or agreement, to indemnify the lessors for any deficiency in the amount they might realize from new tenants, if they chose to let to such tenants. There was no property of the debtor which the assignee

could accept. There was no right or interest in the debtor which the assignee, if he had undertaken to accept, could take or hold; and there was nothing for him to surrender. Suppose this had been a case where the lessors had entered and expelled the insolvent two or three years before the insolvency. Could an assignee, under the guise of accepting the lease, revive it and subject the estate to the liability of indemnifying the lessors for any deficiency in the rent, and thus make them preferred creditors? In such case there is no election for the assignee to make,—there is nothing to accept and nothing to surrender; and we are of opinion that it does not fall within the statute. The Legislature had in mind the ordinary case of an existing lease or agreement; it did not contemplate a case like the one before us, and did not provide for it. The plaintiffs cite several English cases arising under the Bankruptcy Act of 1869; from which our statute of 1879 was taken, with some modifications. 32 & 33 Vict. chap. 71, § 28; *Ex parte Duke*, L. R. 22 Ch. Div. 410; *Ex parte Paterson*, L. R. 11 Ch. Div. 908; *Re Maughan*, L. R. 14 Q. B. Div. 956; *Ex parte Corbett*, L. R. 14 Ch. Div. 122; *Re Tickle*, 8 Morrell, Bankr. Rep. 126; *Ex parte Walton*, L. R. 17 Ch. Div. 746.

The English bankruptcy statutes differ so much from our insolvent law that adjudications under the former are of very little aid to us in determining the construction of our statutes. But it will be found, upon examination, that the cases cited are not like the case at bar. In each of them there was an existing lease or term vested in the bankrupt at the institution of the bankruptcy proceedings, having more or less time to run.

We have considered the case in the light most favorable to the plaintiffs; as if they had entered and expelled the lessees after the lease went into operation. We do not find it necessary to consider whether they, in fact, took possession before the term commenced, or, if they did so, what would be the effect upon the rights of the lessors and lessees. The facts that the assignees disclaimed the lease in this case, and that the insolvent debtors entered the plaintiffs' claim upon their schedule of creditors, are unimportant. Neither could this change the application of the statute, or affect the rights of the creditors.

Judgment for defendants.

Emery KNOWLTON *et al.*

v.

James KEENAN *et al.*

In an action by a mail contractor against a subcontractor for failure to perform the subcontract, defendant offered, as an excuse for his nonperformance, evidence that, at and before the execution of the subcontract, plaintiff fraudulently promised to procure a change in the mail schedule, and fraudulently represented that he could secure such change, when at the time he knew that he could not do so; and that he did not thereafter do so. *Held:*

(a) That what was sought to be

proved, if a representation at all, was a representation that something should thereafter be done, and the offer was therefore an attempt to prove a contemporaneous oral contract.

(b) That proof of such contemporaneous oral contract, even if fraudulently made by the plaintiff, was inadmissible, since its effect would be to add to or control the written contract in suit; and such written contract was not itself fraudulent.

(Worcester—Filed January 10, 1888.)

ON defendants' exceptions. *Overruled.*

This was an action of contract upon an agreement in writing dated June 22, 1885, entered into between plaintiffs and James Keenan as principal, and Frank F. Jones, James Keenan, Jr., and M. Coffee as sureties, for transporting the United States mail between Mashpee and Sandwich.

The case was tried in the superior court without a jury. It appeared that Keenan refused to carry the mail under the schedule annexed to the contract, and plaintiffs sublet the contract to other parties at an advance of \$40 a year above the price stated in the contract with defendants. The judge found for plaintiffs, and defendants alleged exceptions.

Further facts appear in the opinion.

Messrs. John W. Corcoran and Thomas F. Gallagher, for defendants:

One of the defenses relied on in this case was fraud on the part of plaintiffs. And the conversation between the plaintiff Jackson, and the principal defendant, Keenan, had at the time the agreement was executed, was admissible upon the issue raised.

Milliken v. Thorndike, 103 Mass. 385; *Holbrook v. Burt*, 22 Pick. 546; *Kerr*, Fr. 388.

If the evidence offered by the defendants tended to show that the execution of the agreement was a part of a plan of deception by which the defendants were led to enter into the agreement, and the defendants stated that the evidence offered had that tendency, then such evidence was material and admissible.

Holbrook v. Burt, 22 Pick. 547; *Page v. Bent*, 2 Met. 374.

What the character of the representation of plaintiff was, was a question of fact to be submitted, under proper instructions, to the jury, or, in the case at bar, to be first heard, and then ruled upon, by the court. The court should have admitted the evidence.

Milliken v. Thorndike, 103 Mass. 385; *Page v. Bent*, 2 Met. 371-374.

The issue of fraud was raised by the defendants. It was then a material question what the character of the representation made by the plaintiff was. The defendant offered evidence of a representation made by the plaintiff, upon his own knowledge, upon a matter susceptible of knowledge, and the defendant claimed that he had relied upon such representation, and believed it to be true.

This evidence was material and admissible.

Page v. Bent, 2 Met. 374, and cases cited.

The evidence offered by the defendants was admissible, not on the ground that it was to add to or vary the terms of the written con-

tract, but to prove facts and circumstances, and also acts of the parties, for the purpose of showing their understanding of its terms.

Knight v. New England Worsted Co. 2 Cush. 271, 283, 284; *Broadbury v. Dwight*, 3 Met. 83, 84; *Hodges v. King*, 7 Met. 586.

In an action for nonfulfillment of a written agreement, parol evidence is admissible to show that the defendant signed the document upon the understanding between the parties that it was not to operate as an agreement unless a certain condition was performed.

4 Jacob's Fisher's Dig. p. 5028; *Pym v. Campbell*, 6 El. & Bl. 870; *S. C.* 2 Jur. N. S. 641; *S. C.* 25 L. J. Q. B. 277.

If the representations and statements of the plaintiff Jackson which were excluded by the court did not amount to fraud, they certainly tended to show an oral agreement collateral to the written agreement, and should have been admitted by the court for that purpose.

4 Jacob's Fisher's Dig. pp. 5029, 5030; *Malpas v. London & S. W. R. Co.* L. R. 1 C. P. 336; *S. C.* 1 H. & R. 227; *S. C.* 12 Jur. N. S. 271; *S. C.* 35 L. J. C. P. 166; *S. C.* 13 L. T. N. S. 710; *Morgan v. Griffith*, L. R. 6 Exch. 70.

Mr. S. L. Graves, for plaintiff:

When there is an agreement in writing, it merges all previous conversations and parol agreements.

2 Pars. Cont. p. 549; *Munde v. Lambie*, 122 Mass. 338, and cases cited; *Potter v. Smith*, 103 Mass. 68; 1 Greenl. Ev. pp. 312-319.

If such a statement was made by the plaintiffs before the execution of the contract, it was simply an expression of opinion; for it was not in the power of the plaintiffs themselves to change the schedule time,—a fact which the contract itself shows and plainly states, and which the defendants well knew.

If the plaintiffs stated that they would secure a change in the schedule time of carrying the mails, and it was their opinion and belief that they could do so, and they did not intend to deceive defendants by the statement, it was not a fraud, although the statement may have proved untrue.

3 Met. 374, and cases cited.

Devens, J., delivered the opinion of the court:

The defendants made a written contract with the plaintiffs (who were themselves contractors with the United States, having authority to sublet their contract) to carry the mails from Mashpee to Sandwich and back, according to a certain schedule. As an excuse for the non-performance of their contract, they offered evidence that, at and before the execution of this contract, the plaintiffs fraudulently promised to procure a change in the schedule, and fraudulently represented that they could secure such a change; that they knew at the time that they could not; and that they did not thereafter do so.

The fraud which the defendants sought to establish was the failure to perform an oral promise,—a promise contemporaneous with the written agreement, and constituting a part of the transaction, which the plaintiffs knew they could not perform.

The case at bar is readily distinguishable from those cases where it has been held that, if a per-

son makes a representation of a fact as of his own knowledge in a matter susceptible of knowledge, and such representation is not true, or where, in a matter of opinion, judgment, or estimate, dishonestly, and with the intent to deceive, states that as of his own knowledge which is not true; and the party to whom the statement is made relies and acts upon it as true, and thus sustains damage,—it is a fraud and deceit, for which the party making it is responsible. *Tryon v. Whitmarsh*, 1 Met. 1; *Pag v. Bent*, 2 Met. 371; *Miliken v. Thorndike*, 103 Mass. 385; *Munde v. Lambie*, 122 Mass. 336. That which the defendant sought to prove, if it can with propriety be termed a representation at all, was a representation that something should thereafter be done. Such a representation, from its nature, could not be true or false at the time it was made, and, if anything, was a contract or promise. The difference between a representation that something exists which does not, and a representation that something shall be done thereafter, is obvious. *Beattie v. Ebury*, L. R. 7 Ch. App. Cas. 804. A representation which amounts to an engagement, if enforceable, must be so as amounting to a contract. "There is no middle term, no *tertium quid*," says Lord Cranworth, "between a representation so made as to be effective for such a purpose—and being effective for it—and a contract." *Maunsell v. White*, 4 H. L. Cas. 1056.

What the defendants sought to establish by their evidence was an oral contract by which the terms of the written contract were to be changed by the efforts of the plaintiffs; and the mails which defendants had, in writing, agreed to transport according to a specified schedule, were to be transported according to a different schedule, to be obtained from the Postmaster General. The principle that written contracts are not to be enlarged, added to, or controlled by previous or contemporaneous oral agreements, is too well settled to require citation of authorities. Proof of such a representation as that offered by the defendants was proof of an oral contract only, to be thereafter executed. Nor, even if the plaintiffs made this oral contract fraudulently, knowing they could not perform it, would that have rendered the evidence admissible. There was no fraud in the written contract itself; and such evidence could not have been received to control its operation, and virtually to annul it.

Exceptions overruled.

COMMONWEALTH of Massachusetts

Gridley B. ROWELL.

1. Mere surplusage will not vitiate a complaint or indictment, and need not be established by proof.
2. The complaint must allege all the material elements which constitute the offense charged, and they must be proved.
3. If the complaint unnecessarily allege anything which is descriptive of the identity of the offense, it must be proved as alleged.

4. Where the defendant was driving a milk wagon on which was painted a license and the name "Rowell & Lawrence," on which wagon were cans of milk not marked "skimmed milk," from which was taken a quantity of adulterated milk; and where the complaint charged defendant and one Lawrence, as copartners, with having in their possession adulterated milk, with intent to sell the same, it was not necessary for the government to prove that defendant and Lawrence were partners.
5. The fact that defendant was upon the wagon was competent evidence for the jury upon the issue whether he was in possession of the milk with intent to sell it.

(Suffolk.—Filed February 6, 1888.)

ON defendant's exceptions. *Overruled.*

Complaint alleged that Gridley B. Rowell and John A. Lawrence, copartners in trade, did have in their possession a certain quantity, that is to say, one pint, of milk not of good standard quality,—that is to say, milk containing less than 13 per cent of milk solids,—with intent then and there unlawfully to sell the said milk within this Commonwealth; that the said Rowell and the said Lawrence, copartners as aforesaid, did have in their possession a certain quantity, that is to say, one pint, of milk to which a certain foreign substance, to wit, annatto coloring matter, had been added, with intent then and there unlawfully to sell the said milk within this Commonwealth, against the peace of said Commonwealth, etc.

The government introduced evidence tending to show that one pint of milk was taken from a two-quart can, not marked "skimmed milk," on a team on which was painted a license and the name "Rowell & Lawrence," on which team were certain other cans of milk and the defendant, who handed the milk to Jordan, a chemist in the employ of said milk inspector, for analysis.

There was also evidence, on cross-examination of the government witnesses, that there were other milk dealers in Boston named Rowell.

Jordan testified that he analyzed about a teaspoonful of the milk, and found that it contained twelve and thirty-four one hundredths milk solids; that he, with the assistance of Babcock, the milk inspector, analyzed about a gill of said milk, and found that it contained annatto, a coloring matter, which they extracted, and with it colored a circular piece of paper about the size of a nickel five-cent piece, a light yellow, which was submitted in evidence without objection.

The government offered no evidence tending to prove a copartnership between this defendant and Lawrence, and no evidence that the defendant was the servant or agent of said copartnership, or of any other person, and rested.

The defendant offered no evidence, but contended, and asked the court to rule, that under the complaint—which alleged that Gridley B. Rowell and John A. Lawrence, copartners in trade, committed the offense charged in the complaint aforesaid, and that the milk was in

their possession with intent to sell—the defendant could not be convicted; but the presiding judge declined so to rule, and ruled that if the jury believed, beyond a reasonable doubt, that the milk was in the possession of the defendant at the time the sample was taken from the can, with intent to sell the same, he should be convicted notwithstanding the allegations in the complaint in reference to copartnership with Lawrence.

Defendant's counsel requested the court to instruct the jury: 1. In order to convict, the government must prove that there was a copartnership between said Rowell and Lawrence, and that the defendant was one of said partners, Rowell & Lawrence, the name on the wagon. 2. The government not having submitted any evidence that there was such a copartnership, and no evidence that he was a copartner, and no evidence that he was the servant or agent of said copartnership, or of any other person, he cannot be convicted. 3. The mere fact that the defendant was in the wagon marked Rowell & Lawrence would not, of itself, be evidence that he intended to sell the milk or expose or exchange or offer for sale or exchange said milk. 4. If the cart did not belong to Rowell, then the milk was not in his possession.

The judge declined to give the instructions, but instructed the jury that if the defendant was upon the said wagon, and in charge of the same, that was evidence from which the jury might find that he was in possession of said milk with intent to sell the same.

To which rulings, and refusals to rule and instruct, the defendant excepted.

Mr. F. A. Perry, for defendant:

The complaint charges a joint act, like conspiracy or riot. There is no provision in the common law for indicting a copartnership. A partnership cannot commit a crime.

2 Bl. Com. bk. 4, p. 21.

The statute clearly implies that it is individuals, and not associations, that may be complained of for acts done by themselves or their servants or agents. As great strictness is required in proof of criminal allegations, it seems clear that the government failed to prove its complaint.

See 1 Greenl. Ev. § 58; *Com. v. Ray*, 3 Gray, 441.

The allegation in the complaint that the defendant and John A. Lawrence were copartners, and as such did have in their possession a certain quantity, that is to say, one pint, of milk, etc.,—is descriptive, and must be proved as alleged, with precision and exactness.

1 Greenl. Ev. §§ 56, 64; *Com. v. Wellington*, 7 Allen, 299; *Com. v. Hartwell*, 128 Mass. 415; *Com. v. Pierce*, 130 Mass. 31; *Com. v. Moore*, Id. 45; *Chapin v. White*, 102 Mass. 139; 124 Mass. 340; *Roscoe*, Cr. Ev. 9th ed. 90, 92; 1 Russell, Cr. 5th ed. p. 25; *Coleman v. State*, 2 S. W. Rep. 859; *Com. v. Tobias*, 1 New Eng. Rep. 506, 141 Mass. 132; 3 Greenl. Ev. § 10.

Mr. Andrew J. Waterman, Atty-Gen., for the Commonwealth:

The instruction of the court as to inference to be drawn from the possession of milk by the defendant was correct.

The fact that the defendant was on a milk wagon, with the appurtenances described, was evidence from which the jury might properly

infer that he intended to sell the milk, or had exposed it for sale.

The allegation that Rowell and Lawrence were partners was mere *descriptio personarum*, or addition, and not a part of the description of the offense charged, and need not be proved.

Com. v. Lewis, 1 Met. 153; *State v. Nelson*, 29 Me. 329.

It is within the analogy of *Com. v. Cooley*, 10 Pick. 37, where the indictment alleged that the burying-ground (in which the offense was committed) "belonged to the First Congregational Parish in Greenfield," where it was held that the allegation was unnecessary, and did not become material by having been introduced into the indictment.

See also *U. S. v. Howard*, 3 Sumn. 14; *State v. Noble*, 15 Me. 476.

Morton, Ch. J., delivered the opinion of the court:

The first count of the complaint charges that "Gridley B. Rowell and John A. Lawrence, copartners in trade, of said Boston," had in their possession, with intent to sell it, milk not of good standard quality. The second count, upon which alone the defendant Rowell was convicted, charges that "the said Rowell and the said Lawrence, copartners as aforesaid," had in their possession, with intent to sell it, milk to which a foreign substance had been added. The court refused to rule that it was necessary for the government to prove that Rowell and Lawrence were copartners, and the defendant Rowell excepted.

The rule is that mere surplage will not vitiate a complaint or indictment, and need not be established by proof. The complaint must allege all the material elements which constitute the offense charged, and they must be proved. And if the complaint unnecessarily alleges anything which is descriptive of the identity of the offense, it must be proved as alleged. But any allegations not descriptive of the identity of the offense, which can be omitted without affecting the charge against the defendant and without detriment to the complaint, may be treated as surplage, and need not be proved. *Com. v. Pray*, 13 Pick. 359; *Com. v. Cooley*, 10 Pick. 37; *Com. v. Lewis*, 1 Met. 151.

In the case at bar, the allegation that the defendants are copartners in trade is entirely immaterial. If it be stricken out, the complaint is good and the same offense is charged. It is not one of the elements of the offense that they were partners, and the allegation may be rejected as surplage, and need not be proved. The rulings of the court upon this subject were correct. The court also correctly ruled that the fact that the defendant Rowell was upon the wagon, under the circumstances stated in the testimony in the case, was competent evidence for the jury upon the issue whether he was in possession of the milk with intent to sell it.

Exceptions overruled.

Winnifred SHORT *et al.*

v.

John DEVINE.

A grant to the defendant reserved to the grantor, his heirs and assigns, the right

to pass and repass with teams and otherwise over and upon a strip of land ten feet in width on the southerly line of the premises. A devise by the said grantor gave to the plaintiff, her heirs and assigns, a parcel of land adjoining the said way, at the east end, together with the privileges and easement of said way to and from the street. *Held:*

(a) That the right to a partition fence is part of the estate in the land, and this right includes the burden of having one half of the fence upon the premises, and the privilege of having the other half upon the coterminous land.

(b) The reservation of a right of way over land, the line of which coincides with the division line between the lands and others, cannot affect the right to a partition fence on the line.

(c) If an adjoining owner having the right of free access from any part of his lands to the way does not assert such right, but assents to the erection of a partition fence, the statute in relation to such fences applies.

(d) In the absence of any evidence or custom to the contrary, it may be assumed that a person who receives a right to pass through his neighbor's yard receives it under the same conditions as to entrance to the yards that owners generally impose upon themselves.

(e) The reservation, in a deed of a house and lot, of a right to pass through the yard, does not imply a right to remove usual and reasonable gates at the entrance.

(Bristol—Filed February 6, 1888.)

ON report. *Judgment on the verdict.*

Action of tort for obstructing plaintiffs' right of way.

The plaintiffs hold their estate under the will of Thomas Devine, deceased, and the defendant holds his under a deed from the said Thomas Devine to him.

At the trial it was agreed that the plaintiffs had a right of way over and upon the premises described in said deed of Thomas Devine to the defendant, within the limits named in said deed.

It was also agreed that the defendant had built, as a division fence so called, a close board fence, supported with posts, along and upon the south line of the way described in said deed, which is the south line of defendant's premises; the fence and posts averaging from 6 to 8 inches in thickness and between 4 and 5 feet in height. The defendant had also caused to be made and hung across and upon said way, at the easterly end thereof, two close board gates. At the westerly end of said way, defendant had erected two open slat gates, 11 feet wide, this being the only way from the plaintiffs' premises to and from the public highway. No question was made at the time, that, if the defendant had the right to erect and maintain gates and fence, the gates and fence above described were not reasonable and suitable. There was no evidence that the fence had at any time actually obstructed the plaintiffs in the use of the way.

The plaintiffs requested the court to rule and to instruct the jury that, "under the clause in said deed reserving a way, the fee remained in the grantor, and the plaintiff Winnefred, as his heir and devisee, acquired a right of way in the *locus* as appurtenant to the lot devised to her; and that she had a right to use it for all beneficial purposes for which a street or way might be rightfully used, including the ways mentioned in the deed of the grantor to the grantee, and otherwise, without being obstructed in its said use by gates, fences, bars, or otherwise.

"If the fee did pass from the grantor to the grantee, the plaintiffs had a right of way over the *locus* as appurtenant to the lot devised to Winnefred Short, and had a right to use the same as before named."

The court declined so to rule, and ruled that the fee in the land over which the right of way was reserved in the deed passed to the grantee therein, and that the defendant, as owner thereof, subject to said right of way, had the right to build and keep up suitable gates across the same at either end, and also to build and maintain a suitable division fence upon the line between him and the adjoining proprietor; and directed a verdict for the defendant.

Mr. J. C. Blaisdell, for plaintiffs:

The way is accurately described as being a strip of land ten feet in width, on the southerly line of the premises conveyed, and the plaintiffs have a right to the entire width of the ten feet to travel over and upon at all times and for all purposes for which the way may be used, and any narrowing of the way, even to the extent of a few inches, is an obstruction, and may be removed.

Welch v. Wilcox, 101 Mass. 162.

The fence that is called a division fence is well enough as a fence, but it is not in the right place,—it encroaches upon our rights; it occupies from six to eight inches of our way, and ought to be removed.

Gates interfering with the convenient use of a way are an obstruction.

Dickinson v. Whiting, 2 New Eng. Rep. 356, 141 Mass. 414; *Fox v. Union Sugar Refinery*, 109 Mass. 292; *Stearns v. Mullen*, 4 Gray, 152; *Sargent v. Hubbard*, 102 Mass. 381.

The necessity of opening and closing the gates, as well as the more limited space of the way, materially interferes with the convenient use of the way.

Dickinson v. Whiting, *supra*; *Williams v. Clark*, 1 New Eng. Rep. 603, 140 Mass. 238.

Before the defendant had put either the fence or gates upon the way, his grantor, the plaintiffs' (Winnefred's) father gave her in his will, made on the 6th day of February, 1884, the premises that she with her husband and children now occupy, "to her, her heirs and assigns, with all the privileges, easements, and appurtenances thereto belonging," among which we submit to the court is the free and unobstructed use of the ten-foot way named in the deed to the defendant, to and from their premises.

Salisbury v. Andrews, 19 Pick. 255.

The gate at the east end of the way can do the defendant no good, while it diminishes the value of the plaintiffs' property, and makes their house less convenient; and the plaintiffs

claim that the way reserved in the defendant's deed is a perpetual easement or right of way attached to their premises.

Whiting v. Lee, 1 Allen, 198; *Salisbury v. Andrews*, 19 Pick. 255.

Messrs. Morton & Jennings, for defendant:

1. The fee of the ten-foot strip passed to the defendant. The strip is included in the boundaries named in his deed as part and parcel of the premises therein described. The defendant's lot is not bounded on the south by a strip ten feet wide, to be used for a common and open way by whosoever owns any portion of the entire tract, but is bounded by other land of the grantor; and the reservation is of a right to pass and repass over and upon a strip ten feet wide along the south line of defendant's lot, and included in defendant's lot, not of the land itself.

2. The defendant has the right to erect suitable gates across said way, and to build a division fence along the south side, which is the south line of his land. The effect of the reservation in the deed to defendant was of a convenient way to the grantor and his grantees, within the limits named, with a right on the part of the defendant to make any such reasonable use of the premises as would not obstruct the plaintiff in such way. The case of *Welch v. Wilcox*, 101 Mass. 162, is not in conflict, because the way was in that case an open and common way.

Van Olinda v. Lothrop, 21 Pick. 292; *Underwood v. Carney*, 1 Cush. 292; *Johnson v. Kinnicutt*, 2 Cush. 153; Washb. Easem. 2d ed. pp. 216, 252; Wood, Nuis. 166; *Marwell v. McAtee*, 9 B. Mon. 20.

It would be unreasonable to hold that the defendant could not erect a division fence on the line between himself and the lot next south because the plaintiff has a right of way over a ten-foot strip adjoining such line.

The reservation is of a private right of way in the strictest sense. It does not prevent the plaintiffs' use of the way to erect gates of the kind described, which are easily opened, or to place fence along the south side.

W. Allen, J., delivered the opinion of the court:

Thomas Devine, under whom both parties claim, conveyed the northerly portion of his front land to the defendant, and in the deed reserved a right of way in these words: "The grantor reserves to himself, his heirs and assigns, to pass and repass over and upon a strip of land ten feet in width on the southerly line of above granted premises, to and from North Court Street, with teams and otherwise." In *Johnson v. Kinnicutt*, 2 Cush. 153, the grantor conveyed the westerly portion of his land, the easterly line of the land conveyed being twenty feet westerly of the west wall of his store, and granted "the right of passing and repassing over the space of twenty feet between the west wall of the store aforesaid and the eastern line of the before-granted premises." It was held that these words did not describe the limits of the way granted, but the close over which the grantee should have a convenient and suitable way, and that he could not object to obstructions of the "space" which did not interfere

with a reasonable and convenient way for him. The reservation in the deed in the case at bar will not be construed more strictly against the grantee than the grant in the case cited would be construed against the grantor, and in other respects the cases are on all fours, and differ from *Tucker v. Howard*, 123 Mass. 529, and *Nash v. New England Mut. L. Ins. Co.* 127 Mass. 91, which were grants of existing and defined "passageways" particularly described.

The statement in the report that the division fence was built upon the south line of the way described in the deed must be taken to mean the south line of the strip of land over which the right to pass and repass was granted, and that the south line of the way was also the division line,—that is, the south line of the land conveyed. The line of the way coinciding with the division line between adjacent lands, the question in regard to the fences is whether the building of a division fence upon the line was a disturbance of the plaintiffs' right of way. It does not appear that the division fence interfered, or could interfere, with any suitable and reasonable way for the plaintiffs over the strip of land. But if it should be assumed that the plaintiffs had a right of way over the whole width of ten feet, we do not think that the fence would be an obstruction. The law provides for partition fences. Pub. Stat. chap. 86, §§ 2, 7, 9. When the statute applies, the privileges and burdens prescribed in it apply to the land, and affect and modify the estate in it. The right to a partition fence is part of the estate in the land. The conveyance of the land includes the right and the duty to have a fence upon the division line, the burden of having one half of the fence upon the premises, and the privilege of having the other half upon the coterminous land. *Neuell v. Hill*, 2 Met. 180; *Sparhawk v. Tuitchell*, 1 Allen, 450; *Kennedy v. Owen*, 181 Mass. 431.

No easement or incumbrance can grow out of this right; it cannot constitute or work a breach of a covenant of warranty, or of quiet enjoyment, or against incumbrance in a conveyance of the land, or a disturbance of a right of way granted over the land. How could the reservation of the right of way in the deed affect the right of the parties to it as a partition fence? The reservation in the deed of Thomas Devine to the defendant of a right of way over the land, the line of which coincided with the division line between the lands, could not affect the right to a partition fence on the line. Thomas Devine, the grantor, clearly had a right to have a partition fence, one half of which should be on the defendant's land that was subject to the right of way; and Mrs. O'Day, his devisee of the land adjoining on that side, and of the right of way appurtenant to it, had the same right; and the defendant has no right to erect a fence wholly on her land. As against the plaintiffs, it will not affect the defendant's right to a partition fence if the reservation shall be so construed as to give to Thomas Devine, and those holding under him, the parcel of land on the southerly side of the way, the right of free access to the way from any part of that land, and to prevent the erection of any fence or obstruction on the division line between that parcel and the way. If the owner did not assert such right, but required or assented to the

erection of a fence, the statutes in relation to partition fences would apply. The plaintiff is the devisee of Thomas Devine of another parcel of the land bounding only on the easterly end of the way, and of the right of way over the strip of land to the street as appurtenant to that. The right she has is the right appurtenant to the parcel she holds, and does not include a right to enter upon the way, except at its termini, and gives her no right to prohibit the defendant and Mrs. O'Day from erecting a partition fence between their lands. Under any construction that can be given to the reservation, we think that the defendant had a right, as against the plaintiff, to erect a division fence upon the line of the way, which we understand to be a fence one half of which is upon either side of the division line, and the ruling of the court on this point is correct.

The right of the defendant to erect gates must depend upon the facts and circumstances. The plaintiffs' right was to pass and repass from the street to her house lot, over a strip of land, ten feet wide, belonging to the defendant. The gates were erected at the termini of the way, not in the middle of it, as in *Dickinson v. Whiting*, 2 New Eng. Rep. 356, 141 Mass. 414. The passage through them was more than ten feet wide, and the only question in regard to them was whether the defendant had a right to maintain reasonable and suitable gates at the termini of the way. *Williams v. Clark*, 1 New Eng. Rep. 603, 140 Mass. 238, was on the construction of an agreement by a railroad corporation to furnish a convenient crossing. The crossing was built by the corporation in 1853, without gates or bars, and was so maintained by it and its successors until 1884. It was held that there was no right to obstruct the crossing by gates or bars. The court says: "While in terms it is not provided that this crossing shall not be obstructed by gates or bars, yet the facts that it was to be 'convenient,' and that the railroad company itself constructed, and for many years permitted, the existence of such a one, sufficiently show that what it intended to grant was a free right of passage. No usage or circumstances, such as are shown when one grants a way or right of way over a field devoted to agricultural or other purposes, indicating that the right granted is to be subordinate to the rights of the grantor, or the use made by him of the premises, here exists. That a crossing obstructed by gates or bars is less convenient to those entitled to use it is fully conceded by the defendant's argument. In *Welch v. Wilcox*, 101 Mass. 162, the owner of two adjoining estates in Charlestown conveyed one to the defendant, with the right to use 'the passageway leading from Lexington Street, as now laid out, over the other estate, which he soon after conveyed to the plaintiff, excepting a three-foot passageway as laid out on the premises. There was no gate in Lexington Street, and the passage was open and remained so for eight years, when the plaintiff erected a gate at the end of it on Lexington Street, which narrowed the passage three inches. The defendant removed the gate. The case was submitted on agreed facts, one of which was that the defendant could show that passages of like character in Charlestown were without gates; and the court held that the plaintiff had no right to maintain

the gate. The court says: 'It does not appear in what manner the way was laid out, but we must infer that it was by some well-marked boundaries, known and recognized by both parties. There was no gate separating the passageway from the street at the time of these conveyances; and, in the opinion of the court, the plaintiff had no right to erect and maintain a gate at the entrance of said passageway, or to narrow the way as described. If the obstruction in the way had existed at the time of the deed to the defendant, or even if it had been shown that similar passageways were usually so closed, the plaintiffs' claim would stand on stronger ground; for it may well be presumed that the parties to the grant were acquainted with the public usages, and created this easement with reference to those usages.'

In *Underwood v. Carney*, 1 Cush. 285, the defendant owned a right of way over Morton Place, in Boston, subject to a prior right of way of the plaintiff. The defendant erected warehouses on the line of Morton Place, obstructing the place with sidewalks, trap-doors, shutters, etc. A ruling that the use made by the defendant of the way was a reasonable use, was sustained, and judgment entered on a verdict ordered for the defendant. The court says that "public usage, the use which others similarly situated make of their land, is evidence of a reasonable use," and that that rule is decisive of the case; "for we are not satisfied that the defendants make any use of the passageway, or that they have done any acts on their lands adjoining thereto which were not justified by a common and well-established usage." In *Van O'Linda v. Lathrop*, 21 Pick. 292, the action was by the owner of the fee against the owner of a right of way for abuse of the right. The case was tried before Mr. Justice Shaw and a jury, and was submitted to the jury under instructions as to what would be a reasonable use of the way. The opinion considers what is a reasonable use of a way, depending much on the local situation and much on general usage.

The present case was tried before a jury, and comes up on the report of the judge, which states that the parties agreed upon certain facts, upon which the plaintiff asked for certain rulings and instructions to the jury, which were refused, and other rulings were given, and a verdict directed and taken for the defendant. In this respect, and in the fact that the action is by the owner of the right of way for obstructing the way, the case resembles *Underwood v. Carney*, *supra*. The case was not submitted to the court upon an agreed statement of facts, but the parties agreed upon what facts could be proved; and the court ruled that they were not sufficient to sustain a verdict for the plaintiff. The form of the ruling is that the defendant had a right to maintain suitable gates, but the real ruling, as shown by the course of the trial, was that the plaintiff had not shown that the defendant did not have the right to maintain the gates. A person over whose land there is a right of way will or will not have a right to maintain gates at the ends of the way, according to circumstances. Upon the facts in this case we think it does not appear that the plaintiff had not the right, and that it must be taken for the purposes of this case that he had

the right. The defendant holds the fee of a house and lot on a public street, under a deed in which the grantor reserved a right of way. The grantor owned and occupied the adjoining lot on the street, and owned two smaller lots in the rear of the two upon the street. There were no division fences between the lots. It does not appear whether they were or were not fenced upon the street. The right reserved was to pass and repass over a strip of land ten feet wide, next to the lot occupied by the grantor. At the time of the grantor's death there were houses upon the two lots in the rear, and those lots and the one occupied by him were devised by him to different children, the one in the rear of the defendant's being devised to the plaintiff, and occupied by her. The defendant's lot is about 44 feet wide and 88 feet deep. The plaintiff's lot is of the same width and about one half the depth of the defendant's. Nothing appears as to the manner in which the way and the different lots have been used, and nothing as to the size and position of the houses, except a plan without measurements, and not stated to have been drawn to a scale. It appears, from that, that the defendant's house is near the northerly line of his lot, and not far from the street, and occupies considerably more than half of the front of the lot, and that the strip of land on which is the right of way is a part of his dooryard. It does not appear what the usage in Fall River and in the defendant's neighborhood is in regard to having fences in front of houses, and gates at the entrance to yards. It is probable that there is some usage in regard to it, and it is reasonable to suppose that it may be customary to have such fences and gates. In the absence of any evidence to the contrary, it may be assumed that a person who receives a right to pass through his neighbor's yard receives it under the same conditions, as to an entrance to the yard, that owners generally impose upon themselves; and that the person who receives it would be likely, were he owner, to impose upon himself. It is not to be presumed from the mere fact that a person grants a right to pass through his yard to adjoining land that he thereby agrees to leave his yard open to the public; and the reservation, in a deed of a house and lot, of a right to pass through the yard, does not imply a right to remove usual and reasonable gates at the entrance. *Maxwell v. McAttee*, 9 B. Mon. 20; 78 Pa. 80. All the facts and circumstances which are stated are consistent with the right of the defendant to maintain the gates, and nothing appears to restrict his right in that respect as owner of the fee. The court therefore properly ruled that he had the right to maintain suitable gates at either end of the strip of land over which the right of way was reserved.

Judgment on the verdict.

COMMONWEALTH of Massachusetts
v.

Thomas FORD.

1. Conviction of a witness of felony or misdemeanor may be shown, to affect his credibility.

2. It is presumed that proper instructions were given to the jury; such instructions imply that the jury could not act by a majority, and that each juror must act upon his own convictions.

(Middlesex—Filed February 6, 1888.)

ON defendant's exceptions. *Overruled.*
Complaint under Pub. Stat. chap. 101, § 6, charging the defendant with keeping a tenement for the illegal sale and illegal keeping for sale of intoxicating liquor. At the trial in the superior court, before Aldrich, J., the defendant was a witness in his own behalf, and the government offered in evidence a record showing his previous conviction of a similar offense. The defendant objected, and asked the court to rule that the word "crime," in Pub. Stat. chap. 169, § 19, meant felony, and not misdemeanor; the court overruled the objection, and allowed the record to be put in evidence under defendant's exception. After the jury had been out several hours, they returned and reported to the court that they were unable to agree; the judge then read to the jury part of the report of the case of *Com. v. Tuley*, 8 Cush. 1. The defendant then requested the court to instruct the jury that (1) the case should not be decided with reference to a majority or minority vote of the jury; and (2) it is the right of any juror to stick to his judgment if he thinks he is right. The court refused to give these instructions; the jury returned a verdict of guilty, and the defendant alleged exceptions.

Mr. T. Riley, for defendant:

The word "crime" generally denotes an offense of a deep and atrocious dye. When the act is of an inferior degree of guilt, it is called a misdemeanor.

4 Bl. Com. 4.

This Act should be construed as declaratory of the common law, except that what rendered a witness incompetent could now be given to affect his credibility only. The statute reads: "The conviction of a witness of a crime may be shown, to affect his credibility." *Ergo*, no crime that could not possibly affect witness's credibility is competent.

See 1 Greenl. Ev. § 378.

If the word "crime," in this statute, means any misdemeanor or offense, it covers the offense of nightwalking and prostitution, and it has been decided that the commission of this of-

fense, or "crime," is no impeachment of the credibility of a witness.

Com. v. Gorham, 99 Mass. 420.

Notwithstanding the decision in the case of *Com. v. Bonner*, 97 Mass. 587, we claim that the rule that the character of the defendant in a criminal case is not to be assailed unless said defendant puts his character in issue is paramount to Pub. Stat. chap. 169, § 19, and not covered by it.

Mr. Andrew J. Waterman, *Atty. Gen.*, for the Commonwealth:

The word "crime," in Pub. Stat. chap. 169, § 19, is not limited to felonies. A misdemeanor is a crime. Offenses of the character which appeared in evidence are contemplated by said statute.

Com. v. Hall, 4 Allen, 805-807.

All necessary instructions were given. The point that a case should not be decided by a majority vote sufficiently appeared in the charge.

The defendant was not, at the time when the request was made, entitled to the charge in the form requested.

Day v. Cooley, 118 Mass. 524; *Townsend v. Pepperell*, 99 Mass. 40; *Brown v. Dean*, 123 Mass. 254. See also *Phillips's Case*, 132 Mass. 283.

The fact that a juror had a right to stick to an abiding conviction in his mind that he is right in an opinion formed after considering the evidence and discussing the question with his associates sufficiently appears in the charge given.

Per Curiam:

Under Pub. Stat. chap. 169, § 19, the conviction of a witness of any crime, whether a felony or a misdemeanor, may be shown to affect his credibility. *Com. v. Hall*, 4 Allen, 805.

It is to be presumed that proper instructions were given; and such instructions necessarily implied that the jury could not act by a majority, and that each juror must act upon his own convictions. The judge was not required to repeat these principles, which every juror must have understood. Whether he should do so was within his discretion, and no exception lies to his refusal to give the further instructions at the time and in the form requested by the defendant.

Exceptions overruled.

CONNECTICUT.

SUPREME COURT OF ERRORS.

Levi SCUTT

v.

TOWN of SOUTHBURY.

1. On an application to the superior court, pursuant to the provisions of Gen. Stat. § 2935, asking for a reversal of an order made by the selectmen of a town, and approved by the town, discontinuing two highways, the only question at issue is whether these highways, or either of them, are of common convenience and necessity; and where the committee to whom the application was referred reported that one of the roads was convenient and necessary for the plaintiff and a few of his neighbors, such finding was not necessarily decisive of the question of common convenience and necessity, and is not inconsistent with the general finding that the road was not required by common convenience and necessity.
2. Where, upon hearing of such an application, the petitioner fails to offer relevant evidence of facts which bear upon the question whether these highways, or either of them, were of common convenience and necessity, he cannot be heard upon appeal in that regard.
3. Upon the return of the report of the committee, in the absence of any "irregular or improper conduct" on their part, the duty of the court is to dismiss the application, with costs.

(New Haven—Filed January, 1888.)

APPEAL by plaintiff from a judgment of the Superior Court for New Haven County in favor of a defendant in the matter of an application for revocation of the action of selectmen in discontinuing certain highways. *Affirmed.*

The case is stated in the opinion.

Mr. William Cothren, for plaintiff:

These proprietors' roads or ways were different from the public highways, in that the title remained in the proprietors; and they had control of them in the same manner as of their enclosed lands,—bought and sold and exchanged them for other lands taken up by the proprietors.

State v. Meritt, 35 Conn. 315.

In *State v. Taff*, 37 Conn. 393, 401, it is stated: "The town had, at a town meeting in 1877, voted that the land over which the way in question ran should lie common, and not be used for any other purpose, without the consent of every individual proprietor." The court held: "If the land belonged to the town, the inference of an acknowledgment by the vote that the land belonged to the proprietors could not estop the town from subsequently claiming the land, and dedicating it to public use as a highway. If the land belonged to the proprietors, the vote of the town was a nullity. On a question of ownership, whether in the town or proprietors, the vote might be

important evidence for the proprietors; but we have seen that that question is not necessary to be determined in this case.

In the case of *Fowler v. Savage*, 3 Conn. 97, the court says: "As to the reservation by the proprietors, I need only remark that such reservation gave no authority to the town."

Mr. A. N. Wheeler, for defendant:

The power given to selectmen of towns, by statute, to discontinue highways within the limits of their respective towns, is general and unlimited, embracing all existing highways, by whomsoever laid out or dedicated (with two exceptions only), and irrespective of the ownership or tenure of the land subjected to the easements.

Gen. Stat. 1875, p. 237, § 85.

The original proprietors, as a matter of law, did not retain any title in the reserved highways, but parted with all their interests therein when they dedicated the highway and granted the adjoining land.

Stiles v. Curtis, 4 Day, 386; *Peck v. Smith*, 1 Conn. 103; *Church v. Meeker*, 34 Conn. 430.

The reserving of highways by the original proprietors was a dedication by them.

State v. Meritt, 35 Conn. 314.

Title to the land reserved by the proprietors for highways may be acquired by adverse possession, free from the easement.

Cady v. Fitzsimmons, 50 Conn. 211.

By common convenience and necessity is meant, not an absolute physical necessity, but so great a public benefit that the want of the way is a great public inconvenience.

Commonwealth v. Cambridge, 7 Mass. 158, 167.

This is a question of fact, and exclusively within the province of the committee; and having decided, without irregularity or improper conduct on its part, that these roads are not of common convenience and necessity, that determination is final.

Harwinton v. Catlin, 19 Conn. 520; *Webb v. Rocky Hill*, 21 Conn. 468; *Peckham v. Lebanon*, 39 Conn. 235; *Goodwin v. Wethersfield*, 43 Conn. 437.

And the report cannot be set aside on the ground that the committee mistook the evidence.

Bradley v. Bassett, 18 Conn. 563; *Colgrove v. Rockwell*, 24 Conn. 585; *Ashmead v. Colby*, 26 Conn. 312.

And the court could not review the finding of the committee, even if the whole evidence were reported.

Knapp v. White, 23 Conn. 541.

Towns or individuals ought not to lie by in highway cases, and, after great expense made, make application to quash the whole proceedings.

Freetown v. Bristol, 9 Pick. 51; *Rutland v. Worcester*, 20 Pick. 71; *Com. v. Westborough*, 3 Mass. 406; *Hancock v. Boston*, 1 Met. 122; *Holten v. Berkshire*, 7 Met. 561.

Also when, in all the proceedings, the roads are alleged to be highways, and at a late day the objection is made that the road is a town-way, and not a highway, it will not be entertained.

Whately v. Franklin, 1 Met. 336.

The exception that a town or city passed no legal vote discontinuing a highway cannot be

taken, after a petition for relief has been referred to road commissioners, without objection, and a report made thereon.

Manchester's Petition, 28 N. H. 296.

And a demurrer admits only the facts well pleaded.

Beardsley, J., delivered the opinion of the court:

This is an application to the superior court, pursuant to the provisions of the statute (Gen. Stat. pp. 236, 237, §§ 29, 35), asking for a reversal of an order made by the selectmen of the town of Southbury, and approved by the town, discontinuing two highways.

The plaintiff alleges that the highways are of common convenience and necessity, and of the greatest convenience and necessity to him as a means of access to his land and to market, and upon these grounds only asks for relief. The application was referred to a committee, pursuant to the statute, who reported that common convenience and necessity did not require that "either of the roads should be reopened or maintained as a highway," and concluded their report as follows: "Both said highways * * * should be and remain discontinued and closed."

The plaintiff remonstrated against the acceptance of the report, upon the following grounds:

1. The land crossed by said highways belongs to the original proprietors of the town of Woodbury, and was never laid out by the town of Southbury, or its selectmen, to be used as highways.

2. Said highways were not highways of the town of Southbury, and could not be, by it or its selectmen, discontinued.

3. Said highways were laid out by the original proprietors of the town of Woodbury for public convenience, and the special convenience of access to their interior lands, and were, at the time the town and its selectmen attempted to discontinue them, in use for the particular purposes for which said proprietors had dedicated them.

4. The committee, having come to the conclusion that said Muddy Brook Road was of common convenience and necessity only to the plaintiff, his family, and a few neighbors, decided, by mistake of law, on their own premises, that it was not of common convenience and necessity to anybody.

5. Said highways were not legally shut, so that the order of the committee that they be not reopened is null and void.

6. That the committee exceeded its authority, and attempted to assume the authority and power of the court, in deciding and ordering "that both said highways, the Dark Entry Road and the Muddy Brook Road, should be and remain discontinued and closed;" and both its report and its action are illegal, and should be set aside.

The defendant demurred to the several grounds of remonstrance, and the court decided that they were insufficient. The plaintiff assigns such decision as error.

The decision of the court was manifestly correct. If the committee did (as is assumed by the plaintiff in his fourth ground of remonstrance, and admitted by the demurrer, but nowhere else appears) come to the con-

clusion that one of the roads was convenient and necessary for the plaintiff and a few of his neighbors, such finding was not necessarily decisive of the question of common convenience and necessity, and is not inconsistent with the general finding that the road was not required by common convenience and necessity. And there is no foundation for the claim made in the sixth ground of remonstrance.

The only comment to be made upon the language of the committee referred to in it is that it was unnecessary, the report being complete without it.

The other alleged errors have no foundation. Upon the plaintiff's application, the only question at issue between the parties was whether these highways, or either of them, were of common convenience and necessity. Indeed, this was the only question which, by the statute under which the application was made, the committee could determine.

If the matters which he now sets up bore upon that question, he had an opportunity to offer his evidence in support of them, on the trial, and cannot now be heard upon them. If they did not, they are outside of the case as it stood before the committee.

Upon the return of the report of the committee, in the absence of any "irregular or improper conduct" on their part, the duty of the court, as defined by the statute, was to dismiss the application, with costs.

There is no error in the judgment appealed from.

In this opinion the other Judges concurred.

Jefferson D. BLAKESLEE

v.

Margaret TYLER.

1. A *qui tam* action, under Gen. Stat. p. 253, § 1, for placing an obstruction in a highway, is an action for a tort, and may, under Gen. Stat. p. 417, § 9, be maintained against a married woman without joining her husband, provided the tort was committed by her without the actual coercion of her husband.
2. Where bars which obstructed a highway served to enclose lands of a married woman, and, after they had been taken down, the woman and her husband started together to put them up, and the husband said to her as she was running ahead of him, "Put them up."—*Held*, that the facts did not make out a case of actual coercion by the husband.

(New Haven—Filed November, 1887.)

A PPEAL by defendant from a judgment of the Court of Common Pleas of New Haven County in favor of plaintiff in a *qui tam* action under Gen. Stat. p. 253, § 1, for placing obstructions on a highway. *Affirmed*.

The case was commenced before a justice of the peace, appealed to the common pleas, and tried to the court before Pickett, J. Judgment having been rendered for plaintiff, defendant appealed.

The case is fully stated by the court.

Mr. T. E. Doolittle, for defendant, appellant.

Messrs. William B. Stoddard and Seymour C. Loomis, for plaintiff, appellee.

Beardsley, J., delivered the opinion of the court:

The defendant is the wife of Henry Tyler, defendant in the previous case of *J. D. Blakeslee v. Henry Tyler*, ante, p. 815, which was brought to recover the penalty for placing obstructions upon a highway. She acted with him in placing the obstructions upon the highway, and is sued for the recovery of the statutory penalty. The finding of facts, and of the defendant's claims, in the trial of the former case, are made part of the record in this case, and the court finds the following additional facts specially applicable to this case:

"On May 24, 1866, the plaintiff having thrown out said bars, the said Henry Tyler and his wife, the defendant, immediately went toward them together, and she, being more active than her husband, ran ahead of him, and reached the bars first, upon which he, being near, said to her, 'Put them up,' which she proceeded to do in part, until he came up, when they together put up the remainder of the bars. No other request or command was made by him to her, and she was subject to no actual coercion by her husband in doing what she did toward replacing the bars. The title to the land easterly from the bars, and adjacent thereto, was in the said Margaret Tyler. Upon the foregoing facts the plaintiff claimed that this action was for a tort, and could be sustained, under the provisions of Rev. Stat. p. 117, § 9, against the wife alone, without the joinder of the husband as a party to the action. The defendant claimed that the provisions of the statute had no applicability to this case, as this was an action to recover a penalty under a penal statute, which was not qualified by the statute. The defendant also claimed that the direction given to the defendant by her husband on the 24th of May, to put up the bars in question, was such coercion as exempted her from any liability in this action."

The court ruled adversely to the claims of the defendant, and this ruling is assigned for error.

The statute referred to (Gen. Stat. p. 417, § 9) is as follows: "Actions may be sustained against a married woman upon any causes of action which accrued before her marriage, and upon any contract made by her since her marriage, upon her personal credit, for the benefit of herself, her family, or her separate or joint estate, and for any tort committed by her without the actual coercion of her husband; and her property attached, and taken on execution, in the same manner as if she was unmarried; and her husband shall not be liable on any such causes of action."

Two questions arise under this statute: Was the act of the defendant a tort? If so, did her husband compel her to commit it?

In *Canfield v. Mitchell*, 43 Conn. 169, which, like this, was an action upon the statute, and brought upon the same statute, it was decided to be a civil action. Judge Swift says that "this form of action is a species of action on

1 Conn.

the case." 2 Swift, Dig. 589. The only classification of civil personal actions recognized by law is that of actions upon contracts and actions of tort. 3 Bl. Com. 117. "All acts or omissions which the law recognizes as the subject of the provisions and application are either contracts, torts, or crimes." 1 Hill. Torts, 2.

The statute gives to an individual this remedy, to recover a penalty for his own benefit as well as that of the public, for the wrongful act of the defendant, and thereby, in effect, stamps the act as a tort. This being so, and the tort being of such a nature that those committing it are severally liable for the penalty (*Curtis v. Hurlburt*, 2 Conn. 809), the defendant is liable, though she acted in concert with her husband, unless he actually coerced her to commit it. The court finds that he did not coerce her, and this finding is conclusive, unless it is inconsistent with the facts upon which it rests.

We think that it is fully justified by the facts. It is apparent that the statute quoted was designed to make radical changes in the civil rights and liabilities of the wife, in respect to her torts as well as contracts. By the common law she was, for the most part, protected from liability for her torts, as well as responsibility for her crimes committed in the presence of her husband, by the presumption that she acted by his coercion. This presumption in many, if not in most, cases probably rested upon a slender basis of fact, but generally prevailed, owing to the inherent difficulty of proving that it was not well founded.

The statute abolishes this presumption in respect to torts, and requires the wife to prove, for her justification, that her husband in fact compelled her to commit the tort for which she is sued.

The facts found fall far short of showing such coercion. The bars in question served to enclose the land of the defendant; the plaintiff had taken them down, and the defendant and her husband started together to put them up. Her husband said to her, "Put them up;" but this was when she was running towards the bars in advance of him, and was evidently mere language of encouragement. There is no reason to believe that she would have stopped short of doing what she intended, if he had said nothing. If it had appeared that the wife put up the bars in consequence of what was said by the husband, the question would still arise, whether she was coerced to do so within the meaning of the statute.

There is no error in the judgment appealed from.

In this opinion the other Judges concurred, except Carpenter, J., who dissented.

Daniel LILLIBRIDGE

v.

Thurston B. BARBER.

1. In an action for trespass to the person, the allegation of place is immaterial. Where one act only is complained of, and a location given to it, plaintiff may safely prove that it was committed in an-

other location, unless defendant pleads, and offers evidence to prove, that his act is justifiable because of the place where committed.

2. In case four witnesses had equal opportunities for seeing, equal accuracy in observation and memory, equal capacity and desire to tell the truth, it is **permissible**, in the exercise of judicial discretion, to call the **attention of jurors to quantity of testimony**, and to instruct that the testimony of three must outweigh that of one.
3. Where, in an action for assault, defendant is corroborated only by the testimony of persons not eyewitnesses, and by proven circumstances, it is **not error** for the court in its charge to **speak of his testimony as substantially uncorroborated**.

(New London—Filed November 1887.)

A PPEAL from a judgment of the Superior Court of New London County in favor of plaintiff in an action for assault. *New trial denied.*

The case is sufficiently stated in the opinion.

Messrs. S. Lucas, and Browning & Crandall, for defendant, appellant:

The allegation of place, in the plaintiff's complaint, was material. The plaintiff had located the assault for which he sought damages, in his complaint and by his proof, and hence could not recover for any other assault than that located. Upon this state of facts, defendant would not attempt to justify any trespass committed on his own land, for none was alleged, attempted to be proved, or claimed by the plaintiff.

The jury were instructed, not only that the allegation of place was immaterial, but that in fact the place where the assault and battery was committed was immaterial. In this the court erred, because the allegation of the place where the assault and battery was committed was material by reason of the allegation and the proof offered by the plaintiff.

1 Swift, Dig. 640; 2 Greenl. Ev. § 86; 2 Add. Torts, 780.

Both plaintiff and defendant detailed the facts and circumstances at great length, as they claimed them, relative to the matter in controversy. It was claimed, on the part of the defendant, that he was corroborated by other witnesses introduced in his behalf, and by all the facts and circumstances in the case.

By the charge, the attention of the jury was diverted from the question of fact, and directed simply to that of the credibility of the witnesses. It should have been left to the jury, under all the circumstances of the case, to find what the fact was.

A jury is very easily misled into giving too much weight to the number of witnesses called by a party, and overlooking the circumstances of the case.

This court is "not disposed to countenance an attempt to divert the minds of the jury from facts in issue to the honesty of the parties or their witnesses, however closely connected the two questions may be."

White v. Reed, 15 Conn. 465.

Messrs. F. T. Brown and W. A. Briscoe, for plaintiff, appellee:

The allegation of the place where an assault and battery is committed is entirely immaterial.

The place need not be alleged, and, if alleged, the plaintiff may prove the fact to have been done at any other place.

Place is only material when alleged by the defendant in connection with some justification of the assault, the justification having no foundation except at the place alleged.

1 Swift, Dig. 640; 1 Greenl. Ev. 2d ed. § 61: *Mellor v. Walker*, 2 Saund. 50, note.

Defendant must make the allegation and assume the burden of proving it. In order to justify, he must admit the assault, or some part of it. In the case at bar defendant pleaded a general denial without setting up any matter in justification; that is, he chose to deny the assault altogether, instead of admitting it, or some portion of it, and attempting to justify. In such a situation, what difference did it make where the assault occurred?

If, in paragraph 1 of the complaint, the words "upon the land of the plaintiff known as the Morse farm" were omitted, a complete statement of the cause of action would remain. The words quoted are therefore surplusage.

1 Swift, Dig. 771.

Pardee, J., delivered the opinion of the court:

The assault charged, alleged in the complaint, is as follows: "On April 19, 1886, the defendant assaulted the plaintiff at said Norwich, upon land of the plaintiff known as the Morse farm, and violently seized the plaintiff around the body and threw him down upon the ground and stones with great force, and fell upon him, and struck him upon the face and body."

Upon the trial, the plaintiff offered evidence to prove one act of trespass only, and that it was committed upon his own land, near to the line separating that from the land of the defendant. The defendant offered evidence tending to prove that he committed no act of trespass; that the plaintiff trespassed upon his land, and there threatened to assault him; that he ordered him to depart; that the plaintiff refused: that he gently removed him; that in so doing, without intention to injure him, he accidentally fell with the plaintiff; that whatever injury the latter received was by such accidental fall; and that, if he assaulted the plaintiff at all, it was on his, the defendant's land.

In argument, the defendant claimed that the allegation of place in the complaint is material, and must be proven as made. The court charged as follows: "The place where the assault and battery were committed is immaterial, and that allegation is immaterial,—especially where, as in this case, there seems to have been a dispute between the parties with respect to the title or boundary of the land or the right of the plaintiff to be on it. But, aside from these considerations, the general principle is that the place where an assault and battery is committed is immaterial, provided it is within the jurisdiction of the court; and that, in this case, is conceded."

To this the defendant objects, insisting that the plaintiff had located the assault upon his

own land; that this allegation of place is material; that the proof must correspond; and that a trespass by the defendant upon his own land is entirely different from one upon the land of the plaintiff.

The objection is not well taken. An action for trespass to the person goes with the person injured, and may be brought wherever he can obtain jurisdiction over the defendant or his property. Place is not of the essence of such an action; indeed, it is quite immaterial. When one act only is complained of, and a location is given to it, the plaintiff may himself safely prove that it was committed at another. This, unless the defendant pleads and offers evidence tending to prove that his act is justifiable because of the place where committed. Such evidence the plaintiff must overcome, either as to place or justification. The office of this complaint was to forewarn the defendant as to the charge, in order that he might prepare his defense. If, in the matter of locality, it were to such a degree misleading as that the proof was a surprise to him, he could have found protection in a postponement of trial by the court, and opportunity to prepare anew.

The plaintiff charged, and claimed to have proved, that the defendant assaulted him at a particular place. Without plea of justification, upon a simple denial of the truth of the charge, the latter introduced evidence tending to prove that if he committed any assault it was at another place. If the jury believed that in doing this he proved an unjustifiable assault at the latter place, this proof enures to the benefit of the plaintiff as effectively as if he had himself so charged and proven. The law regards the resulting truth; it does not concern itself as to the party introducing the evidence.

There were only two eyewitnesses to what occurred between the parties; these confirmed the truth of the allegations of the complaint. The defendant claimed that the testimony of others, not eyewitnesses, and proven circumstances, corroborated him.

The court charged the jury upon this point as follows: "The plaintiff and Mr. and Mrs. Wheeler testify to one state of facts, and the defendant to another, entirely different. If these persons are all equally credible, the plaintiff has shown, by a fair preponderance of proof, that he was assaulted as claimed by him in the complaint. That is the question for you to weigh and determine,—the credit to be given to each of the witnesses. If you find the plaintiff's testimony, with the corroboration of Mr. and Mrs. Wheeler, outweighs the substantially uncorroborated testimony of the defendant, your verdict should be for the plaintiff."

In this the defendant insists there is error, for the reason that the attention of the jury was thereby diverted from the question of fact, and directed simply to that of the credibility of the witnesses. It should, he claims, have been "left to the jury, under all the circumstances of the case, to find what the fact was."

Precisely this is the effect of the quoted portion of the charge. The instruction is that, if four witnesses had equal opportunity for seeing, equal accuracy in observation and memory, equal capacity and desire to tell the truth, the testimony of three must outweigh that of one. Of course it is best, as a rule, that judi-

cial comment to the jury upon testimony should concern quality rather than quantity. But in the case supposed it is permissible, in the exercise of judicial discretion, to call the attention of jurors to quantity. If, upon seeing, hearing, and weighing the witnesses, it should so happen that the jurors believe that in all of the named qualities each witness is equal to each of the others, they must accept the agreeing testimony of three rather than the contrary testimony of one.

This rule controls the decisions of men in determining questions of fact for their own purposes; no contrary rule can be laid down for the guidance of a jury. Before it can operate upon the mind of a juror, he must of necessity, under the instruction of the court, try each witness as in a crucible, and determine precisely what portion of his testimony is truth, to what degree he is credible, and must compare each with every other. This done, the juror has discharged his whole duty.

Neither was it error on the part of the court to speak of the testimony of the defendant as being substantially uncorroborated; it was judicial comment upon the legal effect of it.

No one of the assigned errors furnishes a reason for a new trial, and it is therefore denied.

In this opinion the other judges concurred, except **Park, Ch. J.**, and **Carpenter, J.**, who were of opinion that the court below erred in its instructions to the jury with regard to the preponderance of the testimony of the three witnesses for the plaintiff over the single witness for the defendant, regarding this as wholly a matter for the judgment of the jury.

James F. R. O'NEIL'S APPEAL from Probate.

1. The **good faith attending a payment made by an administratrix under an order of court afterwards reversed is not simply a belief** on the part of the administratrix that such order will protect her; and where the **administratrix obtained orders ascertaining the heirs and distributees of the estate, omitting the appellant as a distributee, knowing that the appellant was living and was entitled to a share, by intentionally concealing such knowledge from the probate court, the actual bad faith and fraud are inconsistent with the existence of the good faith essential to the statutory protection.**
2. Without considering whether it was discretionary with the probate court, after the reversal of such orders, to deny the application of the appellant to ascertain the heirs and distributees of the estate, and to make an order for the distribution, it is well settled that the **disposition of discretionary matters of this character by the probate court is subject to revision by the appellate superior court;** and, if it is a discretionary matter, the final exercise of discretion resides in the superior court.

and there is no error in the reversal, by that court, of the action of the probate court.

8. Revised Probate Laws, Act 1885, § 197, makes it the duty of the probate court, upon the application of the heir, to ascertain the heirs and distributees of an estate, and to make an order for the distribution to the ascertained heirs.

(Fairfield—Filed October 7, 1887.)

APPEAL by James F. R. O'Neil to the Superior Court of Fairchild County, from an order and decree of the Probate Court for the District of Bridgeport, accepting the distribution of the estate of Patrick Reynolds, deceased, by Rose Reynolds, the administratrix. The Superior Court reversed said order and decree, and said administratrix now appeals to the Supreme Court of Errors. *Judgment of Superior Court affirmed.*

The facts appear from the opinion.

Messrs. Canfield & Davenport, for James F. R. O'Neil:

It is the duty of the Probate Court to ascertain the heirs and distributees of every intestate estate, and, in case such estate consists wholly of cash, to order the administrator to pay over the same to the heirs, taking proper receipts therefor.

Rev. Prob. L. Act 1885, p. 514, § 197.

"The proper, if not exclusive, remedy of any heir claiming a distributive share, is to cite the administrator to settle his account, and, if there be a surplus appearing on such account, to apply to the court of probate to make a decree of distribution according to law."

Loring v. Steineman, 1 Met. 211.

The superior court ought not to have gone into the question as to what had been done with the money, in passing on the question as to whether an order of payment should be made. It is the policy of our law to have all such matters disposed of in the probate court in a regular way, and to appear of record in that court.

Potvin's App. 81 Conn. 382.

The investigation by the superior court, therefore, of the questions as to the amount of money she has now in her possession, and as to what she had done with the amount she stands charged with in her final account, was irrelevant. But, having gone into that subject, the court found that those irregular orders—subsequently appealed from and annulled—were obtained by her fraudulently, and in disregard of her duty as administratrix. Her acts under them constitute no protection to her under the statute, and she stands chargeable with the money paid out by her as much as if there had never been any order issued.

Moore v. Holmes, 32 Conn. 561; *Sanford v. Thorp*, 45 Conn. 241; *Rorland v. Isaacs*, 15 Conn. 122; *Warren v. Powers*, 5 Conn. 383.

In legal contemplation she has the money on hand, and can be ordered to pay it over. In the event of a noncompliance her bond can be put in suit.

Deavenport v. Richards, 16 Conn. 310.

Stoddard, J., delivered the opinion of the court:

The appellant is an heir at law of Patrick

Reynolds, deceased, whose estate is in settlement in the Bridgeport Probate District. Claiming as such heir at law, he asked the probate court to ascertain the heirs and distributees of the estate, and to make an order for the distribution of the estate to the ascertained heirs. In the orderly administration of an intestate estate, this is the right of the heir to ask, and the duty of the court in due season to make. This duty is commanded by the express words of the statute. Sess. Laws 1885, § 197, p. 514. The only objection that is made to such an order is that, upon the application of Rosa Reynolds, the administratrix, the court of probate has heretofore made an order of distribution, and that, in pursuance of such order, the administratrix had in fact paid over to the respective persons named in that order the several sums named therein.

The probate court refused the appellant's application. The ground of the refusal does not appear in the record, but presumably it was because the facts found by the appellate court were not made to appear in the probate court. The order of distribution made at the instance of the said Rosa Reynolds was, upon the appeal of this appellant, reversed and set aside. And it is found that the appellant was not named in the first order of distribution. And it is further found by the superior court that, "at the time the administratrix applied to the court of probate for the passage of the several orders referred to" (that is, the orders preliminary to and including the first order of distribution), "at the time of making said payments pursuant to the order, and at all times since the death of the intestate, the appellee" (Rose Reynolds) "knew that the appellant was in existence, and was an heir to the estate, as hereinbefore recited, and intentionally concealed and withheld said knowledge from the court of probate; and that the several orders were passed in consequence of the representations of the appellee, and in accordance with such representations."

Rosa Reynolds was a sister of the deceased, and an heir at law, and was named as distributee in the first order. Her distributive share of the estate was of course enlarged by the exclusion, from the list of distributees, of the name of the appellant, also a lawful heir. She obtained the orders that so resulted, knowing that the appellant was living and was entitled to a share, by intentionally concealing such knowledge from the probate court. In so doing, she violated her faith and duty to the appellant. It was a breach of trust, and the orders were obtained through the active, willful fraud of the administratrix. The orders were so fraudulently obtained for the manifest purpose of paying over to herself and the other named distributees the share of the estate that belonged to the appellant. And now her learned counsel says that, having consummated her fraudulent purpose, the administratrix is protected, because, he says, such a payment is a payment made in good faith. In order to make the logic symmetrical, he also defines the "good faith" to be the existence of a belief on the part of the administratrix that the law would protect her if she in fact made the payment under an order of the court.

We think that the good faith attending a

payment made by an administrator under an order of court, which order is afterwards reversed, is not simply a belief on the part of the administrator that such payment will protect him; and that in the present case the actual bad faith and fraud established by the finding of the court are wholly inconsistent with the existence of the good faith essential to the statutory protection.

It is also said that the action of the probate court, denying the application of the appellant, was discretionary.

Without considering whether it was so discretionary with the probate court, it is the settled law in this jurisdiction that the disposition of discretionary matters of this character by the probate court is subject to revision by the appellate superior court, and, if it is a discretionary matter, the final exercise of discretion resides in the superior court. *Weisne's App.* 39 Conn. 538.

There is no error in the judgment appealed from.

In this opinion the other Judges concurred.

Henry A. LAMBERT

c.

Henry S. SANFORD.

1. A **complaint** alleging that plaintiff made plans for certain houses, and procured bids for the same, at the request of defendant, at an agreed compensation of 2½ per cent upon the estimated cost of the houses, which percentage amounted to \$250,—**Held, not demurrable** because it omitted to aver any previous request by defendant to make the plans or procure the bids; by whom or how or when the cost of the houses was to be estimated; what such estimated cost was; when defendant was to pay plaintiff; that any estimated cost was ever made by anyone; or that any demand was ever made of defendant for 2½ per cent of any estimate of cost.

2. The case having proceeded to a **hearing in damages**, upon defendant's default,—**Held**, that, as the action was upon an express contract set forth in the complaint, it was **not open to defendant to show** that the contract stated in the complaint had **never been made**, and that an entirely different contract existed between the parties.

3. On the **hearing in damages**, plaintiff offered in evidence certain **estimates and bids made by builders**, which plaintiff had obtained for defendant in pursuance of the contract between them. This evidence was objected to by defendant on the grounds (1) that defendant had not accepted the bids, and (2) that the "estimate" referred to in the contract must be an estimate agreed upon by both plaintiff and defendant. **Held**, that neither objection was well taken.

(Fairfield—Filed January, 1888.)

APPEAL by defendant from a judgment of the Court of Common Pleas of Fairfield
1 CONN.

County in favor of plaintiff in an action brought to recover the amount alleged to be due upon a contract. *New trial denied.*

The substance of the complaint is set forth in the opinion.

Defendant demurred to the complaint upon the following grounds:

1. It does not aver any previous request by the defendant to the plaintiff to make such claimed sketches, plans, elevations, and specifications for said three dwelling-houses, nor that the plaintiff, previously to the procuring of said alleged bids for the same, requested the plaintiff so to do.

2. It does not aver by whom, or how, the cost of said dwellings was to be estimated.

3. It does not aver when the cost of said dwellings was to be estimated.

4. It does not aver how much the estimated cost of said dwellings was.

5. It does not aver when the defendant was to pay the plaintiff.

6. It does not allege that any estimated cost of said three dwelling-houses was ever made by any person or persons whatsoever.

7. It does not aver that any demand was ever made of the defendant of 2½ per cent of any estimate of the cost of said three dwelling-houses.

The demurrer was overruled, and defendant answered and was subsequently defaulted, and damages were assessed against him; whereupon he appealed.

Messrs. C. S. Canfield and H. S. Sanford, for defendant, appellant:

According to this complaint, defendant was to obtain nothing for himself, as his own or for his own use, in any way or to any extent. There is no allegation that anything ever was delivered to or received by defendant. Plaintiff knew that he never had delivered anything to the defendant.

Hunt v. Bate, 8 Dyer, 272.

Assumpsit will not lie except upon a previous request either express or implied by law. No previous request is alleged in this complaint. Nor can any be implied by law, because there is no averment that there was any delivery to or acceptance by the defendant of any of the sketches, plans, specifications, or bids, or work.

Bliss, Code, Pl. §§ 268, 276.

Where a consideration is not implied, it is the very gist of an action founded on contract, and must be averred. The complaint should disclose the facts from which it must appear that there was a legal consideration to support the argument relied on. Thus, if an executory agreement between the parties is the consideration of a contract forming the basis of an action between them, it must be pleaded, and performance averred.

Boone, Code Pl. § 19.

Under any system of pleading, the complaint ought to announce to defendant, with fair and reasonable certainty, the material ground of the suit.

It is not alleged when the defendant was to pay the plaintiff. Until the debt is due, no right of action arises. Since there is no averment that any debt was due, the complaint must be demurrable, for it fails to show that any right of action had arisen.

Dale v. Dean, 16 Conn. 579; *Boone*, Code Pl.

§ 26, 185; 1 Swift, Dig. 712 (top); *Platt v. Stonington Sav. Bank*, 46 Conn. 478; Boone, Code, Pl. § 18.

Whenever damages are unliquidated, defendant by a default admits nothing more than nominal damages.

Batchelder v. Bartholomew, 44 Conn. 510.

In *Seddon v. Tutop*, 6 T. R. 607, cited and approved in *Dickinson v. Hayes*, 31 Conn. 428, it is declared that a default in assumpsit leaves open every allegation except the essential one that some debt is due.

1 Swift, Dig. Dutton's Rev. 818.

Judgment by default is interlocutory in assumpsit, where the subject of the action is damages.

2 Archb. Pr. 734-743; 1 Tidd, Pr. 1st Am. ed. 508; *Shericood v. Haight*, 26 Conn. 436; *Carey v. Day*, 36 Conn. 155.

A default or a demurrer overruled admits a cause of action. But in an action sounding in damages, where the damages are not proved, merely nominal damages will be awarded.

Batchelder v. Bartholomew, 44 Conn. 501; *Web v. Web*, 16 Vt. 630.

Mr. John H. Whiting, for plaintiff, appellee.

Stoddard, J., delivered the opinion of the court:

The plaintiff's complaint states that he made plans and specifications for three houses, and procured bids for the same, at the request and by the direction of the defendant, at an agreed compensation of 2½ per cent upon the estimated cost of the buildings. The plaintiff then alleges that that percentage amounts to \$250.

This complaint sets out a special contract, entered into at the request of the defendant, and performed by the plaintiff.

Under our present practice, which is free from technicalities, it is not defective by reason of the omissions stated in the demurrer.

After the demurrer was overruled, it appears that the defendant answered over, alleging by way of defense that a contract had been entered into by the plaintiff and defendant materially different from that alleged in the complaint. Subsequently the defendant permitted a judgment by default to go against him, and moved for a hearing in damages. Upon such hearing in damages the defendant, for the purpose of reducing the damages, offered evidence to prove that the contract stated in the complaint had never been made, but that an entirely different contract existed between the parties. The court excluded this evidence, and this ruling is assigned for error.

"It is generally held that, on the assessment of damages after a default, or on an equivalent state of the record, evidence denying the cause of action, or tending to show that no right of action exists, is inadmissible in mitigation of damages. * * * When an action is brought on a contract set out in the declaration, and there is a default on the assessment of damages, no evidence which goes to deny the existence of the contract, or tends to avoid it, is competent; the default admits it as set forth, and concludes the defendant from denying it."

1 Suth. Dam. 777.

In this State, in some actions of tort, notably in actions in which negligence is of the gist of

the action, evidence in mitigation of damages, which evidence also tends to show the non-existence of some material element of the cause of action, is permitted. But this rule has never been extended to actions upon express contracts set forth in the complaint, and we do not think it applicable to the case at bar.

Upon the construction of the contracts stated in the complaint which is most favorable to the defendant, the only question left open after the default was the estimated cost of the buildings. This estimated cost we understand, in this case, to mean the reasonable cost of buildings erected in accordance with the plans and specifications referred to, and not necessarily the amount of some actual estimate made by a builder, nor an estimate agreed upon by the parties, nor yet an estimate or bid accepted by the defendant. The court below heard evidence as to such estimated cost of buildings to be erected in accordance with the plans and specifications, and upon this issue the defendant was fully heard.

We need not consider whether the contract, if the plaintiff had insisted on such construction, should not have been construed as fixing, by agreement of the parties, such estimated value; for such sum would be larger than the sum fixed by the court; and as all parties upon the trial proceeded upon the construction most favorable to the defendant, there is nothing in this particular of which the defendant can complain.

Certain estimates and bids made by builders, which the plaintiff had obtained for the defendant in pursuance of the contract, were offered in evidence, and were objected to on the specific grounds (1) that the defendant had not accepted the bids, and (2) that the "estimate" referred to in the contract must be an estimate agreed upon by both plaintiff and defendant. In this view of the contract the defendant was in error, and neither objection was well taken. We need not consider whether the bids might not have been properly objected to on other grounds; for the defendant on this appeal must be confined to the particular questions raised and decided in the court below.

There is no error, and a new trial is not granted.

In this opinion the other Judges concurred.

NATIONAL SHOE & LEATHER BANK'S APPEAL from Commissioners.

1. No question for review by the supreme court of errors is presented by an assignment of error to the effect that the trial court ought not to have found certain propositions of fact as it did. Some intervening error of law must be shown, which led to an erroneous result.

2. It is not *ultra vires* for a manufacturing corporation to invest in the materials used in its manufactures, in excess of its immediate necessities, when the price of such materials is low, with a view to benefit by a rise in price. (So held, where it did not appear that such purchases of material were not made for ultimate use for the corpora-

tion, or were made merely to sell again in the market.)

3. Where a bank sought to enforce a claim against "**Brown & Bros.,**" an insolvent manufacturing corporation, for money loaned upon certain notes made by one Wm. H. Brown, signed "Wm. H. Brown," and indorsed "**Wm. H. Brown, Agent,**"—*Held*, that evidence that an account for the financial branch of the corporation's business managed by Wm. H. Brown had stood in the name of "Wm. H. Brown, Agent," in another bank, for some years before it was transferred to the bank now seeking to enforce its claim against the corporation, was admissible to complete the continuous history of Wm. H. Brown's financial transactions for the corporation, and to show knowledge of his doings on the part of the directors of the corporation, in connection with the question of his being a general agent for the corporation in its financial transactions.

(New Haven—Filed January 27, 1888.)

APPEAL by the National Shoe & Leather Bank to the Superior Court from a decision of commissioners in insolvency. The decision appealed from having been reversed by the Superior Court, the trustees of the insolvent estate appealed to the Supreme Court of Error. *Affirmed.*

In the spring of 1884 the affairs of a corporation doing business under the title of Brown & Bros. at Waterbury, Conn., became involved, and said corporation embarrassed. At this time the National Shoe & Leather Bank of New York held claims against the corporation as follows: Notes to the amount of about \$17,300, signed "Brown & Bros." by Wm. H. Brown, President; and three notes, for \$15,000, \$2,400, and \$12,500, respectively, signed by Wm. H. Brown, and indorsed "Wm. H. Brown, Agent." The latter were secured by a pledge of stock of the corporation owned by Wm. H. Brown. Attempts were made to ascertain the whole amount of indebtedness of the corporation, and, after a supposed list of all such indebtedness had been obtained, negotiations were opened with Franklin Farrel, to induce him to come into the management of the corporation, and guarantee or provide for the payment of its indebtedness. In this list the \$17,300 owed to the bank was included, but the other notes were not. Such progress was made that Mr. Farrel was willing to enter into some arrangement looking to that end, and he then tried to ascertain himself the amount of the indebtedness of Brown & Bros. To that end he called upon the bank, and, in connection with the proposed plan of indorsing the outstanding notes and providing for the obligations of Brown & Bros., including the \$17,300 held by the bank, asked the bank officials what the amount of the bank's claim against Brown & Bros. was, and was told by said bank officers that it was \$17,300, and composed of the notes signed "Brown & Bros." No knowledge or information in relation to the other notes came to Farrel.

The trial judge found that, with the understanding and belief on the part of Farrel that the bank's claim was limited to \$17,300, and upon the faith that his information as to the indebtedness of and amount of claims against Brown & Bros. was accurate, Farrel was induced to and did enter into a contract by which he agreed to assume or provide for the indebtedness of the corporation, and to advance enough money to put the company on a safe and reliable basis for the continuance of its business. The bank had full knowledge that Farrel was entering into the contract with that belief and understanding as to the indebtedness of Brown & Bros., and especially, in reference to its own claim, that such claim was limited to \$17,300.

Farrel became president, and assumed the control and management of the corporation. About the month of November, 1885, an attempt was made to secure a renewal of what remained unpaid of the \$17,300 held by the bank, at which time the bank officials said they had no objections to a renewal of the paper, but that the three other notes must then be taken care of. Compliance with this proposition having been refused, proceedings in bankruptcy were instituted against the corporation.

The bank's claim to prove the amount of the three notes against the assets of the corporation was rejected by the commissioners, and the bank appealed to the superior court, where the decision was reversed; whereupon the trustees of the estate appealed to this court, claiming, *inter alia*, that these notes were never considered as a debt of the corporation.

Further facts are stated in the opinion.

Messrs. S. W. Kellogg and C. R. Ingersoll, for appellant:

The contract of the corporation, if any, must be governed by the law of New York; there the notes were made and delivered, and there the whole contract was executed.

Webster v. Howe Mach. Co. 3 New Eng. Rep. 567, 54 Conn. 394; *Allen v. Rundie*, 50 Conn. 20, 28.

The corporation was entitled to notice of nonpayment of these notes, whether the writing on the back is held to be an indorsement or a guaranty. The two parties to the notes as drawn were Wm. Henry Brown, the maker, and the bank as payee. Where a third person, not a party to a negotiable note, indorses the same in the manner these notes were indorsed, that third party must have due notice of nonpayment, to entitle the holder to recover against him.

Spies v. Gilmore, 1 N. Y. 321; *Moore v. Cross*, 19 N. Y. 227.

Brown's general agency could not bind the corporation by the indorsement of these notes as agent.

Smith v. Cheshire, 13 Gray, 320; *Taber v. Cannon*, 8 Met. 458; *Paige v. Stone*, 10 Met. 168.

The bank was bound to take notice of the extent of Brown's power as agent.

Credit Co. v. Howe Mach. Co. 3 New Eng. Rep. 561, 54 Conn. 357.

Commissioners of insolvent estates have both law and equity powers in allowing or rejecting claims.

Donoran's App. 41 Conn. 559.

Messrs. George C. Lay, D. F. Hollister, and John S. Beach, for appellee:

The omission by the corporation to put upon record the existence of an agency, the actual duration of which had exceeded nine years, would not exempt the company from liability to the bank, even if the proceeds of these particular loans had been, as between the agent and the principal, misappropriated by Mr. Brown.

2 Morawetz, Corp. §§ 585-594, and cases there cited.

But the agent did not misappropriate the proceeds of these loans.

"The corporation having received and used the money raised upon its credit by these loans, we hardly think the company is in a condition to claim that the loans are void as being unauthorized."

Hopson v. Aetna Axle & S. Co. 50 Conn. 600.

Loomis, J., delivered the opinion of the court:

The appellant presented to the commissioners, on the assigned estate of Brown & Bros., an insolvent corporation, a claim aggregating the sum of \$29,900, represented originally by three notes,—one dated January 15, 1884, for \$2,400; one dated March 15, 1884, for \$12,500; and one dated March 27, 1884, for \$15,000,—all signed "Wm. H. Brown," and payable to H. N. Knapp, cashier of the appellant bank, four months from date, and all indorsed "Wm. H. Brown, Agent," and discounted at the appellant bank, and the avails appropriated to pay the legitimate debts and obligations of Brown & Bros. The commissioners rejected the claim, and the bank appealed to the superior court, where the claim was allowed in full; and now the trustees of Brown & Bros. bring the case to this court to revise the rulings of the superior court.

At the outset of the discussion before this court, the counsel for the appellee made a vigorous effort to restrict the inquiry simply to the question whether Brown & Bros. could be held liable as makers, indorsers, or guarantors of the notes in question, irrespective of the fact that they received the proceeds; and many of the errors assigned hinge upon this idea. Had the claim been so restricted in its presentation and prosecution, there would be obvious difficulties in the way of sustaining the judgment of the superior court; for one must be a party to a note, to be made liable as maker or indorser; and the face of the notes in question does not indicate that they had any relation to Brown & Bros.; and, if the indorsement of Wm. H. Brown, Agent, could be regarded as the indorsement of Brown & Bros., it would still be a mere contingent liability, without any foundation being laid to make that liability absolute.

We think, however, that the record does not sustain the claim that only the notes themselves were presented and considered before the commissioners.

The form of the presentation of the claim is not explicitly stated. The report of the commissioners only shows the gross amount presented, without any reference to any notes. The reasons of appeal from the doings of com-

missioners, after referring to the three notes presented to the commissioners as representing the claim of the appellant, amounting in the aggregate to the sum of \$29,900, give this additional reason,—“that the consideration of all said notes was money loaned to the appellee, and that money so loaned was used by the appellee in conducting its business, and for its benefit.” Now it is obvious, from the record, that this last-mentioned reason was one of the issues of fact before the trial court, and much evidence was introduced on both sides bearing on this point, without any objection on the part of the appellee based on the restricted nature of the claim presented; and this issue as to the consideration and the application of the proceeds of the notes was distinctly found against the appellee. We think, therefore, there is no foundation for this objection; and what we have said in this connection is a sufficient answer to all the arguments, and all the assigned errors, which assume or imply that the claim of the appellant was based solely on the technical liability of Brown & Bros. as makers, indorsers, or guarantors of the notes referred to.

In regard to most of the remaining objections, we think the appellees have been concluded by the finding of facts.

The contention in the court below (as, indeed, in this court) centred around three propositions of fact, viz.: That Wm. H. Brown was the financial agent of Brown & Bros. in New York at the time these loans were made by the bank; that under his general agency he had authority to bind the Brown & Bros. corporation by making accommodation loans on its credit; and that the entire proceeds of the loans in question went to pay the debts and obligations of the corporation.

Now a reference to the finding will show that every one of these propositions is affirmed in the most direct and explicit language.

This result carries the case upon its merits entirely beyond our province for review; for it will not suffice to assign for error that the court ought not to have so found the propositions of fact (which it will be seen characterizes several of the assignments). Some intervening error of law must be shown, which led to an erroneous result. Does any such error appear?

It was claimed in the argument (but is not assigned for error, and therefore it does not require notice) that the avails of these notes were used in copper speculations by Wm. H. Brown, and therefore his acts, though for the benefit of the corporation, were *ultra vires*.

It is not found that the avails of the notes in question were so used, but it is found that, “for many years before the failure of said corporation, said Wm. H. Brown had been in the habit, in connection with the business of buying supplies for immediate use at Waterbury, of obtaining loans, in the name and for the benefit of said corporation, for quantities of copper, spelter, and other supplies, in excess of the immediate necessities of the corporation, and for the purpose of obtaining the benefit of any rise in the price thereof that might occur. Now, if the inference was legitimate that the avails of the notes in question were included, there is nothing *ultra vires* in the act.

The corporation was organized for the manufacture of copper and brass goods. It would

be a strange restriction if it could not invest in the raw material it must use, in excess of its immediate necessities; or that it could not buy largely, when the material was low in price, with a view of having the benefit of it when it should rise. There is nothing in the finding that intimates that the purchases of the copper were not made for ultimate use, or that they were made merely to sell again in the market.

There are two assignments of error which relate to the ruling of the court as to the admission of evidence. The first is stated in the finding as follows: "Against the objection and exception of the appellee, Wm. H. Brown testified that, about the year 1872, with the knowledge of the officers of the corporation, and with the acquiescence and in the presence of said Philo Brown, Wm. H. Brown opened accounts with the Loan & Indemnity Co., a banking corporation in New York city, as follows: one account with 'Wm. H. Brown, Agent;' and the other, 'Brown & Bros. Wm. H. Brown, Secretary,' and the signatures of said Philo and Wm. H. were then left at said bank. The records of said corporation do not show said Brown's appointment as secretary until January, 1874. I find the facts as above testified to by said Brown, except as to the date of beginning said account."

The facts above testified to were the only ones to which objection was made. The court proceeded, without objection, to hear evidence, upon which it was further found that "it was confusing to have the same bank account for the business transactions at Waterbury and New York city, and the said two accounts were opened as matter of convenience in transacting the business of the corporation."

The account of Wm. H. Brown, agent, was the one used in the conduct of the New York business, and the account Brown & Bros. was used in connection with the business at Waterbury. Said Wm. H. Brown had entire and exclusive control over the account of Wm. H. Brown, agent. The Loan & Indemnity Co. went out of business in 1875, when said accounts were transferred to the said National Shoe & Leather Bank, the appellant in this case. The said accounts were opened in said National Shoe & Leather Bank in the same forms as in the Loan & Indemnity Co. Said Philo Brown and Wm. H. Brown left their signatures at said bank, and the signature of said Van Dusen was sent or left there. Philo Brown had full knowledge of this transfer of said accounts to the Shoe & Leather Bank, and said accounts were so kept with his consent thereafter."

By way of criticism, it may not be amiss to say that the error as assigned, contrary to the record, applies the objection to evidence of other connecting facts as well as to the one first mentioned. It also makes the alleged inadmissibility of the evidence depend wholly on the fact that it did not appear that the appellant had knowledge of the facts so proved,—a point not raised at the trial; if it had been, the evidence might have been supplied.

But we will consider the objection as it stands. In the first place, we do not see how the evidence could have prejudiced the appellee; for, if it were stricken out, we would have precisely the same mode and course of

dealing, by the same person, and for the same objects, continued for nine years, with the appellant bank. But the evidence was admissible to complete the continuous history of Wm. H. Brown's financial transactions for the corporation in New York; to explain the origin and mode of keeping the accounts and of procuring loans for the benefit of the corporation; and to show knowledge of his doings on the part of the directors.

It is a mistake to assume—as is done in the assignment of error we are considering—that knowledge on the part of the appellant was a prerequisite to the admissibility of the evidence in question. Had the appellants' claim been based solely upon an appearance of authority upon which it relied, where the circumstances would estop the corporation, knowledge might be essential.

But the parties were at issue upon a question of agency. It was immaterial whether or not the bank had any proof that Brown was agent of this corporation when it furnished the money. It will suffice if it first discovers and produces it on the trial of its claim. A general agency is established and defined, not merely by the authority which the agent actually receives from his principal, but by that which the latter allows the former habitually to assume and exercise.

Now this evidence that Wm. H. Brown was allowed to act during the many years covered by his transactions with the appellant bank and its immediate predecessor, with the knowledge and acquiescence of the directors of Brown & Bros., tended strongly to establish the fact found by the court, that he was the general and exclusive financial agent of the corporation in New York.

The remaining claim as to the admission of evidence is stated as follows in the finding:

"The appellee, for the purpose of showing a reason why the account in the name of Wm. H. Brown, agent, was opened in that form at the bank, offered evidence that Wm. H. Brown became insolvent about the year 1873 or 1874, and was thereafter unable to hold property in his own name until his father's death in 1880; which the court excluded.

We think this would have raised an issue entirely outside the merits of the controversy. It was incumbent upon the bank to show that it loaned the money to Brown & Bros., and not to Wm. H. Brown individually or as agent of anybody else; and whether he was a bankrupt or not was immaterial.

We do not think the remaining objection, that the bank by its conduct has estopped itself from making and enforcing its claim against the corporation, has any foundation to rest upon. The finding shows there was no concealment, by the bank, of these notes from the Brown & Bros. corporation or its officers.

At a meeting of the directors on the 5th of May, 1884, Wm. H. Brown called attention to the three notes in question; and on the next day Van Dusen and Chatfield called at the appellant bank, and were then shown the three notes in question and the manner in which they were signed.

The court expressly finds that "the officers and directors of Brown & Bros. had, when the contract was made with Farrell, knowledge of

the existence of the notes in question; but failed to inform him of their existence, but did not regard them as obligations of said corporation." It was not, then, the conduct of the bank that misled the directors, but their own erroneous views of the law.

Whether or not Farrell has any grievance as against the appellant, it is not our province to determine in the present case.

There was no error in the judgment complained of.

In this opinion the other Judges concurred.

Walter H. LEWIS *et al.*

v.

HARTFORD SILK MFG. CO.

A **manufacturing company**, desiring to obtain advances to enable it to engage in the manufacture of a certain line of goods, duly **executed** to a commission merchant, to whom it was in the habit of consigning its goods for sale, a **mortgage** on its real estate to **secure advances not to exceed a certain sum** at any one time, and conditioned that the obligation should be void if the company should deliver to the commission merchant goods whose value should equal the advances made by him, or should save him harmless; the commission merchant made advances somewhat in excess of the amount secured by the mortgage; thereafter he arranged, on the request of the general financial agent of the company, to make **additional advances**, not contemplated by the mortgage, on the verbal promise of such agent that such additional advances should be secured by the mortgage and by the consigned goods. The **avails** of the **consigned goods** were less than the amount secured by the mortgage, and the commission merchant, with the knowledge of the company, applied such avails on the said additional advances in the first instance, and, the company having gone into insolvency, brought suit to foreclose the mortgage. *Held:*

(a) That the **mortgage protected advances** made by the mortgagee up to the **amount secured thereby**, and was not confined to such advances as were necessary to enable the mortgagor to commence the manufacture of the goods referred to.

(b) That the mortgagee, by virtue of the **verbal agreement** made by the **general financial agent** of the **mortgagor company** on behalf of the company, could **repay** himself for the said **additional advances** from the proceeds of the **consigned goods**, before making any application of such proceeds upon the mortgage debt.

(c) That, hence, the **mortgagee** was **entitled to recover** under the mortgage the balance of his said **advances** to the mortgagor company, **less the proceeds** of the said **consigned**

goods, and less the proceeds of certain stock in another company which had been deposited with the mortgagee as security additional to the mortgage.

(Hartford—Filed January, 1888.)

APPEAL by plaintiffs and by defendant trustee in insolvency of defendant corporation, and by defendant trustee in insolvency of one of its stockholders, from a judgment of the Superior Court of Hartford County dismissing a petition for the foreclosure of a mortgage. *Reversed.*

The facts are fully stated in the opinion of the court.

Mr. Charles E. Perkins, for plaintiffs:

It was once held that the proceedings of directors must be proved by their recorded votes, but this rule has long since been changed.

Sherman v. Fitch, 98 Mass. 64; *Melledge v. Boston Iron Co.* 5 Cush. 175; *Mining Co. v. Anglo Californian Bank*, 104 U. S. 195 (28 L. ed. 707); *Martin v. Webb*, 110 U. S. 7, 14 (28 L. ed. 49); *Union Mfg. Co. v. Pitkin*, 14 Conn. 174, 187.

The principles applicable to appropriation of payments are decisive of this case. Sending gingham that they may be sold, and their proceeds applied to the payment of debts, is the same as sending money. All the gingham sent after June 9, 1885, appear to have been sent for the very purpose of application upon the additional advances. As soon as they were received and sold the avails were at once so applied, and notice thereof sent to the company, who assented to it, and so entered them on their own books. This made a valid appropriation at the time, which cannot now be attacked by the assignee.

Dulles v. De Forest, 19 Conn. 204; *Chester v. Wheelwright*, 15 Conn. 567; *Stamford Bank v. Benedict*, 15 Conn. 443; 2 Jones, Mort. p. 21, § 906.

This is sufficient evidence of ratification. Either the directors in fact knew of the agreement and the entries on the books of the company, in which case not objecting was a ratification; or they did not pay any attention to the business of the company, and left it to be done entirely by the president and Bartholomew, in which case they would be considered as having authority.

1 Morawetz, Corp. p. 505, § 539; 2 Morawetz, Corp. p. 601, § 633, p. 595, § 629; Angell, Corp. p. 818, § 304; *Sherman v. Fitch*, 98 Mass. 59, 64; *Scott v. Middletown, U. & W. G. R. Co.* 86 N. Y. 200; *Kraft v. Freeman Printing & Pub. Assn.* 87 N. Y. 628; *Martin v. Webb*, 110 U. S. 7, 15 (28 L. ed. 49).

Where the principal receives the benefit of an agreement without inquiry or rejection, he is bound by the whole contract, and cannot reject the parts beneficial to the other side.

Kraft v. Freeman Printing & Pub. Assn. 87 N. Y. 628; *McClure v. Briggs*, 58 Vt. 83; *Mundorff v. Wickersham*, 63 Pa. 87.

After a corporation has enjoyed the benefit of a contract or other arrangement made in good faith with any of its regular agents, it is but fair that every reasonable presumption should be made in order to hold the transaction binding upon the company.

2 Morawetz, Corp. § 632, p. 601; *Martin v. Webb*, 110 U. S. 7, 15 (28 L. ed. 49).

It is found that it was agreed between Lewis Bros. & Co. and Plunkett that, if they would make additional advances, they should be covered by the mortgage in the same manner as the \$100,000. Such an agreement to extend the operation of a mortgage may be made by parol, and is binding upon the parties.

Mead's App. 46 Conn. 417; 1 Jones, Mort. p. 279, § 876.

The assignee succeeds only to the rights of the assignor, and is affected by all the equities against him, and he takes the property subject to all equities.

Burr. Assign. p. 587, § 891; *Palmer v. Thayer*, 28 Conn. 237; *Chace v. Chapin*, 180 Mass. 128; *Yeatman v. Savings Inst.* 95 U. S. 766 (24 L. ed. 590); *Adams v. Collier*, 122 U. S. 862, 391 (30 L. ed. 1207).

Section 8 of the contract between Lewis Bros. & Co. and Bartholomew provided that if the terms of said mortgage are hereafter modified, such modifications are to be considered as incorporated into this agreement. The effect of this provision was to make the agreement of Plunkett bind Bartholomew, if it bound the company.

Roe v. Jerome, 18 Conn. 158; *Taylor v. Ely*, 25 Conn. 258.

Messrs. Henry C. Robinson and Hyde & Joslyn, for Charles M. Joslyn, trustee:

As between natural persons, or between corporations acting regularly through the proper agents, a lien of a mortgage may be practically extended by agreement of the parties, without going through the form of a fresh deed, upon the principle that where advances are made larger than the amount covered by the protection of the mortgage, upon a later and outside agreement between the parties, not expressed in mortgage-deed form, that the lien of the mortgage shall cover the additional advances, equity will not allow the mortgagor to redeem the mortgage until he has complied with the terms of the collateral, informal undertaking.

Scripture v. Johnson, 3 Conn. 211; *Mead's App.* 46 Conn. 417.

But this rule has no kind of binding force upon the land itself, nor any force at all except against the mortgagor.

In Connecticut, the real estate of a corporation, in the absence of special legislation, can only be conveyed in mortgage by the vote of the directors of the corporation at a meeting of the board held and warned for that purpose.

See *Stow v. Wyse*, 7 Conn. 219; *Browne, Corp.* § 54.

The president and the bookkeeper have no possible power to convey the land of a corporation in Connecticut. They are not its agents for that purpose.

See *Perry v. Simpson Waterproof Mfg. Co.* 87 Conn. 584; *Jackson v. Campbell*, 5 Wend. 572; *Jones, Mort.* § 128. See *Swazey v. Union Mfg. Co.* 42 Conn. 559.

In a forum where registration of deeds is important, where accuracy of description in the condition of a mortgage is vitally important, and where the parties are held to the exact limitations of their contract expressed in writing, sealed with their seals, acknowledged to be in writing, attested by disinterested witnesses, and recorded in public records, and in a forum where a mortgage deed is a conveyance of a

fee,—any outside agreement, varying the original mortgage deed and not wrapped in the solemnities required by law for the transfers of land, is utterly void as against subsequent incumbrancers, purchasers for value, creditors, and trustees in insolvency.

See *Jones, Mort.* 564; *Pom. Eq. Jurisp.* 1197; *Stoughton v. Pasco*, 5 Conn. 446; *Pettibone v. Griswold*, 4 Conn. 158; *Shepard v. Shepard*, 6 Conn. 41; *North v. Belden*, 18 Conn. 376; *Hart v. Chalker*, 14 Conn. 79; *Merrill v. Swift*, 18 Conn. 268; *Perry v. Simpson Waterproof Mfg. Co.* 87 Conn. 584; *Bramhall v. Flood*, 41 Conn. 68; *Stearns v. Porter*, 46 Conn. 314; *Ives v. Stone*, 51 Conn. 456; *Adams v. Adams*, 51 Conn. 544; *Winchell v. Coney*, 54 Conn. 27; 2 West. Rep. 827; *Townsend v. Todd*, 91 U. S. 452 (23 L. ed. 418); *Joslyn v. Wyman*, 5 Allen, 62; *Upton v. South Reading Nat. Bank*, 120 Mass. 153; *Gardner v. Emerson*, 40 Ill. 296; *Davis v. Jewett*, 3 Greene (Iowa), 226; *Bassett v. Hathaway*, 9 Mich. 28; *Johnson v. Anderson*, 30 Ark. 745; *Youngs v. Wilson*, 24 Barb. 510.

Messrs. Case, Maltbie, & Bryant, for E. A. Freeman and Hartford Silk Mfg. Co., defendants:

In the absence of anything in the act of incorporation bestowing special power upon the president, he has, from his mere official station, no more control over the corporate property and funds than any other director. The affairs of corporate bodies are within the exclusive control of their boards of directors, from whom authority to dispose of their assets must be derived.

Titus v. Cairo & F. R. Co. 37 N. J. L. 98, 102. See also *Chicago & N. W. R. Co. v. James*, 22 Wis. 198; *Walworth Co. Bank v. Farmers Loan & T. Co.* 14 Wis. 325; *Perry v. Simpson Waterproof Co.* 37 Conn. 584; *Hart v. Stone*, 80 Conn. 94.

This court, in *Seeley v. North*, 16 Conn. 97, said: "A ratification of an unauthorized act of an agent, without full knowledge of all the circumstances connected with said act, cannot be presumed, and will not bind the principal. And such knowledge is a most important qualification of the doctrine of ratification, and indispensable to its legal as well as equitable operation."

It is the object of this law to prevent fraud, and give security and stability to title. It results, unquestionably, that the conditions of a mortgage deed must give reasonable notice of the incumbrances on the land mortgaged. And, what is not of less importance, the incumbrance on the property must be so defined as to prevent the substitution of everything which a fraudulent grantor may devise to shield himself from the demands of his creditors.

Pettibone v. Griswold, 4 Conn. 162; *Stoughton v. Pasco*, 5 Conn. 442; *Shepard v. Shepard*, 6 Conn. 37; *Hubbard v. Savage*, 8 Conn. 215; *Booth v. Barnum*, 9 Conn. 286; *North v. Belden*, 18 Conn. 376; *Hart v. Chalker*, 14 Conn. 77. See *Sansford v. Wheeler*, 13 Conn. 168; *Bramhall v. Flood*, 41 Conn. 68; *Ives v. Stone*, 51 Conn. 446.

In *Shipman v. Aetna Ins. Co.* 29 Conn. 254, this court holds: "Under the statute, the petitioner (a trustee for an insolvent debtor) is trustee for the insolvent's creditors. He is the in-

strument by which, instead of by attachment, the insolvent's property is secured for the benefit of creditors, and the agent of the creditors, as well as of the law, for the appropriation of that property to the payment of their debts. And a conveyance which is deemed fraudulent and void as against an attaching creditor himself, must be invalid also as against a trustee who stands in the place of and represents such creditor."

Pardee, J., delivered the opinion of the court:

This is a suit for the foreclosure of a mortgage. The foreclosure was denied by the court, and the plaintiffs have appealed. Edward A. Freeman, who is a trustee of the Hartford Silk Manufacturing Co. in insolvency, also appeals; as does also Charles M. Joslyn, trustee in insolvency of the estate of George M. Bartholomew,—both trustees having been made defendants.

The plaintiffs are a firm under the name of Lewis Brothers & Company.

On October 22, 1884, the Hartford Silk Manufacturing Co. executed and delivered its bond to the plaintiffs for the payment of \$100,000; also, by way of security therefor, a mortgage of real estate situated in Tariffville, in the town of Simsbury. The condition in the bond and mortgage is as follows:—

"The condition of this obligation is such that, whereas the said Hartford Silk Manufacturing Co. is the manufacturer of certain silk and cotton goods at Tariffville, Connecticut, and has heretofore sent, and expects hereafter to send, its manufactured goods to said Lewis Brothers & Co., commission merchants in said city of New York, for sale, the said Lewis Brothers & Co. making advances from time to time on the manufactured goods received by them; and whereas the said company is about to commence the manufacture of gingham, and it is understood between the parties hereto that said company will need certain accommodations from time to time, for a longer or shorter period, in order to enable it to prepare for and to commence the manufacture of said gingham, and before it will be possible to obtain sufficient advances on the gingham so manufactured, and said Lewis Brothers & Co. are willing, and have agreed, to give such accommodations to said company from time to time within a period of twenty-four months from the date hereof, by accepting its drafts drawn upon them, provided that no one of said drafts shall be for a larger sum than \$5,000, and the aggregate thereof shall never exceed the sum of \$100,000 outstanding at any one time,—not including, however, in said aggregate, any advances made by them to said company on any other line of goods in the possession of said Lewis Brothers & Co.,—now, if said Hartford Silk Manufacturing Co. shall manufacture and deliver into the hands and possession of said Lewis Brothers & Co., for sale by them on commission, sufficient of said gingham, the value whereof shall be equal to the aggregate of said accommodation so given by said Lewis Brothers & Co. to said company for the purpose aforesaid, and, in default thereof, shall save the said Lewis Brothers & Co. harmless from the payment of all and every of

said drafts so drawn upon them by said company and accepted by them for the purpose aforesaid, and each and every renewal or partial renewal thereof, then this obligation is to be void, otherwise in full force and effect."

The bond and mortgage were duly executed and delivered in pursuance of a vote of the directors of the Hartford Silk Manufacturing Co., and recorded.

Between October 22, 1884, and June 30, 1885, the company drew its drafts on the plaintiffs for \$106,000, which were accepted by the plaintiffs, and renewed from time to time till the insolvency of the company, and were subsequently paid by the plaintiffs. The amount was intended to be only \$100,000, but by mistake was made \$106,000. The company was declared insolvent in September, 1886, and Edward A. Freeman was appointed trustee of its estate.

For some time previous to the execution of the bond and mortgage, the plaintiffs had been engaged in selling silk and tapestry goods on commission for the company, and making advances and accepting drafts on account of the goods, and had an open account of the same with the company, which was continued as a separate account until its insolvency. Another and distinct account was opened with the plaintiffs for the drafts accepted under the bond and mortgage, designated "Lewis Brothers & Co., Account No. 2," in which all the drafts were credited to the plaintiffs.

Soon after the execution of the bond and mortgage the company commenced to manufacture gingham, and on January 13, 1885, began to forward them to the plaintiffs, and continued to send them from time to time until its insolvency. The net cash value of these goods received by the plaintiffs prior to July 9, 1885, was \$12,000, and the value of all received by them was \$80,907.08. The company kept a separate account of them under the designation of "Lewis Brothers & Co., Merchandise Account, No. 2."

At the time the company commenced to forward these goods to the plaintiffs, they had accepted drafts on them amounting to \$61,000.

On December 4, 1884, George M. Bartholomew, a stockholder and director in the company, executed and delivered the agreement *mentioned in the answer and cross-complaint of Charles M. Joslyn, trustee of the insolvent estate of Bartholomew. The stock mentioned in the agreement had previously been delivered by Bartholomew to the plaintiffs.

On or about July 9, 1885, Thomas F. Plunkett, the president and principal business and financial manager of the company, requested the plaintiffs to accept other drafts, and thereby make other and additional advances to the company than those contemplated and secured by the

*This agreement was as follows:

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mortgage, to which the plaintiffs agreed, under a verbal promise by Plunkett that they should be secured therefor by the mortgage, and the gingham which had been, and thereafter should be, consigned to them, and also by the Flat Top Coal Co.'s stock mentioned in the Bartholomew agreement. Bartholomew was present with Plunkett on some of the later occasions when additional advances were applied for. The arrangement for those additional advances was not authorized or ratified by the company, by a vote of its stockholders or directors.

The Flat Top Coal Co.'s stock was of the par value of \$100 per share, and was sold by the plaintiffs October 11, 1886, after the default of the company to fulfill the condition of the mortgage, for \$36,618.75, which was a fair sale, and a fair price for the stock. The sale of the stock was made by the plaintiffs without notice to Bartholomew or the company.

In pursuance of the arrangement with Plunkett, the plaintiffs from time to time, prior to September, 1886, made additional acceptances and advances, amounting in all to \$51,000, which has never been paid. The company received the full benefit of them, and the plaintiffs would not have made them but for the arrangement mentioned and their belief that they would be protected by the company.

In September, 1886, Bartholomew was duly declared insolvent, and the defendant Joslyn was appointed trustee of his estate.

On October 25, 1884, the company executed and delivered to Plunkett and Bartholomew a mortgage of the same premises described in the mortgage to the plaintiffs, which was not recorded until within less than sixty days of the insolvency of the company. This mortgage was given to secure the indorsements made by Plunkett and Bartholomew of the notes of the company. During all the time the mortgage was withheld from record, the company was contracting indebtedness in the purchase of material for the conduct of its business, and in procuring the discount of notes, much of which indebtedness was unpaid at the time the company went into insolvency.

After July 9, 1885, the plaintiffs entered in a separate account, designated "Merchandise Account, No. 2" their additional acceptances as a debt of the company, and also entered in the credit side of the account the avails of all the gingham theretofore and thereafter received and sold by them; those theretofore received and sold not having been previously credited to the company in any other account kept by the plaintiffs. On January 1, 1886, the plaintiffs sent said company a copy of the account to that date, made as above mentioned, which the company received without objection, and entered in its own books, and the account was thereafter continued to be kept in the same

fore deposited with said Lewis Brothers & Co. 525 shares of stock in the Flat Top Coal Co. as additional security, in consideration of said advances already made or to be made hereafter.—

It is hereby understood and agreed: First. That Lewis Brothers & Co. shall have the right to sell any or all of said shares of stock, at private or public sale, and without notice to said Bartholomew, in case of default in the conditions of said mortgage.

Second. If the conditions of said mortgage are fulfilled, then immediately upon demand said Bar-

tholomew shall be entitled to receive back said shares of stock, free from any liens above referred to.

Third. If the terms of said mortgage are hereafter modified, such modifications are to be considered as incorporated in this agreement.

Fourth. If Lewis Brothers & Co. hereafter sell said stock as aforesaid, they will assign to said Bartholomew their interest in said mortgage security, subject to their prior claims thereon.

Signed and sealed by G. M. Bartholomew and Lewis Brothers & Co. [Ed.]

manner by both the plaintiffs and the company, until the insolvency of the company.

The superior court found that "the bond to the plaintiffs was fully paid by the avails of the gingham sold, and by enough of the avails of the Flat Top Coal Co. stock to cover the deficiency, and the mortgage was thereby fully satisfied; and at the commencement of the suit nothing was due the plaintiffs on the bond.

"At the time of the failure of the company, Bartholomew was indebted to it \$7,846.98, which should be deducted from the avails of the Flat Top Coal Co. stock remaining after the payment of the bond, and the balance of the avails should be paid by the plaintiffs to Joslyn, as trustee of Bartholomew.

"The plaintiffs have a valid claim on the mortgaged premises for the additional acceptances and advances, and should release the same to Freeman, as trustee, subject to such claim.

"The mortgage from the company to Bartholomew and Plunkett is invalid against the trustee and creditors of the company, and a cloud upon the title to the premises."

The judgment of the superior court is as follows:

"This action, by complaint claiming foreclosure of a mortgage to the plaintiffs from the Hartford Silk Manufacturing Co. of certain real estate, machinery, etc., situated in Simsbury in said county, and made to secure a bond for \$100,000, and also claiming possession of the mortgaged premises and property, duly came to this session of said court, when the plaintiffs appeared, and the defendants E. A. Freeman, trustee of the insolvent estate of said company, and C. M. Joslyn, trustee of the insolvent estate of George M. Bartholomew, also appeared, and Thomas F. Plunkett did not appear.

"Said Freeman, trustee, and said Joslyn, trustee, severally filed answers and cross-complaints.

"Said Freeman, by his answer and cross-complaint, claims that any sums due to the plaintiffs upon said bond and mortgage had been fully paid by the delivery to them of gingham valued at \$80,907.08, and by the amount realized and received by the plaintiffs from the sale of certain stocks pledged to the plaintiffs by said Bartholomew as additional security for liabilities arising under said bond and mortgage. Also, that if, under the agreement by which said stock was pledged as such additional security, said Joslyn, trustee, was entitled to have said bond and mortgage assigned to him as security for the amount paid out on account of the same from the sale of said stock, then the said Freeman was entitled to set off and deduct therefrom an indebtedness of \$7,846.98, with interest, existing from said Bartholomew to said Hartford Silk Manufacturing Co. Also, claiming that a certain mortgage of said property to

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"The mortgage from the company to Bartholomew and Plunkett is invalid against the trustee and creditors of the company, and a cloud upon the title to the premises."

The judgment of the superior court is as follows:

"This action, by complaint claiming foreclosure of a mortgage to the plaintiffs from the Hartford Silk Manufacturing Co. of certain real estate, machinery, etc., situated in Simsbury in said county, and made to secure a bond for \$100,000, and also claiming possession of the mortgaged premises and property, duly came to this session of said court, when the plaintiffs appeared, and the defendants E. A. Freeman, trustee of the insolvent estate of said company, and C. M. Joslyn, trustee of the insolvent estate of George M. Bartholomew, also appeared, and Thomas F. Plunkett did not appear.

"Said Freeman, trustee, and said Joslyn, trustee, severally filed answers and cross-complaints.

"Said Freeman, by his answer and cross-complaint, claims that any sums due to the plaintiffs upon said bond and mortgage had been fully paid by the delivery to them of gingham valued at \$80,907.08, and by the amount realized and received by the plaintiffs from the sale of certain stocks pledged to the plaintiffs by said Bartholomew as additional security for liabilities arising under said bond and mortgage. Also, that if, under the agreement by which said stock was pledged as such additional security, said Joslyn, trustee, was entitled to have said bond and mortgage assigned to him as security for the amount paid out on account of the same from the sale of said stock, then the said Freeman was entitled to set off and deduct therefrom an indebtedness of \$7,846.98, with interest, existing from said Bartholomew to said Hartford Silk Manufacturing Co. Also, claiming that a certain mortgage of said property to

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On or about July 9, 1885, Thomas F. Plunkett, the president and principal business and financial manager of the company, requested the plaintiffs to accept other drafts, and thereby make other and additional advances to the company than those contemplated and secured by the

*This agreement was as follows:

Whereas Lewis Brothers & Co., of New York City, have agreed to give their acceptances of drafts or advances to the Hartford Silk Manufacturing Co. to the amount of \$100,000, as set forth in the mortgage heretofore made by said Hartford Silk Manufacturing Co. to Lewis Brothers & Co., dated October 22, 1884, and recorded in the Land Records of Simsbury, Connecticut, October 23, 1884, in Book 52, at pages 296-307, to which mortgage reference is hereby made, and the same is made part of this agreement; and whereas in addition to said mortgage security, George M. Bartholomew has heretofore

mortgage, to which the plaintiffs agreed, under a verbal promise by Plunkett that they should be secured therefor by the mortgage, and the gingham which had been, and thereafter should be, consigned to them, and also by the Flat Top Coal Co.'s stock mentioned in the Bartholomew agreement. Bartholomew was present with Plunkett on some of the later occasions when additional advances were applied for. The arrangement for those additional advances was not authorized or ratified by the company, by a vote of its stockholders or directors.

The Flat Top Coal Co.'s stock was of the par value of \$100 per share, and was sold by the plaintiffs October 11, 1888, after the default of the company to fulfill the condition of the mortgage, for \$38,618.75, which was a fair sale, and a fair price for the stock. The sale of the stock was made by the plaintiffs without notice to Bartholomew or the company.

In pursuance of the arrangement with Plunkett, the plaintiffs from time to time, prior to September, 1886, made additional acceptances and advances, amounting in all to \$51,000, which has never been paid. The company received the full benefit of them, and the plaintiffs would not have made them but for the arrangement mentioned and their belief that they would be protected by the company.

In September, 1886, Bartholomew was duly declared insolvent, and the defendant Joslyn was appointed trustee of his estate.

On October 25, 1884, the company executed and delivered to Plunkett and Bartholomew a mortgage of the same premises described in the mortgage to the plaintiffs, which was not recorded until within less than sixty days of the insolvency of the company. This mortgage was given to secure the indorsements made by Plunkett and Bartholomew of the notes of the company. During all the time the mortgage was withheld from record, the company was contracting indebtedness in the purchase of material for the conduct of its business, and in procuring the discount of notes, much of which indebtedness was unpaid at the time the company went into insolvency.

After July 9, 1885, the plaintiffs entered in a separate account, designated "Merchandise Account, No. 2" their additional acceptances as a debt of the company, and also entered in the credit side of the account the avails of all the gingham theretofore and thereafter received and sold by them; those theretofore received and sold not having been previously credited to the company in any other account kept by the plaintiffs. On January 1, 1886, the plaintiffs sent said company a copy of the account to that date, made as above mentioned, which the company received without objection, and entered in its own books, and the account was thereafter continued to be kept in the same

manner by both the plaintiffs and the company, until the insolvency of the company.

The superior court found that "the bond to the plaintiffs was fully paid by the avails of the gingham sold, and by enough of the avails of the Flat Top Coal Co. stock to cover the deficiency, and the mortgage was thereby fully satisfied; and at the commencement of the suit nothing was due the plaintiffs on the bond.

"At the time of the failure of the company, Bartholomew was indebted to it \$7,846.98, which should be deducted from the avails of the Flat Top Coal Co. stock remaining after the payment of the bond, and the balance of the avails should be paid by the plaintiffs to Joslyn, as trustee of Bartholomew.

"The plaintiffs have a valid claim on the mortgaged premises for the additional acceptances and advances, and should release the same to Freeman, as trustee, subject to such claim.

"The mortgage from the company to Bartholomew and Plunkett is invalid against the trustee and creditors of the company, and a cloud upon the title to the premises."

The judgment of the superior court is as follows:

"This action, by complaint claiming foreclosure of a mortgage to the plaintiffs from the Hartford Silk Manufacturing Co. of certain real estate, machinery, etc., situated in Simsbury in said county, and made to secure a bond for \$100,000, and also claiming possession of the mortgaged premises and property, duly came to this session of said court, when the plaintiffs appeared, and the defendants E. A. Freeman, trustee of the insolvent estate of said company, and C. M. Joslyn, trustee of the insolvent estate of George M. Bartholomew, also appeared, and Thomas F. Plunkett did not appear.

"Said Freeman, trustee, and said Joslyn, trustee, severally filed answers and cross-complaints.

"Said Freeman, by his answer and cross-complaint, claims that any sums due to the plaintiffs upon said bond and mortgage had been fully paid by the delivery to them of gingham valued at \$80,907.08, and by the amount realized and received by the plaintiffs from the sale of certain stocks pledged to the plaintiffs by said Bartholomew as additional security for liabilities arising under said bond and mortgage. Also, that if, under the agreement by which said stock was pledged as such additional security, said Joslyn, trustee, was entitled to have said bond and mortgage assigned to him as security for the amount paid out on account of the same from the sale of said stock, then the said Freeman was entitled to set off and deduct therefrom an indebtedness of \$7,846.98, with interest, existing from said Bartholomew to said Hartford Silk Manufacturing Co. Also, claiming that a certain mortgage of said property to

fore deposited with said Lewis Brothers & Co. 25 shares of stock in the Flat Top Coal Co. as additional security, in consideration of said advances already made or to be made hereafter,—

It is hereby understood and agreed:

First. That Lewis Brothers & Co. shall have the right to sell any or all of said shares of stock, at private or public sale, and without notice to said Bartholomew, in case of default in the conditions of said mortgage.

Second. If the conditions of said mortgage are fulfilled, then immediately upon demand said Bartholomew shall be entitled to receive back said shares of stock, free from any liens above referred to.

Third. If the terms of said mortgage are hereafter modified, such modifications are to be considered as incorporated in this agreement.

Fourth. If Lewis Brothers & Co. hereafter sell said stock as aforesaid, they will assign to said Bartholomew their interest in said mortgage security, subject to their prior claims thereon.

Signed and sealed by G. M. Bartholomew and Lewis Brothers & Co. [Ed.]

secure a bond of \$200,000, made by said company to Thomas F. Plunkett and George M. Bartholomew on October 25, 1884, and not recorded until September, 1886, and within 60 days of the assignment in insolvency of said company, was invalid and void, and was a cloud upon the title of said Freeman, as trustee, which should be removed.

"Said Joslyn, by his answer and cross-complaint, claims that all claims of the plaintiffs under said bond and mortgage to them have been paid; that 525 shares of the stock of the Flat Top Coal Co. was pledged to the plaintiffs by said Bartholomew as additional security for the sums becoming due under said bond and mortgage; that the plaintiffs received from the Hartford Silk Manufacturing Co., on the said bond and mortgage, \$80,907.08, and then sold said stock for \$86,618.75, and applied \$——— of the amount upon said bond and mortgage; that said bond and mortgage should be assigned to and vested in said Joslyn, trustee, as security for said last sum, and that judgment should be rendered against the plaintiffs for the proceeds of said sale, not applied on said bond and mortgage, the sum of \$———, or that the plaintiffs should be ordered to return said stock to said Joslyn, trustee.

"The court finds that there is nothing due the plaintiffs upon said bond and mortgage; that the allegations of the answer and cross-complaint of the defendant Freeman are true; and the allegations of the answer and cross-complaint of the defendant Joslyn (except the allegation that he is entitled to the return of the stock of the Flat Top Coal Co.) are true.

"Whereupon it is adjudged that the plaintiffs' complaint be dismissed; and said mortgage to Thomas F. Plunkett and George M. Bartholomew is invalid and a cloud upon the title to the premises and property therein described, and, as such, is removed, set aside, and discharged; that the interest of the plaintiffs in said mortgaged premises and property be assigned and conveyed by them to, and vested in, said Joslyn, trustee, subject to the claim of the plaintiffs thereto as security for \$6,000 and interest, advanced by mistake, beyond the \$100,000 intended to have been advanced, and for \$51,000 and interest for additional acceptances and advances made by the plaintiffs to said Hartford Silk Manufacturing Co. after July 9, 1885, under a verbal arrangement, outside of and subsequent to the plaintiffs' mortgage, between them and said Thomas F. Plunkett; and said Joslyn, trustee is empowered and directed to release the interest in said premises and property so conveyed to him by the plaintiffs, to said Freeman, trustee, on the receipt from him of \$9,678.85, and the interest thereon, said sum being a portion of the avails of Flat Top Coal Co. stock belonging to said Bartholomew, and sold by the plaintiffs and applied toward the payment of said bond, after deducting \$7,846.98 for the indebtedness of said Bartholomew to said company; and that said Joslyn, trustee, recover said sum of \$9,678.85, and interest, from the plaintiffs, and his costs, taxed and allowed at \$———; and that said Freeman, trustee, recover from the plaintiffs his costs, taxed and allowed to be \$———."

The plaintiffs appeal from this judgment for

the following reasons: 1. The court should have held that the plaintiffs had the right to apply the avails of gingham sold by them upon the additional advances made by them, as stated in the finding. 2. The court erred in ordering that the plaintiffs' complaint be dismissed. 3. The court erred in ordering that the plaintiffs convey their interest in said mortgaged premises and property to said Joslyn, trustee. 4. The court erred in directing that said Joslyn recover of the plaintiffs the sum of \$9,678.85. 5. The court should have found, as matter of law upon the finding, that the agreement of said Plunkett with the plaintiffs was binding upon said company, and that the appropriation of the avails of said gingham to pay said additional advances, acquiesced in by said company, and entered upon the company's books, was valid, and that the mortgage should have been held valid for the amount of said acceptances not paid by the avails of said gingham above said amounts so applied on said additional advances.

The defendant Joslyn, trustee, appeals, for reasons as follows: 1. The court should have held that the amount secured by said mortgage to the plaintiffs was the amount needed by the Hartford Silk Manufacturing Co. "in order to enable it to prepare for and to commence the manufacture of gingham." 2. The court should have held that the amount secured by said mortgage was no greater sum than \$61,000, that being the amount of said advances when said company began to ship gingham to the plaintiffs. 3. The court should have held that the undersigned was entitled to a judgment against the plaintiffs for the full amount realized by the sale of said Flat Top stock. 4. The court erred in not holding that the undersigned was entitled to an assignment of the plaintiffs' mortgage to at least the extent of \$19,092.92, that being the difference between \$100,000 and the amount of said gingham; or that the undersigned was entitled to the benefit of said mortgage to that amount. 5. The court erred in not holding that the undersigned was entitled to a foreclosure, either as assignee or equitable owner, against said silk company, for the amount of \$19,092.92, less the indebtedness, if any, from said Bartholomew to said company. 6. The court erred in not holding that the undersigned was entitled to a judgment against the plaintiffs for \$17,525.83, that being the difference between the proceeds of said Flat Top stock and said \$19,092.92. 7. The court erred in holding that the mortgage to said Bartholomew and Plunkett was invalid, and a cloud upon the title to said premises and property, and should be removed. 8. The court erred in holding that the interest of the plaintiffs in said mortgaged premises and property be assigned to the undersigned, subject to the claim of the plaintiffs thereto, as security for \$6,000 and interest, advanced by mistake, and for \$51,000 advanced under a verbal agreement between them and said Plunkett.

We will consider two of the questions arising upon the record: 1. Does the mortgage protect advancements by the mortgagees to the extent of \$100,000, or only such as were necessary to enable the mortgagor to commence the manufacture of gingham? 2. Could the plaintiffs, by virtue of the agreement made by Plunkett and Bartholomew in behalf of the Silk Manu-

facturing Co., repay themselves for advancements, to the extent of \$51,000, from the proceeds of gingham manufactured and consigned to them by the company, before making any application of such proceeds upon the mortgage debt of \$100,000?

The expressed purpose of the mortgage is to secure the mortgagees for future advancements. Neither party could foresee the precise limit to the mortgagor's necessities. It had the right to determine the amount for which it would pledge its estate; up to that the mortgagees had the right to rely upon the pledge as security for loans, as against the mortgagor and all others. The inquiring public is not concerned with any statement in this instrument except the insertion in it of \$100,000. In that there is the precision and certainty necessary to its protection. In the presence of an explicit statement of the sum which the mortgagor would borrow if the mortgagees would lend, the recital as to the purpose to which the former proposed to apply the money is of no legal significance. Having the money in its possession, the mortgagor could apply it at its pleasure; the mortgagees would be powerless to compel use or prevent misuse; and are not to be affected by any act of omission or commission. They fulfilled their legal obligation to the public in placing upon record the utmost limit of their lien; thereafter there remained to no person the right to assume that it was less. If a mortgagor has reason to apprehend that the giving of a mortgage will injuriously affect his financial standing, he has the right to reduce that danger to the lowest possible degree by inserting in the mortgage a declaration that he is not compelled to borrow because of losses, but because he wishes to make improvements from which he expects large returns. No intending creditor has any legal excuse for finding any other meaning than this in the recital. The agreement that the mortgagor would deliver and the mortgagees receive gingham in payment for advancements, is not placed beyond the power of the parties to change or annul by parol, by themselves or by their agents, because it is recited in an instrument which needed a corporate vote for its validity. It is not variant in character or effect from an agreement by the mortgagor to pay money when and as fast as it should receive it; or from any agreement as to time and mode of delivery and reception of any kind of personal property in discharge of the obligation. The effect of it is limited to the immediate parties. No other person has any interest in or right to enforce it, or right to assume that it has been or will be carried into effect by the parties making it. There still remains to the mortgagee the right to change the time and mode of payment, and to allow the mortgagor to pay other creditors. He may make other advancements and receive money, gingham, or any other property in payment, without endangering his right to a foreclosure for his entire debt.

On or about July 9, 1885, T. F. Plunkett, the president, and principal business and financial manager of the Silk Manufacturing Co., requested the plaintiffs to make advancements to the company, in addition to those contemplated and secured by mortgage, and verbally agreed that these should be secured by the mortgage,

by the gingham previously and subsequently consigned to them, and by the Flat Top Coal Co.'s stock pledged by Bartholomew. Requests for additional advancements were renewed from time to time by Plunkett, and on some of the later occasions Bartholomew was present. Upon such requests and agreement, the plaintiffs, between July 9, 1885, and September, 1886, advanced the sum of \$51,000 to the company. There was no vote, either of its stockholders or directors, authorizing such borrowing or agreement. No such vote was necessary to make the acts of Plunkett binding upon the corporation. Having made him its principal and general financial manager and agent, with no limitation upon his power, and having notified all persons concerned of such appointment, the company is bound by his act of borrowing for its benefit, and of pledging gingham or any other personal property for repayment. He was clothed with power to borrow money for its necessary and proper uses from any person who would lend; to sell gingham and repay; or consign gingham with leave to retain the proceeds; or use any other property for that purpose. And as in these matters, in legal contemplation, he was the corporation, he could bind it as effectually as it could bind itself by corporate vote, when taking up money, by an agreement that payment should be secured by the previous mortgage; provided (in the interests of other creditors) the aggregate should not exceed the extreme limit of \$100,000. Of course a corporate vote was necessary to a valid mortgage by its financial agent of real estate of the Silk Manufacturing Co. to the plaintiffs. But all money or other personal property, or rights therein, coming into its possession because of the mortgage security thus given, were at the disposal of its general, unlimited, financial agent, equally with any other personal property belonging to it. A corporate vote is not made necessary to the valid disposition of this right in personal property because of the mention of it in a sealed instrument. Therefore if we should concede that, as against the plaintiffs, the agreement between them and the Silk Manufacturing Co. constituted a valuable right in the possession of the latter, nevertheless Plunkett had absolute power of disposal of this right for its benefit. He could exchange, sell, pledge, or annul it by his individual action at his discretion. Presumably the agreement by the mortgagor to deliver, and by the mortgagee to receive, gingham in payment was for the benefit of the latter; and, although it has a place in the condition of the mortgage, they were under no obligation to see in it any limitation upon the power of the mortgagor's general financial agent thereafter to borrow, if they should be willing to lend, other and additional sums for its benefit, and make payment therefor in money, gingham, or other personal property. The purpose of the mortgagor was to give satisfactory security for the loan of \$100,000; not at all to bar itself from borrowing other money if a willing lender could be found.

As it is the company's duty always to pay its debts, the application of any of its personal property or rights in stock at any time to that use, by its accredited financial agent, without limitation, is binding upon it. And whatever

valuable property right, as against Bartholomew, the Silk Manufacturing Co. had in the use and application of his shares in the Flat Top Coal Co., that right was at the disposal of Plunkett, for the benefit of the company, by sale or pledge; Bartholomew's rights, of course, not to be affected by any act of Plunkett not authorized or ratified by himself.

Moreover, upon the record there was such corporate ratification of Plunkett's acts as would have established them in the absence of previous authority. On June 30, 1885, the plaintiffs had advanced to the Silk Manufacturing Co. the full sum of \$100,000, for the security of which the mortgage was given, and, by mistake, \$6,000 in excess. On January 1, 1886, they gave the company written notice that they had advanced additional sums to it, and had applied towards the payment therefor the proceeds of the gingham which it had consigned to them, and which were referred to in the condition of the mortgage. The company received this notice, and made on its own books a like credit upon a like account. Silence then imposes silence now upon it in reference to this transaction. The result is an actual application of the proceeds of the gingham by the plaintiffs to the repayment of the last advances, with the knowledge and assent of the Silk Manufacturing Co.

Therefore, upon the plaintiffs' appeal, there is error in the judgment of the Superior Court in dismissing the petition; in denying the plaintiffs the right to repay themselves, from the proceeds of gingham consigned by the Silk Manufacturing Co., and sold by them, first of all, the sum of \$51,000, advanced by them to the company, with interest; in determining that there is nothing due them upon the bond and mortgage executed by the company in their favor under date of October 22, 1884; in denying them the right, secondly, to receive from the company, as a debt secured by the mortgage, the balance of their advancements to it, with interest, less the proceeds of gingham consigned by the company and sold by them, with interest, also less the proceeds of the shares of the Flat Top Coal Co., pledged by Bartholomew and sold by them, with interest; in requiring them to assign and convey to Joslyn, trustee, their right and title to and interest in the mortgaged premises and property before repayment to them of advancements above mentioned, with interest; in ordering them to pay Joslyn, trustee, the sum of \$9,678.35; and in not granting the plaintiffs' petition for foreclosure.

If, after the adjustment of the plaintiffs' claims upon the foregoing principles, there remains unsettled any question of practical importance between the trustee of G. M. Bartholomew and the trustee of the estate of the Silk Manufacturing Co., it will be determined.

In this opinion the other Judges concurred.

Edgar H. NEWTON

NEW YORK & NEW ENGLAND R. R. CO.

1. A statute which makes a railroad company responsible for the consequences

of the lawful use of its property is **not penal.**

2. Action on the **case** is the proper remedy at common law for damages caused by **sparks escaping from a locomotive**, and is **not barred** within six years.

(Windham—Filed February 4, 1888.)

A PPEAL by defendant from a judgment of the Superior Court of Windham County in favor of plaintiff in an action brought to recover damages for injury to property by fire. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Simeon E. Baldwin and George A. Conant, for defendant, appellant:

1. The three years' limitation applies:

(a) Trespass.

The common law gave a remedy for a fire due to negligence, by an action on the **case**; and for a fire due to the direct act of the party,—as by thrusting a firebrand into a hayrick,—by an action of trespass.

The complaint charges that “the defendant communicated fire to the plaintiff's property from a locomotive engine.” This could not be ground for an action on the **case**. It was therefore barred, under Gen. Stat. p. 494, § 7, by the lapse of three years before suit brought.

Gates v. Miles, 3 Conn. 64, 69.

(b) Express contract, not written and signed by contracting party.

Express contracts or agreements, by § 7, must be sued on within three years, unless reduced to writing and signed.

Master, Wardens, etc., v. Loder, 6 Eng. L. & Eq. 309.

The defendant does not deny its obligation under the Act of 1881, but it says that the obligation rests on an express agreement, to wit, the charter, not signed by it or its agent. The provision of the charter imposing it was an express executory contract, on a sufficient consideration. If the law is valid, it gives the plaintiff—as one of those for whose benefit the promise was made—the right to sue on it.

Trustees of the Bishop's Fund v. Rider, 13 Conn. 87, 94-99.

But such agreement, if broken, the statute, in terms (§ 7), requires to be sued on in three years.

2. The action a penal one.

The statute as to penal actions is as follows (Gen. Stat. p. 444, § 10): “No suit for any forfeiture upon any penal statute shall be brought but within one year next after the commission of the offense.”

The Act of 1881 imposes and creates a new burden, and makes any communication of fire from a locomotive an actionable offense against the law, whether the company be in fact in fault or not.

Mitchell v. Hotchkiss, 48 Conn. 9.

Mr. Sumner, for plaintiff, appellee.

Beardsley, J., delivered the opinion of the court:

This is an action by complaint, dated September 18, 1886, to recover damages for injury to property of the plaintiff by fire alleged to

have been communicated to it by the defendant's locomotive on the 2d day of June, 1888. The action is brought under the following statute:

"Whenever any injury is done to a building or other property of any person * * * by fire communicated by a locomotive engine of any railroad corporation, without contributory negligence on the part of the person, * * * the said corporation shall be held responsible in damages to the extent of such injury," etc. *Sess. Laws 1881, p. 48.*

There is no allegation in the complaint that fire was caused by the negligence of the defendant.

The defendant alleges in its answer: (1) that the right of action for the cause stated in the complaint did not accrue within one year next before the commencement of the action; and (2) that such right of action did not accrue within three years next before the commencement of the action. The plaintiff demurs to these allegations in the answer, and the question presented is whether the plaintiff's right of action is barred by the Statute of Limitations. The defendant claims that it is so barred; first, upon the ground that the statute is a penal one, and a suit to recover the penalty imposed by it must therefore be brought within a year after the right of action accrues. *Gen. Stat. p. 494, § 10.* We see no reason for holding that the statute is a penal one. In the case of *Burroughs v. Housatonic R. Co.* 15 Conn. 124, this court held that a railroad company, free from negligence, was not liable for damage from fires kindled by sparks from their locomotives.

The statute was passed to remedy what was regarded as a defect in the common-law rule of liability thus established, by providing that railroad companies should be liable for such damage, though their own negligence did not contribute to it. The companies are not subjected by it to a penalty, as for doing an unlawful act, but are made responsible for a consequence of the lawful use of their property and exercise of their rights.

But the defendant claims that, if the statute is not a penal one, the proper remedy to enforce the liability created by it is an action of trespass, which is barred by the Statute of Limitations, the provisions of that statute being that actions of trespass shall be brought within three years, and actions on the case within six years, next after the right of action shall accrue. *Gen. Stat. p. 494, §§ 6, 7.*

Since the enactment of that statute the distinction in the forms of action has been abolished by the Practice Act, so called; but by a provision of that Act the defense of the Statute of Limitations "available in any form of action shall be available in like manner and to the same extent against the complaint founded on the proper subject-matter of such action." The question, therefore, is whether trespass or case would at common law have been the appropriate form of action under the statute.

This of course depends upon the allegations in the complaint. They follow in substance the language of the statute, and are to be similarly construed; and the language of the statute is to receive a rational construction as applied to the subject to which it relates. The only

liability to fires from railroad locomotives, and indeed the only conceivable way in which they could communicate them, is from sparks emitted from the smokestack, or live coals dropped upon the track, being carried by the wind into contact with some combustible material.

An action on the case would have been, at common law, the proper remedy to recover for damage so produced, whether the negligence of the company contributed to it or not; for at common law the decisive test as to the form of action to be adopted was not whether the injury was produced or not by the negligence of the defendant, but whether its act was an immediate injury to the person or property of the plaintiff, or injurious only by consequence, and collaterally. 3 Bl. Com. 123.

The liability of innkeepers and common carriers for the loss or damage of the goods of their customers does not depend upon their negligence; but case is, at common law, a proper action to enforce it.

The defendant makes the further claim that the action is barred by the provision in the statute that "no action founded upon any express contract or agreement not reduced to writing, etc., shall be brought but within three years next after the right of action shall accrue."

It argues that, inasmuch as the defendant's charter subjects it to "all the restrictions, duties, and liabilities set forth in the general laws, which now are or may hereafter be in force, relating to railroad corporations," the defendant, by accepting it, entered into an express unwritten contract, and that this action is founded upon it. If it were necessary to decide these questions, we should probably hold that the company was responsible to the State only for a violation of the obligation imposed upon it by this provision of its charter; but if otherwise, and a contract was created by the company's acceptance of its charter, upon which an individual might sue, such contract was not an express, but an implied one.

It is unnecessary, however, to discuss these questions, because it seems clear that even if, as the defendant claims, an express contract exists, this action is not founded upon it. The defendant is subject to the provisions of the statute under which the action is brought. It operated independently and *proprio vigore* to charge them with liability, if they are liable, and is therefore the foundation of the action.

There is no error in the judgment appealed from.

In this opinion the other Judges concurred.

Marks FISHEL *et al.*

v.

Israel BENNETT, JR.*

1. Where a statute forbids the sale of spirituous and intoxicating liquors by sample, by soliciting or procuring orders therefor, in any town of the State where such liquors may not lawfully be sold, and provides that no action shall

*See *State v. O'Neil* (Vt.), 1 New Eng. Rep. 775; *Re Liquors of Young & Lyon* (R. I.), Id. 813; *Well v. Golden* (Mass.), 2 New Eng. Rep. 235; *Fisher v. Lord* (N. H.), Id. 285; *State v. Basserman* (Conn.), Id. 327; *State v. Ascher*, 3 New Eng. Rep. 558, 54 Conn. 299; *Jones v. Surprise* (N. H.), 4 New Eng. Rep. 232.

be maintained for the price of liquors sold anywhere, with intent to enable any person to violate a law of the State relating to the sale of intoxicating liquors; and where plaintiffs sent their agent into the State, with authority to take orders for liquors, and to ascertain in what towns the same might and might not be lawfully sold, who took an order for a bill of liquors, knowing that the person giving such order intended to sell the same in violation of the law of the State, such plaintiffs, filling the order out of the State, are chargeable with the knowledge of the agent; and the transaction is a sale with intent to enable a person to violate the law of the State relating to the sale of intoxicating liquors.

2. The fact that the agent had no authority to sell does not affect the liability of the plaintiffs.
3. Though plaintiffs had no actual intent to enable the purchaser to violate the law of the State, yet the law will conclusively presume that the agent had communicated his knowledge to the plaintiffs, and will hold them liable to its consequences.

(Hartford—Filed February 8, 1888.)

APPEAL by plaintiffs from a judgment of the Court of Common Pleas of Hartford County in favor of defendant in an action brought to recover the price of liquors sold and delivered. *Affirmed.*

Pub. Acts 1882, pt. 4, chap. 107, § 11, regulating the sale of intoxicating liquors, provides that "no person shall sell any spirituous and intoxicating liquors by sample, by soliciting or procuring orders, or otherwise, within this State, without taking out a license therefor in the manner provided in this chapter; but nothing in this Act contained shall prohibit any dealer in spirituous and intoxicating liquors, duly licensed under the provisions of this Act, from soliciting and procuring orders in any town in this State in which liquors may be legally sold."

Part 9, § 1, of the same Act, provides that no action shall be maintained for the price of liquors sold anywhere "with the intent to enable any person to violate any law of the State relating to the sale of intoxicating liquors."

The facts are sufficiently stated in the opinion of the court.

Messrs. Charles E. Perkins and S. F. Jones, for plaintiffs, appellants:

Thalinger did not make this sale; all that he did was to obtain an order and send it to the plaintiffs for them to make the sale or not, as they saw fit.

Mr. Wood, on Fire Insurance, p. 631, § 386, says: "When the agent has neither actual nor apparent authority to make a contract, but only authority to receive and forward proposals for a policy, and to deliver the same to the assured, and receive the premium therefor, knowledge of the agent cannot be imputed to the principal."

It is only where the agent stands in the place

of the principal in doing some act, so that this act is the act of the principal, that his knowledge becomes the knowledge of the principal. If I employ an agent to find out about a certain thing and inform me, and he finds it out and does not inform me, I am not affected by his knowledge; and it does not bear upon my intent in making a sale legal in fact, although if I had his knowledge it would be illegal. The intention of a party is a fact to be proved as all other facts are proved.

Quinebaug Bank v. Brewster, 30 Conn. 559.

The order was taken in Connecticut and sent to the plaintiffs in New York for their decision as to whether they would accept it or not. They decided to do so, and shipped the goods, in New York, to the defendant, in Connecticut, he to pay the freight. On these facts the sale was made in New York.

Orcutt v. Nelson, 1 Gray, 536; *Brookway v. Maloney*, 102 Mass. 308.

Even if a person is prohibited from selling without a license, under a penalty, the sale is not therefore void, even though made by the nonlicensed person, unless the statute shows that the Legislature intended that the sale should be void, in addition to the penalty of a fine.

Jones v. Berry, 33 N. H. 209; *Niemeyer v. Wright*, 75 Va. 239; *S. C.* 40 Am. Rep. 720, and notes; *Larned v. Andrews*, 106 Mass. 435.

That the Legislature did not so intend here is clearly shown by Acts 1882, pt. 9, § 1, where it expressly says that sales shall be void, and does not mention those of this character. Where there is an express provision defining exactly what sales shall be void, those are the only ones intended.

Messrs. Lewis E. Stanton and William J. McConville, for defendant, appellee:

When the delivery and payment were to be in Connecticut, the sale is in this State.

Lewis v. McCabe, 49 Conn. 141; *Wail v. Golden*, 2 New Eng. Rep. 235, 141 Mass. 364, 368.

A party is bound to know the laws of a State in which he does business.

Hill v. Spear, 50 N. H. 253, 282.

A sale of intoxicating liquors made in this State by a Massachusetts dealer, he knowing that they are intended by the purchaser to be sold in violation of the laws of this State, is illegal and void, and an action on a note given for a part of the price cannot be maintained.

Wilson v. Stratton, 47 Me. 120, 126.

Plaintiffs did actually participate in the illegal purpose by falsely marking the goods with the letter "B," enclosed in a diamond figure. This was done in order to prevent seizure of the liquors, and enable the defendant to get possession of them in safety. As to the effect of such marked packages of liquor in one State to be forwarded into another, see—

Gaylord v. Soragen, 32 Vt. 110; *Skiff v. Johnson*, 57 N. H. 475.

Thalinger was plaintiffs' agent, not only to solicit, but also to ascertain where in this State liquor could and could not be lawfully sold. His knowledge on this point should be imputed to them. He was agent to find out whether these liquors were, or were not, to be sent into no-license towns, and there sold.

The ungracious nature of a defense is no legal answer to it.

White v. Buss, 3 Cush. 448; *Skiff v. Johnson*, 57 N. H. 475; *Foster v. Thurston*, 11 Cush. 822.

Thalinger was engaged in the violation of Pub. Acts 1882, p. 188, § 11, and p. 190, § 1. The plaintiffs now seek to escape from the consequences of his acts and knowledge. To permit this would allow them to do acts here by an agent which they could not do themselves. Courts have gone great lengths against such contracts. "Yet in the face of these laws, and of the known and settled policy of the State, they send their agents into the State to seduce our citizens to enter into contracts looking directly to their violation; and, after having succeeded by such solicitations in inducing them to enter into such a contract, they come before our courts and ask them, on the principle of comity, to enforce them on the technical ground that they were completed in another State. Such proceedings are manifestly in fraud of the laws of the State, and cannot be upheld by any sound principle of comity."

Wilson v. Stratton, 47 Me. 126; *Bancher v. Mansel*, 47 Me. 58. See *Hill v. Spear*, 50 N. H. 264; *Jones v. Surprise*, 4 New Eng. Rep. 262.

Beardsley, J., delivered the opinion of the court:

This is an action brought to recover the price of certain spirituous liquors sold to the defendant.

The defendant made the following answer to the complaint:

1. The defendant denies the truth of the matters alleged in the plaintiffs' complaint, except as hereinafter admitted.

2. The claim of the plaintiffs is for spirituous and intoxicating liquors illegally sold by the plaintiffs within this State, to wit, in the town of Killingly, by soliciting and procuring orders therein without lawful license, and in violation of the law of this State.

3. The demand of the plaintiffs in this suit is for spirituous and intoxicating liquors illegally sold by the plaintiffs to the defendant, with intent on the part of the plaintiffs to enable the defendant to violate the law of this State relating to the sale of spirituous and intoxicating liquors, by again selling the same in this State, contrary to law; and the same in fact were sold by the defendant in said Killingly in violation of the law of this State.

4. At the time when said liquors were sold by the plaintiffs to the defendant, the town of Killingly was a "no-license" town, and the sale of spirituous and intoxicating liquors therein was prohibited by law, as the plaintiffs then knew; and they sent the same into said town with intent to cause them to be therein sold again by the defendant in violation of the law of this State.

The plaintiffs denied the allegations in the second, third, and fourth paragraphs of the answer.

It was not disputed, upon the trial, that the liquors in question were sold and delivered by the plaintiffs, liquor dealers in New York, to the defendant, a hotel keeper in Killingly, in this State. The question as to where the delivery was in fact made was submitted to the jury under proper instructions from the court. It was admitted that, when the liquors were

ordered and sold, Killingly was a no-license town; but it was not claimed that it was known to be such by the plaintiffs, though it was admitted that they knew that there was a local-option law in this State. The defendant testified that he bought the liquors for the purpose of selling them illegally in Killingly.

The order for the liquors in question was given by the defendant to one Thalinger, who, it was admitted by the plaintiffs, was their agent to solicit and take orders for liquors; such orders to be sent to them, and filled only if approved by them.

Fishel, one of the plaintiffs, testified that Thalinger was also expressly authorized by the plaintiffs to inquire and ascertain at what places in this State liquors could be legally sold. The defendant claimed that he knew that Killingly was a no-license town, and the purpose for which the defendant bought the liquors, and claimed that such knowledge should be imputed to the plaintiffs.

Upon this point the court charged the jury that if the plaintiffs, when selling these liquors to the defendant, had full knowledge that they would be sold in Connecticut in violation of law, and were purchased of them by the defendant for the purpose of violating the laws of the State, then the plaintiffs, when they sold these liquors, did so with the intent to enable the defendant to violate the laws of this State relating to intoxicating liquors, and could recover for none of the liquors so sold to the defendant; that in this case it did not appear that the plaintiffs, when they sold the liquors, had personal knowledge that they were purchased by the defendant to sell illegally within this State; and that the jury ought not to surmise that the plaintiffs, as keen business men, had such knowledge; that if Thalinger was their agent only to solicit orders, and not to effect sales, his knowledge of the defendant's intention to sell the liquors illegally would not be imputed to the plaintiffs; but if, according to Fishel's testimony, he was the plaintiff's agent, not only to solicit orders, but was also their agent to inquire and ascertain where liquors could be legally and illegally sold, then the knowledge of Thalinger would be imputed to the plaintiffs; and if Thalinger, when he took the orders, fully understood that the liquors so ordered by Bennett were purchased to sell in violation of the laws of this State, and if the jury should find that they were so purchased by Bennett, then the jury should consider Thalinger's knowledge as the knowledge of the plaintiffs; and the plaintiffs could recover for none of the liquors sold by them with intent to enable the defendant to violate the laws of this State; but that they could recover for any of the liquors which were sold in New York, and not sold with such intent.

The jury rendered a verdict for the defendant, and the plaintiffs have appealed. The question raised by their assignment of errors is as to the correctness of that part of the charge which relates to the effect upon the plaintiffs of Thalinger's knowledge of the illegality of the sale, acquired as their agent.

We think that the plaintiffs have no reason to complain of this charge. If Thalinger had been the agent of the plaintiffs to sell, as well as to ob-

tain orders and the knowledge referred to, and, having such knowledge, had sold liquors to the defendant in the State of New York, it will be admitted that the plaintiffs would have no right of action, for the sole reason that the agent's knowledge of the illegal purpose for which the sale was made would invalidate the contract. In the case supposed they would have no actual intent to enable the defendant to violate the laws of this State, but the law would conclusively presume that the agent had communicated his knowledge to them, and would hold them liable to its consequences. *The Distilled Spirits*, 78 U. S. 11 Wall. 356 (20 L. ed. 187); *State v. Woodhall*, 113 Mass. 391.

It can make no difference with the application of this principle that the authority stopped short of the final act of consummating the sale.

There was no error in the judgment appealed from, and a new trial is not granted.

In this opinion the other Judges concurred.

Charlotte S. LEMMON *et al.*, Exrs.,

r.

Willis A. STRONG *et al.*

1. An allegation in a declaration against the guarantor of a promissory note, that, in order to induce the payee to accept the note and loan the maker the money thereon, the guarantor warranted its payment as set forth, and that the money was loaned and the note accepted in sole reliance upon the warranty,—states a sufficient consideration for the warranty.
2. The following, indorsed on a note: "I hereby warrant the within note good and collectible until paid," is a conditional, and not an absolute, warranty.
3. The words "until paid" extend such guaranty over the whole period of the existence of the note as an outstanding liability; hence, the effect of such guaranty is to warrant the collectibility of the note at any and all times until actual payment, and the failure of a suit thereon against the maker (although not brought until nearly seven years after the making of the note and guaranty, the note being payable on demand) to result in collection, establishes, *prima facie*, a breach of the contract of warranty.
4. Judgment having been recovered on the note against the maker, but not collected, an action was commenced against the maker and guarantor jointly. *Held*, that allegations in the declaration, setting forth such judgment and the amount due and unpaid thereon, were sufficient to authorize a judgment against the maker, if there were no other objection to the declaration;—but *quære*, whether the union of a cause of action upon the judgment, as against the maker, with a cause of action upon the guaranty, as against the guarantor, is not a misjoinder, under § 2, p. 11, of the Rules under the Practice Act.

(Litchfield—Filed February, 1888.)

APPEAL by plaintiffs from a judgment in favor of defendants in an action upon a promissory note. *Reversed.*

The facts are stated in the opinion.

Mr. William Cothren for appellants.

Messrs. Huntington & Warner, for appellees:

The warranty in question is a conditional contract.

Allen v. Rundall, 50 Conn. 9; 2 Dan. Neg. Inst. § 1769, and notes; *Edw. Bills*, p. 235; *Covles v. Peck*, 4 New Eng. Rep. 839, 55 Conn. 251.

The understanding, intention, and agreement between Sherman, Karrman, and Strong, that said loan should lie during the pleasure of said Sherman, without other limitation of time, till demanded by him, was a personal arrangement, and the note being non-negotiable and overdue, Lemmon acquired no right or interest by virtue of any such understanding, arrangement, or agreement.

Chester v. Dorr, 41 N. Y. 279.

If there was such intention, understanding, and agreement, to avail the plaintiff, it must have been in writing.

Allen v. Rundall, 45 Conn. 528, 536; *Same v. Same*, 50 Conn. 9, 24.

If such intention, understanding, and agreement was in writing, it must be so alleged in the complaint.

1 Swift, S. P. 602.

Such intention, understanding, and agreement would be no waiver of due diligence by the defendant Strong, unless in writing.

Allen v. Rundall, 50 Conn. 9, 20.

The complaint nowhere alleges that the decedent, or his representatives, the plaintiffs, are the "actual *bona fide* owners" of the note in question.

Gen. Stat. p. 417, § 6; *Olmstead v. Scott*, 4 New Eng. Rep. 807, 55 Conn. 125, 127.

Loomis, J., delivered the opinion of the court:

The defendant Karrman, on the 26th day of April, 1877, executed a promissory note for the sum of \$400, payable to one B. A. Sherman, on demand, with interest annually, and, in order to induce the payee to accept the note and loan the maker the sum mentioned, the defendant Strong, on the same day, warranted the note in these words:

I hereby warrant the within note good and collectible until paid. W. A. Strong.

The payee, relying solely upon the warranty, accepted the note and loaned the amount to the maker.

In January, 1884, payment was demanded of the maker, who refused to pay, and in February following Sherman commenced suit against him on the note, and, pending the suit, assigned the note to D. L. Lemmon, the plaintiffs' intestate, and Lemmon was by the court substituted as plaintiff in the same suit. On the 5th of March, 1884, in the Court of Common Pleas, in Litchfield County, judgment was rendered in favor of Lemmon and against Karrman for the sum of \$420.60 debt, and \$35.15 costs of suit. Execution issued the same day, and was placed in the hands of a deputy sheriff of the county for service, who, on the 6th of

March, 1884, made demand of Karrman, who paid a small sum on the execution, leaving it unsatisfied for \$420.60. The officer continued a diligent search throughout his precincts for attachable goods and property of Karrman, until the 29th day of April, 1884, but could find none, and on that day returned the execution unsatisfied for the amount named, which has never been paid, but is still due to the plaintiffs, as administrators of Lemmon, now deceased. Before bringing this suit, the plaintiffs notified the defendant Strong that the balance of the note and judgment was due and unpaid.

Each of the defendants demurred to the complaint. The guarantor, Strong, demurred upon the ground that the complaint did not show that the plaintiffs used due diligence to collect the note of the maker, or that the defendant ever waived such diligence, and also because it did not show a legal consideration for the guaranty. The defendant Karrman demurred on the ground that the complaint did not allege any cause of action against him, and, by way of further defense, made answer that judgment had been duly obtained against him as set forth in the complaint. To this answer the plaintiff demurred, on the ground that it did not aver payment of the judgment in whole or in part, or a discharge of Karrman's liability in any manner. The court below sustained the demurrers of both defendants, and overruled that of the plaintiffs.

Our discussion of the case will be confined to the points raised in the reasons for demurrer; and we will first consider the demurrer of the guarantor, Strong.

As to the want of consideration, the precise objection is that the complaint "does not aver what the consideration was." The record itself makes a sufficient answer to this claim, for it sets forth a perfect consideration, namely, that, in order to induce Sherman to accept the note and loan Karrman the money, the defendant Strong warranted its payment as set forth, and that the money was loaned and the note accepted in sole reliance upon the warranty.

The only debatable question is whether the holder of the note exercised due diligence as to its collection of the maker. At the outset, we must concede that the guaranty was conditional, and not absolute. The recent cases of *Allen v. Rundall*, 50 Conn. 9, and *Cowles v. Peck*, 4 New Eng. Rep. 839, 55 Conn. 251, established this point beyond all controversy.

Was the condition, then, in this case, sufficiently complied with? In a guaranty of the goodness or collectibility of a note, the supreme and perfect test is the result of legal proceedings seasonably and properly instituted and diligently pursued. If such result is failure to collect, then it is demonstration that the note was not good or collectible, and there is a breach of the guaranty. In many jurisdictions, as was shown in *Allen v. Rundall*, *supra*, the institution of such a suit is indispensable in all cases where the guaranty is in the form referred to. In other jurisdictions, including our own, a suit may be dispensed with where its result would be fruitless, or it may be waived by the guarantor.

In the case at bar, suit against the maker was brought and diligently prosecuted to final judgment, and execution was promptly issued

and served, and demand and diligent search were made by a proper officer for goods or estate on which to levy, but none could be found; and, after applying the small sums of money paid by Karrman, the execution was returned unsatisfied for the amount stated. This, in the absence of other facts to impeach it, is sufficient to show that at that time the note was not good and collectible. But here comes in the claim that the suit was not commenced at the proper time. The guaranteed note was dated April 26, 1877, and was on demand, while the suit was not commenced till February 9, 1884. It must of course be conceded that the failure of a suit to result in the collection of the note does not establish its noncollectibility unless the suit was instituted at the proper time; but the question of time is to be determined in each case by the terms and true construction of the guaranty in suit. Were this simply a guaranty of the collectibility of the note, without other words to indicate its continuance, it would be construed to mean that the note should be collectible when due, and suit should be promptly brought at that time, if any suit were required.

In the argument for the defendant, the prominent words of the guaranty, "till paid," seem to have been wholly ignored; but surely they had a clear purpose and meaning, which obviously was to mark the duration of the collectibility of the note. Had this been a warranty that the note was good and collectible until the 29th day of April, 1884, when the execution was returned, could there be any doubt that the warranty was broken? Would it not in terms cover the entire period of time, every day and year, up to the time limited? It seems to us that the words now in question are just as certain in their import, only the duration of the guaranty is more extensive; it covers the whole period of the existence of the note as an outstanding obligation.

Guaranties containing the words in question have been under consideration by this court in three cases. In two of them, namely, *Allen v. Rundall*, and *Cowles v. Peck*, *supra*, it was wholly unnecessary to give any construction to the words "till paid" as affecting the time when suit should be brought, because no suit at all had been brought. In *City Sar. Bank v. Hobson*, 2 New Eng. Rep. 556, 53 Conn. 453, the words of guaranty were: "For value received, we guarantee the within note till paid." Now, although there was no particular discussion of the import of the last two words, yet it is manifest from the decision that, upon the duration of the guaranty, these words were given all the force we now claim; for, in the opinion of the court, as given by Pardee, J., on page 455, it is said: "This was an absolute and unqualified contract by each of the signers to pay the note if the maker did not. Upon nonpayment at maturity it became, and has since continued to be, their duty to go to the holder and pay it, and this without demand or notice." This case was cited by the plaintiffs in *Cowles v. Peck*, *supra*, to support the claim that the guaranty in the last-mentioned case ought to be regarded as an absolute one. But this court distinguished the case from the other, upon the ground, mainly, that the guaranty in the last case, in terms, applied to the goodness

of the note, of which the accepted test was its capability of being collected of the maker, independently of any act of payment on his part, while in the other case, there being no words in the guaranty to apply it to the quality of the note as to collectibility, it was held to apply to actual payment on the part of the maker; but in both cases the guaranty was the same, as to its continuance.

We conclude, therefore, that the guaranty in the case at bar warranted the collectibility of the note at any time, and at all times, until actual payment, and that the failure of the suit brought to result in collection established, *prima facie*, a breach of the contract, for which the defendant Strong is liable.

Should it be suggested that we have established a hard doctrine for guarantors, we reply that it is surely no harder than to construe a guaranty as absolute, as in *City Sav. Bank v. Hobson*, *supra*, and in *Breed v. Hillhouse*, 7 Conn. 523, and many other cases. Regard must necessarily be had to the terms of the guaranty; which must control as in all other cases of contract obligation. In the case at bar, we do not see how it is possible to construe the contract more favorably for the guarantor without practically expunging the two words he deliberately used.

The conclusion reached on this part of the case renders it unnecessary to consider the effect of the agreement of waiver, or the fact of the "utter insolvency" of the maker of the note, as alleged in the complaint.

The remaining question relates to the demurrer and answer of the defendant Karrman.

His demurrer to the complaint is that it sets forth no cause of action against him. There are many allegations that have no relevancy to any claim against him, yet the judgment against him having been particularly set forth, and the amount due thereon having been alleged, and that it is still due and unpaid, there is enough, under the Practice Act, to authorize a judgment against him, were there no other objection. A better ground of demurrer would have been the misjoinder of different causes of action against different defendants.

It is not improbable that the plaintiffs' counsel was misled by the language of § 2, page 11, of the Rules under the Practice Act, which is as follows: "Persons severally and immediately liable on the same obligation or instrument, including parties to bills of exchange and promissory notes, and indorsers, guarantors, and sureties, whether on the same or by a separate instrument, may all or any of them be joined as defendants, and a joint judgment may be rendered against those so joined. But where a cause of action against one person is not complete until after suit against another, such persons cannot be joined as defendants."

This would probably have justified the joinder had not Karrman's obligation on the note been lost by merger in a valid judgment, while Strong, the guarantor, is only liable on his contract of guaranty. The pleadings, however, do not require a decision of this point. The answer of Karrman, setting up the same judgment described in the complaint as an outstanding and valid obligation, was of course no defense, but rather a confession. Taking the

demurrers as they are given, there was error in overruling that of the plaintiffs and sustaining that of Karrman.

The case against Karrman is obviously of no importance to the plaintiffs, who have already one valid judgment, and, in view of the suggestions we have made as to a possible misjoinder, will probably be discontinued when the case goes back to the court below.

There was error in the judgment complained of, and a new trial is granted.

In this opinion the other Judges concurred.

Barnett BENNETT

v.

Peter GIBBONS.

1. An assignment of error in an **action for fraud in the exchange of horses**, that the plaintiff testified, under defendant's objection, that he had "paid his lawyer \$25 in the case," that his own "horse was worth \$30," and that he "paid defendant \$20 difference,"—is not good.
2. Where the defendant gives in evidence certain **statements** made to the plaintiff at the time of the trade, **by a third party**, as to the value of defendant's horse, the **reply** of the plaintiff thereto is **evidence of the fact whether the deceptions of the defendant were successful**; and the exclusion of such evidence on the general objection, referring to the reply itself, was error. The objection that no foundation was laid for the question, not having been made below, deemed to have been waived.
3. In such a case it is not **error to give the following request to the jury**: "If you find that the defendant represented his horse free from disease, knowing nothing about the truth of his statement, and that in fact it had an incurable disease, he was guilty of a fraud, and your verdict should be for the plaintiff,"—**where the charge immediately after supplies the defect** in such request by stating that it must also be found that the defendant intended to cheat and defraud the plaintiff, and that the request was not law unless the jury found that the defendant's representations were not expressions of opinion, but were false statements made intending to deceive the plaintiff.
4. The plaintiff having in his possession a **writing** which he declined to produce upon request of defendant's counsel, and which, on being identified by defendant, was offered in evidence by plaintiff, but **excluded** on defendant's objection, it was not error to **charge the jury to lay the paper, and the fact of refusal of plaintiff to produce it, out of consideration of the case, and that no inference should be drawn for or against either party on account of it.**

APPEAL by defendant from a judgment of the Court of Common Pleas of New Haven County in favor of plaintiff in an action brought to recover damages for fraud in effecting the exchange of a horse. *New trial granted.*

At the trial, the court, after reading plaintiff's requests to charge (the second and third of which were as follows: "2. If you find that the defendant made the representations that his horse was free from disease, and knew of their falsity, your verdict should be for the plaintiff. 3. If you find that the defendant represented his horse free from disease, knowing nothing about the truth of his statements, and that in fact it had an incurable disease, he was guilty of a fraud, and your verdict should be for the plaintiff"), proceeded to charge as follows:

"The question of fraud is strictly a question of fact for the jury to determine, and the burden is upon the plaintiff to satisfy you, by a fair preponderance of evidence, that the defendant knowingly and intentionally deceived the plaintiff. It is not enough for the plaintiff to prove, as he claims in his second request, that the horse had an incurable disease, and that the defendant knew of it, but he must satisfy you that the defendant actually deceived the plaintiff in regard to it.

"In determining whether or not the defendant was guilty of a fraud upon the plaintiff, you will consider all the evidence adduced in the case, and the circumstances in which the parties were placed at the time of the trade so far as they have been shown by the evidence; and if you find as a fact that the horse of the defendant had an incurable disease, and that the defendant knew the character and fatality of the disease, and that he was inquired of by the plaintiff in regard to this disease, and made the statements, as claimed by the plaintiff, that the horse was sound and free from disease, intending to deceive the plaintiff and thereby obtain from him his horse and a difference in money, your verdict should be for the plaintiff according to this second request of the plaintiff to charge.

"I do not understand the third request to be law, unless you find the representations were not expressions of opinion, but were false statements made intending to deceive the plaintiff.

"The plaintiff cannot recover in this action unless he proves, by a fair preponderance of evidence, that the defendant was guilty of the fraud charged in the complaint in effecting the sale of the horse; for the law is so that, where there is no fraud and no express warranty of the sale of personal property, the purchaser takes it at his own risk.

"The law leaves the parties to select their own terms of agreement, and, if the purchaser takes the risk of trusting to a contract without warranty, and is not entrapped by artifice or defrauded by misrepresentations, and the quality of the article proves inferior to what he expected, he has no redress against the party who sells. Nor does any inference arise that an article is of a certain quality because it was sold for the price for which a good article of the kind might be bought. That is, if you find that this horse was sold to the plaintiff for a sum equal to the value of a sound horse, but

find also that there was no fraud in the sale, you must decide for the defendant.

"The plaintiff, having by the amendment to his complaint abandoned all claims for breach of warranty, you have nothing left for your consideration but the question whether the defendant procured the sale by fraud; and if you find that the defendant did not procure the sale by fraudulent means and representations, but that the plaintiff made the exchange relying upon his own judgment, your verdict should be for the defendant, no matter how unsound or defective the horse finally turned out to be.

"Fraud cannot be presumed or guessed at, but the party alleging fraud must prove it by a fair preponderance of evidence; and, unless it is proven to your satisfaction, the plaintiff has failed to establish his case.

"It is also a principle of law in the sale of personal property that, if the claimed defect is patent—that is, apparent to sight or touch—and can readily be discovered by examination, and, as in this case, the buyer does see and feel the defect, and there is no fraudulent concealment and no false statements regarding it, then the maxim *caveat emptor*—let the buyer beware—applies, and the party takes the property at his own risk. And if you find as a fact, as the defendant claims, that the plaintiff saw and felt of the swelling upon the horse's face, and did not ask in regard to it, and did not require any warranty concerning it, and that there were no false statements made by the defendant concerning it,—no fraudulent concealment regarding it,—your verdict must be for the defendant. Even if you find that the horse had an incurable disease, and that this was known to the defendant, yet, unless you find that the defendant was guilty of some fraud by concealing the disease or misrepresenting it, your judgment should be for the defendant, for it was no part of the defendant's duty to instruct the plaintiff how to buy a horse. He may name the price for his property, and, so long as he is guilty of no deception, he is not liable, even if the plaintiff loses by the operation.

"In determining the preponderance of evidence, if you find a material matter testified to by one witness and denied by a witness of equal credibility on the other side, and no other evidence on the subject, such fact must be found for the party holding the negative, or, in this case, for the defense. But in coming to a conclusion you will carefully weigh all the evidence in the case; and if, upon all the evidence, you find there was intentional fraud and deception upon the part of the defendant, the plaintiff will be entitled to recover.

"The plaintiff requests me to charge you that 'the demand and refusal in reference to a certain writing should not enter into your consideration. There was no need for Mr. Strouse (attorney for plaintiff) to deliver it at that time, because it was not a part of the case. The plaintiff had not been examined in reference to the contents of that paper.' And upon this the court charges: The claim of the plaintiff is based solely upon the fraud of the defendant, and no evidence of a written warranty was given by the plaintiff in his examination in chief. Upon his cross-examination he testified that the defendant had given him a writing, which the counsel for the plaintiff declined

to produce upon the request of the counsel for the defense. Upon the examination of the defendant in chief, he testified that he gave a writing to the plaintiff, and testified fully as to the contents of the writing; and upon his cross-examination the plaintiff's counsel showed him a paper, asked him if that was the paper he signed, and offered to lay it in as evidence, but the counsel for the defendant objected, and the offer was not pressed. You will therefore lay the paper, and the fact of the refusal of the plaintiff to produce it, out of the consideration of the case, and no inference should be drawn for or against either party on account of it.

"If you find as a fact that the plaintiff has proven the fraud complained of, and that the defendant, intending to cheat and defraud the plaintiff, made the statements regarding the condition of the horse, and thus induced the plaintiff to part with his money and horse, you will then determine the amount of damage the plaintiff is entitled to by reason of the fraud; and, in fixing this amount, you can consider the value of the plaintiff's horse, the amount of money the plaintiff paid in exchange, and the plaintiff's expense for counsel fees in the prosecution of this suit."

Further facts appear in the opinion of the court.

Mr. C. S. Hamilton, for defendant, appellant:

Witnesses must testify to facts, not to their conclusions drawn from them.

1 Greenl. Ev. § 484.

The exclusion of the questions asked Dennis J. Driscoll, and the evidence called for thereunder, was most radically erroneous, both technically and substantially.

The entire gist of the plaintiff's complaint, and the thing without proof of which he would have no standing in court whatever, is that he was deceived by the defendant at the time of the purchase. If he knew at that time the condition of the horse, he cannot recover.

Drew v. Roe, 41 Conn. 41, 50; 2 Add. Torts, p. 1082.

In the first place, it is essential that the means used should be successful in deceiving. However false and dishonest the artifices or contrivances may be by which one man may attempt to induce another to contract, they do not constitute a fraud if that other knows the truth and sees through the artifices or devices. *Haud enim decipitur qui scit se decipi*.

Benj. Sales, § 429.

To constitute a fraud, science is always necessary, and it must be alleged in the declaration and proved at the trial; for where there is no science there can be no fraud, and the purchaser must trust to his warranty, expressed or implied.

1 Swift, Dig. p. 554; Benj. Sales, § 454.

The refusal of a party to produce papers, upon notice, as well as the failure of the party giving the notice to use them if produced, is matter for the consideration of the jury; and if the papers are shown to be in the possession or subject to the control of the party upon whom the notice is served, the failure to produce them will warrant the court in instructing the jury that they may, from such failure, presume

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that the papers or books, if produced, would operate unfavorably to his cause.

Wood. Pr. Ev. p. 29; *Clifton v. United States*, 45 U. S. 4 How. 242, 246 (11 L. ed. 958); 1 Swift, Dig. 729; Abb. Trial Brief, 153.

Messrs. Strouse & Law, for plaintiff, appellee:

This being an action of fraud, considerable latitude is allowed in the admission of evidence to prove the fraud. It nowhere appears that the evidence objected to was received for an illegitimate purpose, and the record fails to disclose on what ground it was objected to.

Tyler v. Todd, 36 Conn. 220; *Nalley v. Hartford Carpet Co.* 51 Conn. 524.

Plaintiff's expenses of litigation were properly a part of the damages which the jury might assess.

Lynch v. Hall, 41 Conn. 243.

The practice is to refuse new trials for the improper admission or rejection of evidence, whether material or immaterial, when a point in the cause is clearly proved by competent evidence, and correctly found by the jury, and substantial justice has been done.

1 Graham & W. New Tr. p. 524; 2 Graham & W. New Tr. pp. 609, 634; *Orary v. Sprague*, 12 Wend. 41; *Hunt v. Burrell*, 5 Johns. 13; *Thomas v. Ross*, 8 Wend. 672; *Kelley v. Merrill*, 14 Me. 228; *State v. Engle*, 21 N. J. L. 365, 366; *Stephens v. Cranford*, 1 Ga. 574; *Allen v. Parish*, 3 Ohio, 107; *Hull v. Bartlett*, 49 Conn. 64; *Brown v. Southbury*, 1 New Eng. Rep. 422, 53 Conn. 212.

Loomis, J., delivered the opinion of the court:

This is a complaint for fraud in effecting an exchange of a horse belonging to the plaintiff for one belonging to the defendant. The plaintiff had a verdict in the court below, and the defendant appeals. Ten errors are assigned as reasons for the appeal, nearly all of which relate to the rulings of the court in the admission of evidence.

The evidence of the veterinary surgeon as to the nature and character of the disease which the defendant's horse had before and at the time of the trade; the question whether there were other diseases which would be attended with similar swellings on the head; the fact that the nature and fatal character of the disease were fully explained to the defendant just before the trade; the return of the horse by the plaintiff to the defendant immediately upon discovering the fraud, with the plaintiff's demand for the return of the money and the horse which he let the defendant have,—were all so clearly relevant and proper as to render discussion unnecessary.

The fact that the surgeon, just after the trade, examined the horse for the plaintiff, and told him the same thing he had told the defendant shortly before the trade, was immaterial, except to show the continuance of the disease and that the plaintiff returned the horse to the defendant immediately upon discovering the fraud; which facts do not seem to have been contested, for, when the defendant came to testify, he admitted that the trade was made between eleven and twelve o'clock, and the plaintiff returned the horse at about one o'clock following on the same day.

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The plaintiff's testimony that he paid his lawyer \$25 for conducting the suit, in connection with a further statement that his own horse was worth \$30 and he paid the defendant \$30 difference, did not, it would seem, harm the defendant in the result, for, after having both horses and the \$20 in money, he was required by the verdict to pay the plaintiff only \$30.

But in disposing of the question on this ground, it may be implied that we consider the ruling erroneous, which we by no means concede. It is well settled that in actions of fraud and to recover for flagrant wrongs, in addition to the actual damages arising directly from the transaction, the jury may make the plaintiff good for the expenses of litigation which he was obliged to incur in order to obtain redress. *Linsley v. Bushnell*, 15 Conn. 225; *Ives v. Carter*, 24 Conn. 405; *Welch v. Durand*, 36 Conn. 185.

Now, although it is not usual to introduce evidence to show specifically the amount of such expenses, yet, inasmuch as it is a legitimate element of damage, we do not see why relevant evidence is not as proper as in relation to any other item of damage,—it being understood, of course, that it is discretionary with the jury to include this or not; but it seems to us that it cannot be erroneous to furnish the jury with some sure basis for such an addition, instead of leaving the whole matter to guesswork.

The only error respecting the admission of evidence, which calls for a new trial, is the exclusion of the plaintiff's reply to what the witness Driscoll stated to him respecting the horse he had of the defendant. The finding states the question as follows: "The defendant introduced one Dennis J. Driscoll as a witness, who testified to the conversation between the plaintiff and defendant at the time of the sale, and that he took the plaintiff one side and told him if this horse was all right he would be worth \$150 to \$175, and if the horse was sound he could not expect to get him for the price." The defendant's counsel then asked the witness: "What did the plaintiff say in reply?" To this question the plaintiff objected, and the court sustained the objection and excluded the evidence.

To maintain an action for fraud, it is elementary that there must not only be acts, words, or artifices intentionally false on the part of the defendant, but they must be successful in deceiving. If, then, the plaintiff knew the actual facts as to the condition of the horse he was about to exchange for his own, the defendant's intended deception never reached him. The truth remained in his own mind, however great the deception in the defendant's purpose. There are some attempts to commit crime that are punishable as such under the rules of criminal law, but attempts to defraud are not the subjects of civil action unless they are successful.

What Driscoll told the plaintiff, if true, did tend to show that he had some knowledge of the condition of the horse at the very time he was negotiating for an exchange. It is to be presumed that the reply would have referred to the same matter, and that it would or might have furnished more certain evidence as to the

extent of the plaintiff's knowledge, and as to the real inducements that were leading to the trade.

But the plaintiff says the reply called for was not evidence, because the proper foundation for it had not been laid; that is, it had not appeared that he made any reply. But no such objection was made at the time, but only the general objection, which must have been understood as referring to the reply itself; and the ruling of the court rejecting the evidence offered without any explanation must be understood as referring to the evidence contained in the reply, assuming that the plaintiff did reply. Had the objection that no foundation had been laid for such a question been made at the time, it probably would have been immediately obviated by the preliminary inquiry. We think such an objection ought to be considered as waived under the circumstances.

The defendant complains of the charge in only two particulars. The first is, that "the court erred in its charge to the jury in respect to reading the third request of the plaintiff to the jury." This assignment has been materially strengthened and improved in the brief of the counsel for the defendant before this court, by adding that the request was read as a part of the charge. This obviously is the controlling point. But the record shows that it was not read as part of the charge, and moreover that the charge supplies the very element which the defendant claims to be wanting in the request,—namely, that the defendant must have intended to cheat and defraud the plaintiff,—for the court, immediately after reading the plaintiff's request, charged the jury that "the question of fraud is strictly a question of fact for the jury to determine, and the burden is upon the plaintiff to satisfy you by a fair preponderance of evidence that the defendant knowingly and intentionally deceived the plaintiff. It is not enough for the plaintiff to prove, as he claims in his second request, that the horse had an incurable disease and that the defendant knew of it; but he must satisfy you that the defendant actually deceived the plaintiff in regard to it,"—still further emphasizing the same thoughts in other parts of the charge; and not only so, but the judge alluded to the third request particularly, and said to the jury: "I do not understand the third request to be law, unless you find the representations were not expressions of opinion, but were false statements made intending to deceive the plaintiff." Under these circumstances it is extraordinary, not only that it should have been assigned for error, but still more so that it should have been urged before this court.

The defendant also assigns for error the ruling of the court respecting a writing alleged to have been wrongfully withheld by the plaintiff's counsel from the defendant. But the finding explains the matter fully and shows that the defendant has no grievance at all in that respect; for, after the writing had been shown to the defendant while giving his testimony and identified by him, it was offered in evidence on the trial by the plaintiff, and the defendant's counsel objected to its admission; and for that reason the offer was not pressed.

Without further discussion we will say that

there was no error of which the defendant can complain in the matter referred to in the special finding.

There was error in excluding the plaintiff's reply to what the witness Driscoll said to him about the horse of the defendant, and a new trial is ordered.

In this opinion the other Judges concurred.

Augustus S. CHASE *et al.*, Trustees, etc.,

v.

Noah B. TUTTLE *et al.*

1. A **majority of the directors** of a joint stock corporation may (under the Connecticut statutes) **make a valid general assignment** of the property of the corporation for the benefit of creditors.
2. The **action of the majority of the directors** of a corporation, forming a legal quorum, is **not invalidated** by the fact that certain of the **absent directors**, who were out of the State and not accessible, **failed to receive actual notice** of the meeting.
3. The provision of the Act of 1876 (Sess. Laws 1876, p. 107) that any **one of the directors or executive officers** of any domestic corporation, **owning stock in any other domestic corporation**, shall be **eligible to be a director** of such other corporation, was not repealed by the provision of the Joint Stock Act of 1880 (Sess. Laws 1880, p. 561) that the directors of joint-stock corporations shall be stockholders therein.
4. Where the **record of a meeting of the directors** of a corporation recites that the proceedings recorded were had at a meeting called for a certain purpose, it will be **presumed**, until the contrary appears, that the **purpose of the meeting was specified in the notice** there-of sent to the respective directors.

(New Haven—Filed February, 1888.)

ON reservation upon a finding of facts by the Superior Court of New Haven County in an action of replevin. *Judgment for plaintiffs advised.*

The facts and questions involved are sufficiently stated in the opinion of the court.

Messrs. S. W. Kellogg and C. R. Ingersoll, for plaintiffs:

The assignment of the corporation was valid. A majority of the directors were present and acting, and their vote to make the assignment was unanimous. All the directors who were in the State, and who could be reached by reasonable notice, were present. The assignment, made by a majority of the directors in this case, was legal and valid at common law.

1 Morawetz, Priv. Corp. 2d ed. § 518; 2 Morawetz, Priv. Corp. § 804, note; *Sargent v. Webster*, 13 Met. 497.

But, aside from the common law, the statutes of this State authorize the assignment in insolvency by a majority of the directors, beyond question.

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Gen. Stat. 1875, p. 279, § 12.

Another and later statute makes express provision for an assignment in insolvency by the directors.

Pub. Acts 1885, p. 493.

With both these statutes in full force, there can be no question as to the authority of the majority of the directors to make an assignment.

Middlebury Bank v. Rutland & W. R. Co. 30 Vt. 170; *State v. Smith*, 48 Vt. 266, 286; *Edgerly v. Emerson*, 23 N. H. 555.

H. R. Coit was *de facto* a director of said corporation, and his title to the office, or right to act as a director, cannot be questioned in this suit. He had been duly appointed by the stockholders, and had been an "acting director" for more than one year. This title to the office cannot be attacked collaterally in this way, in a suit or proceeding at law to which he is not a party.

Brown v. O'Connell, 36 Conn. 451; *State v. Carroll*, 38 Conn. 471.

The only proceeding to question his authority is the appropriate action of *quo warranto*. And this is the proper proceeding in case of an officer or director of a private corporation.

Gen. Stat. 1875, p. 482; *Granville Charitable Assn. v. Baldwin*, 1 Met. 359; *Green v. Cady*, 9 Wend. 414; 2 Morawetz, Priv. Corp. 2d ed. § 639; Ang. & A. Corp. Officer, and cases there cited; *State v. Curtis*, 35 Conn. 374, 382.

The notice of the meeting of the directors at which the assignment was authorized and made was sufficient.

The fact of notice being found, the law will presume the contents of the notice were proper for the purpose, in the absence of proof to the contrary.

New Haven Sav. Bank v. Davis, 8 Conn. 191; *Lane v. Brainerd*, 30 Conn. 566; *Sargent v. Webster*, 13 Met. 497; *Chouteau Ins. Co. v. Holmes*, 68 Mo. 601; S. C. 30 Am. Rep. 807; *McDaniels v. Flour Brook Mfg. Co.* 22 Vt. 274, 284.

The Probate Court of Waterbury had jurisdiction to "accept, approve, and record" the assignment, when presented to said court by the agent under the votes of the directors; and, having such jurisdiction, its judgment cannot be collaterally attacked.

Judson v. Lake, 3 Day, 318; *Dickinson v. Hayes*, 31 Conn. 417; *Fortune v. Buck*, 28 Conn. 1; *Sullivan v. Vail*, 42 Conn. 98; *Ashmead's App.* 27 Conn. 248; Freem. Judg. §§ 118, 126.

A corporation cannot set up against its creditors the invalidity of a *de facto* agent appointment.

McCall v. Byram Mfg. Co. 6 Conn. 435.

Messrs. John S. Beach, D. F. Hollister, and George C. Lay, for defendants:

One who deals with a corporation, and contracts with it upon the faith that its directors, who are held out to the public as having the management of its property and affairs, have a legal right to act, ought not to be debarred of his remedy against the corporation for breach of its contract, upon the ground that one or more of its acting directors were not legal directors.

Morawetz, Priv. Corp. §§ 637-640; *Dispatch Line v. Bellamy Mfg. Co.* 12 N. H. 205.

But the doctrine is based upon the familiar

principle of an estoppel *in pais*, and applies only where that principle can be fairly invoked by third parties who have dealt with the corporation in the faith that its agents had in fact the authority they were permitted to assume and exercise. No such principle can apply in this case.

A trustee under an assignment in insolvency stands, toward all honest claimants against the assigned estate, in the same attitude in which his assignor stood.

Pulmer v. Thayer, 28 Conn. 237; 2 Story, Eq. Jur. § 1229; Burr. Assign. 4th ed. § 391.

"The notice of the meeting of the shareholders of a corporation must fix the exact time and place of the meeting, and in certain cases must also indicate the nature of the business to be transacted. If the manner of giving notice is prescribed by the charter, notice must be given in that manner in order to be effectual. * * * The notice must be served upon each shareholder in person, unless otherwise provided by the charter or a by-law."

1 Morawetz, Corp. § 481, and cases there cited; *Stow v. Wyse*, 7 Conn. 214.

"Notice of the meetings of directors must be given in the same manner as notice of the meetings of the shareholders. The notice must distinctly fix the time and place of the meeting, and the notice must be given in time to enable the person notified to reach the place of meeting in the customary manner."

Id. §§ 581, 582.

Loomis, J., delivered the opinion of the court:

This is an action of replevin brought by the trustee of Brown & Bros., an insolvent corporation, for certain goods that were, on the 4th of January, 1886, attached by the defendant, as a deputy sheriff, on the suit of the National Shoe & Leather Bank of New York against the corporation. On the evening of the same day an assignment for the benefit of all the creditors of the corporation was made, pursuant to a vote of a majority of its directors, as is claimed, which was lodged on file in the probate court, and subsequently accepted, approved, and recorded by that court; and the plaintiffs were appointed and qualified as trustees. The sole defense against this action is that the assignment was invalid and of no effect.

The claimed illegality of the assignment is based upon three objections only: 1. That two of the five directors, being out of the State at the time, did not receive any notice of the meeting. 2. That of the three persons who acted as directors in the matter in question, one, namely, Henry R. Coit, was not legally a director, though chosen as such, because he was not a stockholder of Brown & Bros. 3. That the notices of the meeting sent to the directors did not specify the object of the meeting, as required by statute.

I. We do not think the assignment invalid for want of actual notice to the two directors, who were at the time absent from the State. Notice was sent by telegram to them, as to the others, at their address in this State; but, one being in the Territory of Montana, and the other in South Carolina, they failed to receive the notices. Under these circumstances it would seem unreasonable to hold that a majority of the whole number, being present, could

not do a legal act binding the corporation. The exigency demanded immediate action to save the property and to save expense. It is easy to see how disastrous might be the consequences were we to adopt the principle contended for by the defendants. The situation of the absent directors might be much more remote and inaccessible than in the present case, requiring many months or even years to reach them by actual notice. Must the corporation remain paralyzed all this time, without ability to protect itself?

But the suggestion was made, in the argument in behalf of the defendants, that it might be treated as a case of vacancy, which the remaining directors could fill, pursuant to the Act of 1890. Sess. Laws 1890, p. 561, § 7. If, however, the office was vacant as to the two absent directors, then surely the remaining directors could lawfully represent the corporation; for there is no general law or principle requiring vacancies in the board of directors to be filled before the remaining directors can act in the business of the corporation; provided, of course, the number left is sufficient to constitute a legal quorum. Under our General Statutes, p. 279, § 12, "a majority of the directors of any corporation, convened according to the by-laws, shall constitute a quorum for the transaction of business." In order, probably, to avoid a doubt that might arise whether a general assignment was such business as was contemplated under the above statute, the Legislature, by the Act of 1885 (Sess. Laws 1885, p. 498), provided that the assignment of any corporation may be made by the directors in legal meeting called for such purpose." This, however, was not intended to change the rule as to a quorum under the preceding statute. There can be no doubt that a majority of the directors could make a valid assignment.

II. But this brings us to the second objection,—that Henry R. Coit, one of the three who participated in making the assignment, was not a lawful director, and therefore the attempted assignment was made by only two directors. It is conceded that Coit was regularly appointed to the office, and that he was at the time a director *de facto*; but the contention is that he was not eligible to the office because he was not a stockholder of the Brown & Bros. corporation. In behalf of the plaintiff it is earnestly contended that the acts of Coit as a *de facto* director are perfectly valid, and cannot be questioned except once for all in a direct proceeding to oust him from the office, as upon a *quo warranto*. On the other hand, the counsel for the defendants contend that the principle applies only where there exists the element of an estoppel *in pais*; that is, where third parties have dealt with the corporation on the faith that its directors and agents had in fact the authority they were permitted to assume and exercise; but that the corporation itself could not invoke the aid of the same principle in support of the validity of its own acts which have affected the rights of third parties, because the corporation could not have been misled. We have no occasion to settle this interesting question, because we think Coit was a director *de jure*.

While we concede that he was not a personal

stockholder of Brown & Bros. yet by representation he was a stockholder; that is, he was secretary, treasurer, and managing director of the Litchfield Savings Society, which was at the time of his appointment a lawful stockholder in the corporation of Brown & Bros.

At any rate he was eligible to the office of director under the Act of 1876 (Sess. Laws 1876, p. 117), which provides that "any one of the directors or executive officers of any corporation incorporated by the laws of this State, owning stock in any of the banks or other corporations of this State, shall be eligible to be elected as a director of such banks or other corporations, at any meeting of the stockholders of such banks or other corporations, legally convened for the election of the directors, and, upon such election, may act as director of such bank or other corporation."

But the claim is made that the provision was repealed by § 7 of the new Joint Stock Act of 1880 (Sess. Laws 1880, p. 561), which, in providing that the affairs of every joint-stock corporation shall be managed by three or more directors, adds, "who shall be stockholders in the corporation."

There is no express repeal of the first-mentioned Act; and the implication is strongly against it, from the fact that certain specific provisions of former statutes are mentioned as repealed, while the Act of 1876 is not mentioned. Then, in connection with the general repealing clause of Acts inconsistent, there is a saving, among other things, of any rights acquired under existing laws. The right of a savings bank whose assets are invested in another corporation, to have a voice in directing its affairs, is surely of great importance and value. The record does not tell us whether this investment of the Litchfield Savings Society existed when the Act of 1880 was passed. We refer to this now to show the spirit and purpose of the Legislature in carefully guarding all important rights and interests. There is no reason why, in 1880, they should have desired or designed to repeal the wise and just provision of 1876. Nevertheless the counsel for the defendants insist that, however wise and just, it must be swept away by the Act of 1880, because it is so inconsistent with it that both cannot stand and operate together. We answer that both did stand and operate together for the period of four years at least,—from 1876 to 1880; for it is to be borne in mind that the provision referred to in the Act of 1880 was not new, but merely continued in force an old provision found in the General Statutes of 1875, p. 312, § 1, and in the statutes long before that. When the Joint Stock Act was re-enacted in 1880 with some new provisions, it seems unreasonable to suppose that, by the mere retention of the old provision in the same language, it could have been intended to give it a force and effect so much greater than it had for the four years preceding. The remedial nature of the Acts in question, and the reasons for their enactment, will justify us in construing one as explaining and qualifying the other. While it is true that only stockholders are eligible, the necessary implication is that all stockholders are eligible; but, inasmuch as the savings bank, in its corporate capacity, could not well act as a director in another corporation, its executive

officer or chief manager is the stockholder within the meaning of the two Acts under consideration. In reaching the result that the provision of 1876 has not been repealed, we are glad to be supported by the new revision of the statutes which goes into effect in 1888. In that revision the Act of 1876 is retained in § 1922, while the provision of 1880 is also found in § 1950.

III. The only remaining objection is that the meeting of the directors, for the making of the assignment, was illegal for defects in the notice. The only by-law or rule adopted, relative to the matter, prescribed simply that "meetings of directors may be held as often, at such place, and in such manner, as they may from time to time determine." No formality whatever is prescribed; and if all the directors happened to be together, and agreed to hold a meeting immediately for a particular object within their jurisdiction, we do not see how their action could be impeached on that ground. As the want of actual notice to the two directors who were absent from the State, at places so remote that they could not be reached, has been excused in this case, all the directors capable of acting under the circumstances were present.

But it is said that the statute which empowers directors to make an assignment requires that "the meeting be called for such purpose," and, in this connection, the defendants rely on the finding which says that there was no evidence that the telegram contained any notification as to the purpose of the proposed meeting. It will be observed that this is not a finding that the purpose was not specified, but only that the contents of the telegram had not been proved by either party; but, under the circumstances we are about to mention, the burden of showing that the object was not specified was on the defendants. The record of this meeting is annexed as part of the finding, and it says: "At a special meeting of the directors of Brown & Bros., called for the purpose of making an assignment of its estate in insolvency for the benefit of all the creditors, pursuant to the statutes," etc.

Upon this record, until the contrary is found, it must be presumed that the purpose was specified in the call. This principle is sustained by the case of *Sargent v. Webster*, 13 Met. 504, where the validity of an assignment by a corporation for the benefit of creditors was sought to be impeached for want of notice to all the directors. Chief Justice Shaw disposed of the objection as follows: "Another objection of the same kind is that it does not appear that notice of the meeting was given to all the directors. But the contrary does not appear; and it would be hazardous to decide that every vote passed by an aggregate body is void, if it do not appear by the record that all were notified. We believe it is not usual in corporate records to state how the members were notified. The presumption, *omnia rite acta*, covers multitudes of defects in such cases, and throws the burden on those who would deny the regularity of a meeting, for want of due notice, to establish it by proof."

Our own court, in *Lane v. Brainerd*, 30 Conn. 585, applied the same principle both to directors' and to stockholders' meetings. The mere

record of the meeting in the former case was presumptive proof that all the directors had been duly notified; and in the latter case the mere record of the organization of a corporation was presumptive evidence of a fact which was an indispensable condition precedent to its lawful organization.

We advise judgment for the plaintiffs.

In this opinion the other Judges concurred.

William B. CATLIN

v.

John A. FRAZIER.

1. In an action on a redelivery bond in attachment.—*Held*, that declarations of one of the defendants in the original attachment suit, in whose favor judgment had been given, made to the attaching officer at the time of the levy of the attachment, showing that she was unwilling to give a receipt to the attaching officer for the property attached, on the ground that she did not owe the debt to secure which the attachment was made, were **admissible** in evidence in her favor, upon the issue as to whether the attached property belonged to her.

2. The question, "Who owned the goods in the store at the time of the attachment?"—addressed to one having actual knowledge of the facts, calls for a **statement of fact**, and not an expression of opinion, and is competent.

3. On the trial of an issue as to whether or not goods in a store, where the business was attended to by husband and wife, belonged, when attached, to the wife alone, evidence on behalf of the wife that sundry parties, at different times before the attachment, sold to the wife goods to supply the store, is **admissible**.

(New Haven—Filed February, 1888.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas of New Haven County in favor of defendant in an action brought on a bond given to secure the release of certain goods from an attachment. *Affirmed*.

The facts are sufficiently stated in the charge given by the court below, which was as follows:

This action is brought to recover on a bond taken by an officer, after goods have been attached, to secure their release from the attachment.

The condition of the bond in this case is as follows: "Received at New Haven this 31st day of January, A. D. 1885, of William B. Catlin, constable of said town of New Haven, in the county of New Haven, the property described in the annexed schedule, etc., which said property we hereby, for a valuable consideration, agree and promise, jointly and severally, to redeliver in good order to said officer, or to any officer legally authorized to receive the same,

on demand, or, in default thereof, to pay the sum of \$100," etc.

The law is so, where goods are attached, that the officer is held to a strict accountability for their safety, and, to insure the safety, and that the goods attached shall be forthcoming at the time of final judgment, the officer may remove the goods and hold them in his actual possession, or, as in the case of a store, he may place a keeper in charge of them.

But the law also, with great care for the unfortunate, provides that a bond with sufficient surety may be taken, and upon the giving of such bond the property may remain in the hands of the debtor, the bondsman being liable according to the terms of the agreement. And the law looks upon this bond as a solemn obligation, and holds the signers to a strict accountability. He must return the goods to the officer, or pay the amount stipulated in the bond, or show some legal excuse for not doing so.

If goods have been attached as the property of A, and they are actually and entirely the property of B, and have been returned to B, this, if shown to the satisfaction of the court and jury, is a legal excuse for not complying with the condition of the bond.

In the present case certain goods were attached as the property of Charles E. Gerard and Sarah A. Gerard, and, the bond which I have read to you, and upon which the defendant, Frazier, became surety, having been given the officer, the goods were delivered into his possession. Having been delivered to him, the law requires the officer to make a demand for the return of the goods or the payment of the bond, before suit can be brought upon the bond; and it is claimed by the plaintiff, and not denied by the defendant, that a demand was made, both upon the Gerards and Frazier, before this suit was brought, and that the goods were not returned or the bond paid.

Frazier, the defendant, justifies his refusal to return the goods or pay the bond, by answering that the goods attached were the sole property of Mrs. Sarah A. Gerard; that there was no liability on the part of Mrs. Gerard to the plaintiff, either in the case of *Carragan v. Gerard*, or the case of *Catlin v. Frazier*; and that after judgment in the superior court in the case of *Carragan v. Gerard*, in her favor, and before demand made by the officer, he returned the property to Mrs. Gerard.

And this is one question, and a vital one, in this case.—Was Mrs. Gerard the sole and real owner of these goods? And this is a pure question of fact for you to determine upon the evidence as you have heard it. If you find as a fact that she was the owner; that her husband had no interest in them whatever; and that they were returned to her after the judgment of the superior court, and before demand by the officer,—your judgment will be for the defendant.

The pleadings raise the question of fraud, and the plaintiff claims, and has offered evidence to prove, that for years prior to January, 1885, Charles E. Gerard had been carrying on business in his own name, in the same store in which these goods were attached; that during the summer of 1884 he was financially embarrassed; that an attempt was made in the sum-

mer of 1884 to get the license changed from his name to the name of his wife, Sarah A. Gerard; and that the business was transferred to his wife in order to cover up his property and keep it from his creditors.

The plaintiff further claims, and has offered evidence to prove, that for years prior to January, 1885, Mrs. Gerard had been in almost constant attendance in the store; that she had ordered and paid for goods, and had sole control of the books, and that after January, 1885, both she and her husband were in attendance at the store until the time of the attachment; and that there was never any change in the manner of doing business; and to sustain his claim that Charles E. Gerard was the owner of the goods, the plaintiff has offered in evidence the officer's receipt signed by Charles E. Gerard and William Crowley.

The defendant has offered evidence to prove that these goods were purchased by Mrs. Gerard, but has failed to show where Mrs. Gerard had any special property of her own with which to purchase goods or prosecute a business; and in determining the ownership you have a right to consider her acts in connection with the business prior to January, 1885, when it is claimed the change was made, and after that time; and if you find that she purchased goods before that date, and during the time it is admitted her husband was doing business, the same as afterwards, you can consider it in determining whether, upon the evidence of purchase alone, she is the owner.

The defendant claims, and has offered evidence to prove, that, at some indefinite time in the summer of 1884, Mr. Gerard had sold out his entire stock, with the exception of about \$5 worth of cigars, and that Mrs. Gerard, finding the store empty, purchased the goods in question, and commenced the business for herself.

The law looks with suspicion upon transactions between husband and wife, especially when the rights of creditors are to be affected; but it also favors the efforts of women to maintain themselves or assist in the support of their families.

If Mrs. Gerard found this store empty, and, either with her own funds or upon her own credit, stocked it with goods, and thereafter carried on a business in her own name, independent of her husband, such goods and such business are not liable for the husband's debt. It is a question of fact for you to determine whether or not she did so purchase these goods and carry on this business, or whether she was acting as a cover to protect the goods and business from her husband's creditors, as the plaintiff claims.

The Crowley receipt is offered by the plaintiff for the purpose of impeaching the testimony of Mr. and Mrs. Gerard, and is an element of evidence for that purpose.

The defendant, Frazier, testified that he did not see the goods at the time of signing the bond.

This makes no difference with his liability. The surety upon a bond may see and examine the property for which he becomes liable, or he may waive such an examination; but, having once assumed the obligation, he cannot avoid it by saying that he did not see the

goods. You will therefore dismiss from your minds the defendant's statement that he did not see the goods when he signed the bond.

The final question in the case to which I call your attention is, Were the goods ever delivered to Mrs. Gerard?

They were attached as the property of Mr. and Mrs. Gerard, in the suit of *Carragan v. Gerard*, and the surety was liable upon his bond for them or for the payment of the \$100 specified as their value in the bond, until the termination of that suit in favor of Mrs. Gerard in the superior court. If you find as a fact that the property was the sole property of Mrs. Gerard, and that it was in fact delivered to her after judgment in her favor in the superior court, and before demand by the officer, your verdict will be for the defendant; but if you find that the property was still in the possession of Frazier when the demand was made, and that he refused to deliver it to the officer, your verdict should be for the plaintiff.

Mr. C. S. Hamilton, for the plaintiff, appellant:

Mrs. Gerard was allowed to testify to what she had said in her own favor after a writ had been issued against her, to support the defendant's claim that she was the owner of the property in question. This was error.

Burns v. Fredericks, 37 Conn. 86, 91; *Brown v. Crandall*, 11 Conn. 92, 94.

The declarations were not accompanying, and a part of, any act done with the property in question; for the things said were not said while she was doing anything with, or exercising any dominion over, the property, but while she was "bantering" with the officer about whether she or her husband was liable for the debt.

Noyes v. Ward, 19 Conn. 250, 269; *Comstock v. Hadlyme Eccl. Soc.* 8 Conn. 254, 268; *Saugatuck Cong. Soc. v. E. Saugatuck Sch. Dist.* 53 Conn. 478, 480.

"To allow one of the plaintiffs to testify that the plaintiffs were the absolute owners of the property in controversy was almost the same as permitting the plaintiffs to testify directly to the jury that they (the plaintiffs) were entitled to recover. If it is competent for the plaintiffs to testify that they were the absolute owners of the property in controversy, then it would also be competent for the defendant to testify that the plaintiffs were not such owners."

Simpson v. Smith, 27 Kan. 565, 569, 570, 571, 578; *Dunlap v. Hearn*, 37 Miss. 471, 475; *Thiele v. Frostburg Coal Co.* 10 Md. 129, 146; *Hathaway v. Brown*, 23 Minn. 214, 216, 217.

In a case of this kind, when the question of fraud between an insolvent husband and wife, who clearly was only acting as a "cover," is raised, it is not "a pure question of fact" whether the wife can be in law the owner of such property as against an attaching creditor. "For, although it is not found that the conveyance was so made with the intent to defraud creditors, * * * yet the legal inference of fraud would attach to the transaction, and would be irresistible."

Whittlesey v. McMahon, 10 Conn. 137, 141; *Paulk v. Cooke*, 39 Conn. 566, 573; *Young v.*

Heermans, 66 N. Y. 874, 382; *Waite*, F. C. p. 12, § 8; p. 306, § 382.

Messrs. James I. Hayes and J. W. Chapin, for defendant, appellee:

The question of ownership of the attached property, and the business transactions of Mrs. Gerard during the time she claimed ownership, were purely questions of fact, and as such were properly submitted to the jury as vital ones to be considered by them in arriving at a verdict.

Fitch v. Chapman, 28 Conn. 262.

The question of fraud being one of fact, the court did not err in so charging the jury.

Seymour v. Hoadley, 9 Conn. 420; *Shepard v. Hall*, 1 Conn. 382; *Waters v. Bristol*, 26 Conn. 403; *Hoag v. Hatch*, 28 Conn. 591; *Munson v. Derby*, 87 Conn. 309.

It is always presumed that a charge will refer to matters in evidence.

Marlborough v. Sisson, 28 Conn. 54; *Miles v. Douglas*, 34 Conn. 395; *State v. Bantley*, 44 Conn. 540.

Park, Ch. J., delivered the opinion of the court:

In the month of January, 1885, one Carragan brought an action against Charles E. Gerard and Sarah A. Gerard, and attached certain property as the property of the defendants in the suit. The plaintiff in this case was the officer who served the process and attached the property. He took from the defendant the receipt which is the basis of this suit, for the property attached. Subsequently Carragan recovered judgment against Charles E. Gerard, but Sarah A. Gerard obtained judgment in her favor.

On the trial of this case in the court below, the defendant's answer, among other allegations, set forth that the property attached in the suit of Carragan was the property of Sarah A. Gerard, and not that of Charles E. Gerard, against whom judgment was rendered in that case; and on this allegation, as well as others, issue was joined and the case tried.

During the trial Sarah A. Gerard was called as a witness by the defendant; and she, after stating that she was present when the attachment was made in Carragan's suit, was asked to state what was said and done by her and the plaintiff with regard to the attachment, at the time it was made.

The plaintiff objected to the evidence, but the court admitted it; and the substance of her statement was that she told the plaintiff that she did not owe Carragan, and had never traded with him; that he must see Mr. Gerard; that soon after this the plaintiff said he wanted a receipt; that she said she did not owe the debt, and would not give one; and that she had nothing to receipt for.

We think the evidence was admissible to show that Mrs. Gerard was unwilling to give a receipt for the property attached, on the ground that she did not owe the debt to secure which the attachment was made. Such evidence tended to rebut the inference that might have been drawn had she made no denial of owing the debt, and expressed no unwillingness to giving a receipt.

The witness was subsequently asked, "Who owned the goods in the store at the time of the 1 Conn.

attachment?" The plaintiff objected to the question, but the court allowed it; and the witness answered that she did.

It is said that the answer was merely the opinion of the witness, and therefore should have been rejected. But the answer purports to be based upon knowledge of the fact as to who owned the property, which was a fact directly in issue between the parties. Opinion is a conclusion derived from evidence, and falls short of knowledge. We think there is no ground for this claim; nor is there for a similar objection made to the testimony of Charles E. Gerard.

As tending to show that Mrs. Gerard owned the goods in the store at the time of the attachment, the defendant was permitted by the court to show, contrary to the objection of the plaintiff, that sundry parties, at different times previously to the attachment, sold to Mrs. Gerard certain goods to supply the store. The rulings of the court on these questions were so obviously correct that no comment is necessary.

And the same may be said in regard to the objections of the plaintiff to the charge of the court. The charge is very full and correct, and is well adapted to every phase of the case.

There is no error in the judgment appealed from.

In this opinion the other Judges concurred.

Thomas D. DALY
v.

Ervin O. DIMOCK, Clerk of Superior Court.

1. **Testimony taken by the coroner at an inquest**, and reduced to writing and lodged with the clerk of the superior court, as prescribed by Rev. Laws, § 2011, is a public document, open to inspection by all persons interested in the subject-matter, including the person indicted for the homicide which was the subject of the inquest.
2. **Mandamus** is the proper remedy to enforce the right of one indicted for such homicide to obtain an inspection of such testimony.
3. Under the existing statutes, **no discretion rests in the coroner, the clerk, or the court to prevent inspection**, by the accused, of such testimony.

(Tolland—Filed February, 1886.)

PETITION to the Superior Court of Tolland County for a writ of mandamus to compel the clerk of the court to permit petitioner to inspect certain testimony taken before a coroner. Case reserved for the advice of this court. *Issuance of writ advised.*

The facts are fully stated in the opinion of the court.

Messrs. T. E. Steele, Olin B. Wood, and Case, Maltbie, & Ely, for relator:

The proceedings of a coroner holding an inquest *super visum corporis* are judicial.

Reg. v. White, 3 El. & E. 144; *People v. Willett*, 92 N. Y. 29; *Giles v. Brown*, 1 Mill, S.

C. Const. 280; *Boisliniere v. County Comrs.* 32 Mo. 375; *People v. Devine*, 44 Cal. 452.

The clerk is a public officer, created by statute, and entrusted with the keeping of records, documents, and writings which are of general and public interest (Rev. Stat. 75, p. 61); and his duties and powers are purely ministerial. He is clothed with no discretion,—he is not authorized to use any judgment or discrimination with reference to any part of the public.

The English law has advanced to the idea that the due administration of justice is quite as much concerned about the protection of the innocent as the punishment of the guilty.

The coroner was the earliest officer of the English law, and the statute of Edward (De Officio Coronatoris, 4 Edw. I. St. 2 A. D. 1276) is the earliest English law on the subject of coroners. By this statute it is no part of his duty to make any written transcript of the evidence upon which the verdict is founded.

The statute of Philip and Mary (1 & 2 P. & M. chap. 13, § 5, 1554) required the coroner to "put in writing the effect of the evidence given before him, being material," and to bind over the witnesses to appear at the trial of the person accused.

This Act remained in force till 1826, when it was superseded by 7 Geo. IV. chap. 64, § 4, which provides that every coroner shall certify and return the depositions and inquisitions to the court before which the person is to be tried.

The powers and duties of justices and coroners, as to preliminary examinations, were treated by the Legislature as practically the same, and the same policy of the law obtained with regard to both. What that policy was is well shown in *Hurtell's Case*, quoted by Stephen in his *History of Criminal Law*, pp. 227, 228.

It was a constant and most natural and reasonable topic of complaint by the prisoners who were tried for the Popish Plot that they had been taken without warning, kept close prisoners from the time of their arrest, and kept in ignorance of the evidence against them until the very moment when they were brought into court to be tried.

Steph. Eng. Cr. L. 225.

The first alteration in this state of things was effected in 1886, by the Prisoner's Counsel Act. 6 & 7 Will. IV. chap. 114, § 4.

Section 3 of the Act is: "And be it further enacted that all persons who, after the passage of this Act, shall be held to bail or committed to prison for any offense against the law, shall be entitled to require and have, on demand from the person who shall have the lawful custody thereof, and who is hereby required to deliver the same, copies of the examination of witnesses respectively, upon whose depositions they have been so held to bail or committed to prison, upon payment of a reasonable sum therefor.

Stat. at L. 6 & 7 Will. IV. chap. 114. See 1849, 11 & 12 Vict. chap. 42, § 27; 1859, 22 Vict. chap. 33, § 3; 1881, 44 & 45 Vict. chap. 25, § 9; Steph. Eng. Cr. L. p. 221.

Messrs. B. H. Bill and Charles Phelps, for respondent:

The remedy by mandamus is discretionary.

American Asylum v. Phoenix Bank, 4 Conn. 178; *People v. State Auditors*, 42 Mich. 422;

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Page v. Copton, 80 Gratt. 415; *Rea v. Bristol Dock Co.* 12 East, 429; *People v. Hatch*, 33 Ill. 9; *Woodman v. Somerset County*, 24 Me. 151; *State v. Graves*, 19 Md. 851; *People v. Booth*, 49 Barb. 31; 32 How. 17; 48 Ala. 100; 1 T. R. 331, 396, 404, 425; 2 T. R. 336; Redf. R. R. 441, § 190, and notes.

He who would invoke the aid of a writ of mandamus must have a clear and well-defined legal right.

Peck v. Booth, 42 Conn. 274; *State v. New Haven & N. Co.* 45 Conn. 348.

And the court will not grant a mandamus where it appears that the object sought could have been secured, without serious difficulty, without the aid of a court.

Harrison v. Simonds, 44 Conn. 318.

Carpenter, J., delivered the opinion of the court:

This is a writ of mandamus. The relator, Thomas D. Daly, alleges that he is indicted for murder in the second degree in causing the death of one Thomas Murphy; that the coroner held an inquest on the body of said Murphy; that the testimony of the witnesses was, by the coroner, reduced to writing and lodged with the clerk of the superior court; that access to said testimony is essential to his defense to the indictment; and that said clerk, the defendant, denies him the privilege of inspecting the testimony, etc. The defendant demurs on two grounds: (1) that said testimony is not a public record; and (2) that public interest requires that said testimony should not be read by said Daly or his attorneys. The case is reserved for the advice of this court.

The decision depends upon the construction of the statute relating to coroners, passed in 1883. As that statute is not changed in the recent Revision, we shall refer to that, and not to the Session Laws of 1883.

Section 2011 of the Revision is as follows: "The coroner shall reduce to writing, and shall, within ten days after any inquest has been held, return the testimony of all witnesses examined in the inquest to the clerk of the superior court in his county, together with his report of the inquest, which shall include his finding or the verdict of the jury; and he shall also return to said clerk all certificates sent him by the medical examiner in accordance with § 2008, and all similar certificates by him made."

The other sections of the Act do not seem to have any special bearing upon the question before us. There are two clauses, however, that are relied on to some extent. In § 2009 it is provided that the coroner "may order any inquest, or any part thereof, to be held in private." And in § 2010 it is provided that "he may order and cause witnesses to be kept separate, so that they cannot communicate with one another until they shall have testified."

We do not deem it important to consider whether the testimony, when reduced to writing as required by law, and lodged with the clerk of the superior court, is or is not, in a strict, technical sense, a public record.

For the purposes of this case we may concede that the duties of a coroner are of a judicial nature, and that the verdicts of juries and the findings of coroners are, in a general sense,

matters of record. They are results and conclusions of judicial proceedings, and are clearly analogous to verdicts and judgments in ordinary courts of justice. In either case the testimony and other oral proceedings are not matters of record unless made so by statute. In behalf of the plaintiff it is contended that the statute does make the evidence before a coroner, when reduced to writing, a part of the record. We do not regard that as strictly true. The Legislature required that such testimony should be reduced to writing by a sworn officer, and preserved for future reference. It is enough, for our present purpose, to say that it is a public document, relating to matters of public interest, and required by law to be kept by a public officer, who is the custodian of the records of judicial proceedings and other public documents. The statute is silent in respect to the purpose for which such writings are preserved, and the use to be made of them, and by whom. In the absence of any limitation or restriction, we must assume that it was intended that they might be examined by any and all persons interested in the subject-matter. We do not consider that we are justified in saying that they may be inspected by one person and not by another. In the absence of legislation to that effect, we cannot say that they are for the exclusive use of one person or officer, or that any one person or class of persons may not inspect or use them.

The writing in question relates to the prosecution of an indictment before the superior court. We are asked to allow it to be used by the prosecution, and to sanction a refusal to let it be seen, even, by the defense. We think, if the Legislature had intended any such distinction, it would have said so. It has not said so, and we fail to find anything in the statute to justify an implication to that effect. An attempt is made to find such an implication in that provision of the statute authorizing the inquest, or any part of it, to be held in private. No such argument can be legitimately drawn from that provision. The Legislature has not told us why that provision was inserted. Yet the reason is obvious enough. The object of the statute is to ascertain, if possible, the guilty party. If the evidence is likely to implicate some person hitherto unsuspected, it may be advisable, in order to prevent an escape, that the proceedings should be in private. But when a conclusion is reached and the suspected party is arrested, there will ordinarily be no longer any reason for secrecy. Whatever other reasons may have existed for this clause of the statute, it is hardly possible to discover, either in the statute itself or in any conceivable reason for it, sufficient ground for keeping the testimony private after it shall have been lodged with the clerk.

And so of that clause quoted from § 2016. The reasons for keeping the witnesses separate are temporary, and close, and that portion of the statute ceases to be operative, when the witnesses have testified. Both these provisions have sole reference to the proceedings before the coroner, and have no regard to the subsequent use of the testimony by any party in interest.

The argument that the writ ought not to be granted because it is the indicted party who

asks for it, is not a very weighty one. The law presumes every man to be innocent until the contrary appears; and its policy is to give every man accused of crime a reasonable opportunity to prepare and present to a jury his defense. The State does not desire to procure a conviction by any unfair concealment or surprise. It concerns itself quite as much in having the innocent acquitted as in having the guilty convicted. While it affords every reasonable facility for the prosecution of offenders, it is no less solicitous to give to every accused person a fair and reasonable opportunity to make his defense. The statute, in the same section, requires the coroner to return to the clerk the testimony, his report of the inquest, including his finding and the verdict of the jury, and also all certificates sent to him by the medical examiner, and all similar certificates by him made. It will be noticed that the same language is used with reference to all these papers; all are placed upon the same footing. If this section makes one private, all are made so. That all are made so will not be claimed, because the next section, 2012, requires the coroner to make a record of the other papers. It seems impossible to find any reason in the statute itself for keeping the testimony private that will not apply equally well to the report of the inquest, finding, and certificates. Any arguments for it, aside from the construction of the statute, address themselves to the legislative branch of the government, rather than the judicial.

But it is said that the writ is not demandable as a matter of right, but is awarded in the discretion of the court. It is doubtless true that in many cases the court will exercise its discretion. The court will, however, not refuse the writ where the relator has a clear legal right, there is a substantial matter involved, and there is no other adequate remedy. In this case, as we have seen, the relator has a clear legal right. He is indicted for a crime the punishment of which is imprisonment for life. We cannot say, as matter of law, that the privilege of inspecting this testimony is of trifling importance to him. It may be of very great importance; therefore the writ should not be refused on that ground.

Again, it is contended that the relator has other remedy,—that he may obtain information as to the testimony from other sources. The Legislature has seen fit to place within his reach the means of obtaining reliable information with little trouble and expense. Why should he be put to greater trouble and expense to obtain information of a less reliable character? Besides, this consideration, so far as it has force, is an argument against the defendant on the main question. It is somewhat absurd to suppose that the Legislature intended to withhold from the relator all knowledge as to the testimony of witnesses, when at the same time he had adequate means of obtaining such knowledge from other sources.

We are not unmindful of the argument that there may be cases in which a wise public policy would seem to require that facts and circumstances ascertained by the State in the course of its investigation by the coroner should not be made public. Hence we have carefully considered the statute, to see if it admits of any discretion in the coroner, the clerk, or the court;

and we are unable to find that it does. If such a discretion is desirable, it will be for the Legislature to make provision for it.

The Superior Court is advised to issue the writ of mandamus.

In this opinion **Pardee** and **Beardsley, J.**, concurred; **Park, Ch. J.**, and **Loomis, J.**, dissented.

Horatio N. WATERMAN

A. & W. SPRAGUE MFG. CO. and Zachariah Chafee.

1. A creditor who fails to formally assent, within the time limited therefor, to a proposition made to creditors generally for the transfer of the debtor's property to a trustee, to be managed for the benefit of the creditors, will not be presumed to have assented to such transfer, so as to be estopped from enforcing his claim against property included in such transfer, from the facts that he attended the creditors' meeting where the proposition for such transfer was made, and kept silent, and that he refrained, upon the promise of the debtor that his claim should be paid, from accepting time notes provided for under such transfer.
2. The omission of such creditor to institute proceedings (which would have been fruitless) to enforce his claim, in the State where he and the debtor and the trustee resided, and where the transfer was executed, and where such transfer was valid, is not to be imputed as laches which would bar his proceeding in this State (where such transfer had been held to be void as against nonassenting creditors) to enforce his claim against property of the debtor in this State, included in such transfer, of his rights in respect to which, under the laws of this State, he was previously ignorant.
3. Under the Connecticut Statute of Limitations, a creditor, whether a resident of the State or not, has six years after a previously nonresident debtor has come into the State in which to institute a personal action upon a simple contract against such debtor; and the fact that, during the whole time of such debtor's absence from the State, he held real estate here open to attachment by, and of sufficient value to pay the claim of, the debtor, will not affect the creditor's remedy.
4. The Statute of Limitations of another State cannot be pleaded in bar to a proceeding in the courts of this State.

(New London—Filed February —, 1888.)

SUIT brought to the Superior Court of New London County to enforce a judgment lien. Case reserved for advice of this court. Judgment for plaintiff advised.

The facts are sufficiently stated in the opinion of the court.

Messrs. J. Halsey and Tenny & Congdon, for complainant:

The plaintiff is not an assenting creditor in fact.

"The assent of creditors may be given either by becoming parties to and signing the instrument of assignment, when it requires such signature, or by signing an acceptance appended to it, or by verbally assenting to it in terms, or by actually receiving the benefit of it, or by claiming such benefit, or by taking legal measures to obtain such benefit."

Burr. Assign. 890.

"When the trust is for the benefit of all, and no release or other condition is stipulated for or on behalf of the debtor, but the property is to be distributed equally among all the creditors, the assent is to be presumed."

Halsey v. Fairbanks, 4 Mason, 206.

But when the assignment or conveyance is conditional, as when the assignee's liability is limited, there can be no assent presumed; it must be proved.

Spinney v. Portsmouth Hosiery Co. 25 N. H. 18; *Stewart v. Spencer*, 1 Curtis, 157, 166; *Leeds v. Sayward*, 6 N. H. 86; Burr. Assign. p. 889; *Brown v. Warren*, 43 N. H. 430; Bump, Fr. Conv. 431.

An assignment not made for the benefit of all the creditors, and which is not for the benefit of each and every creditor, is not such an assignment as can raise the presumption of assent.

Nelson v. Dunn, 15 Ala. 502; Burr. Assign. p. 382, § 285, and cases cited; *Tompkins v. Wheeler*, 41 U. S. 16 Pet. 118 (10 L. ed. 908); *Hurd v. Silsby*, 10 N. H. 108; 21 Ala. 333-335, 380; *Fall River I. W. Co. v. Croade*, 15 Pick. 11.

"These conveyances were for the benefit only of those who should accept, and they were required to manifest their acceptance by doing certain things."

Greene v. Sprague Mfg. Co. 52 Conn. 372.

Plaintiff is not estopped from now enforcing his claim because the defendant has expended \$250,000 in and about the repairing of the dam of the Baltic Mill.

Estoppels of this kind are never allowed except when the party has been injured by the acts or conduct of the party whom he seeks to estop. It does not appear that Chafee is not abundantly protected for his expenditure in value of the property over and above the incumbrance of the plaintiff's judgment lien.

Fawcett v. New Haven Organ Co. 47 Conn. 227; *Hull v. Hull*, 48 Conn. 257.

"As the courts have never prescribed any specific period as applicable to every case, like the Statute of Limitations, the determination as to what constitutes a reasonable time in any particular case must be arrived at by a consideration of all its elements which affect that question."

Twin Lick Oil Co. v. Marbury, 91 U. S. 387 (23 L. ed. 829).

Waterman did all that was in his power to do to collect his claim, except to demand the trust notes of Chafee. This would have made him an assenting creditor.

Burr. Assign. 890.

It would have been useless to have brought

suit in Rhode Island against the A. & W. Sprague Manufacturing Company, as all the property of the company had been assigned by a deed which the Rhode Island courts had decided to be valid both as to assenting and non-assenting creditors.

14 R. I. 464.

Waterman was a citizen of Rhode Island. He had no knowledge, and is not presumed in law to have knowledge, that the trust deed and assignment were void under the laws of Connecticut, so far as they affected title to real estate situate in this State.

Stedman v. Davis, 93 N. Y. 82; *Bank of Chillicothe v. Dodge*, 8 Barb. 238; *Merchants Bank v. Spalding*, 9 N. Y. 53; 8 Pars. Cont. 399.

It had been held by the courts of Rhode Island that the said deed and assignment were not void.

14 R. I. 464.

The trust deed and assignment are totally inoperative and void to convey any title to real estate in Connecticut for want of sufficient description of the land.

De Wolf v. Sprague Mfg. Co. 49 Conn. 282.

Burrill, in his work on Assignments, p. 162, says: "To the assignment are usually appended two schedules, which are marked, and referred to in the body of the instrument, and are taken as a part of it: (1) a schedule of the property assigned; (2) a schedule of the assignee's creditors, or of the debts to which the property is to be appropriated."

A description of the property assigned is one of the essential features of this instrument.

Voss v. Bradstreet, 27 Me. 156; *Bostworth v. Sturtevant*, 2 Cush. 392; *Lyman v. Loomis*, 5 N. H. 408; *Mason v. White*, 11 Barb. 178; *Eggleston v. Bradford*, 10 Ohio, 812; *Andrews v. Pearson*, 68 Me. 19; *Drakeley v. De Forest*, 3 Conn. 277; *Peck v. Whiting*, 21 Conn. 211; *Carter v. Champion*, 8 Conn. 557; *Strong v. Carrier*, 17 Conn. 880; *Hierman v. Deming*, 44 Conn. 124; op. of Carpenter, J., in *Boston & N. Y. A. L. Co. v. Coffin*, 50 Conn. 162, 163.

To take the case out of the Statute of Limitations one of three things may be considered: (1) an acknowledgment of the debt; (2) a new promise; (3) part payment.

1 Swift, Dig. 301; 3 Conn. 370; 5 Conn. 480; 8 Conn. 480.

The defendant company has promised to pay the claim of the plaintiff.

Amasa Sprague, as treasurer, promised to pay the plaintiff's claim, within six years prior to the bringing of the suit.

Persons acting publicly as officers will be presumed rightfully in office, and their acts binding upon the corporation.

Hall v. Carey, 5 Ga. 239.

An officer of a corporation binds a corporation by acts done in the usual course of business. In this case the acknowledgment of the indebtedness to the plaintiff, and a promise to pay for services rendered, was in the line of the treasurer's business.

4 Paige, 127.

A promise made by a treasurer to pay an account assigned to a third party is binding.

Mount Olivet Cemetery v. Shubert, 2 Head (Tenn.), 116.

A treasurer has the right to negotiate bills taken in the name of his office.

1 Conn.

Perkins v. Bradley, 24 Vt. 66.

Waterman brought his suit in Rhode Island, on his claim for work and labor done for the A. & W. Sprague Manufacturing Company, and recovered judgment against said company. That judgment was reaffirmed in this State. The defendant Chafee now seeks to inquire into the validity of the claim on which the original judgment was rendered. In other words, he seeks to retry this case again on this point. This he cannot do.

Sidenesarker v. Sidenesarker, 52 Me. 481; *Candee v. Lord*, 2 N. Y. 269.

Mr. Charles E. Perkins, for defendant Z. Chafee:

To enable a creditor to bring an action to set aside a conveyance of the debtor as fraudulent against him, the creditor must first obtain a judgment against his debtor upon the claim.

Bump, Fr. Conv. p. 535; Burr. Assign. p. 746, § 508. See *Owen v. Dixon*, 17 Conn. 492.

This judgment must be a valid one, not only as against the grantor, but as against the grantee.

In the suit in Rhode Island in which Waterman obtained the original judgment upon which the judgment alleged in this case was founded, Chafee attempted to appear to set up the defense which he makes here, and the court refused to allow him to appear and defend, upon the express ground that the judgment would not be binding upon him in such a suit as this.

Waterman v. Sprague Mfg. Co. 14 R. I. 43. See *Inman v. Mead*, 97 Mass. 314; *Esty v. Long*, 41 N. H. 108; *Sargent v. Salmond*, 37 Me. 539; *Warner v. Percy*, 22 Vt. 155; *McLoud v. Selby*, 10 Conn. 390; *Sturges v. Beach*, 1 Conn. 507.

The right to plead the Statute of Limitations as a bar is only personal to the debtor so far as his own rights are concerned; when the rights of others are to be affected, they also can avail themselves of the statute, and the debtor cannot injure them by refusing to plead the statute, any more than by refusing to appear at all and allowing judgment to be taken by default.

See Wood, Lim. p. 79; *Lord v. Morris*, 18 Cal. 482; *McCarthy v. White*, 21 Cal. 495; *Grattan v. Wiggins*, 23 Cal. 16; *Ferguson v. Broome*, 1 Bradf. 10; *Peck v. Wheaton*, Martin & Y. (Tenn.) 853; *Hock's App.* 21 Pa. 280.

Creditors of an insolvent estate may set up the statute against any other creditors presenting claims.

Kittera's Est. 17 Pa. 416; *Darson v. Callaway*, 18 Ga. 573; *Shewen v. Vanderhorst*, 1 Russ. & M. 847. See also *McDowell v. Goldsmith*, 24 Md. 214; *S. C.* 6 Md. 319; 2 Md. Ch. 370; *Schaferman v. O'Brien*, 23 Md. 565; *Warner v. Doe*, 33 Md. 579; *McClenney v. McClenney*, 8 Tex. 192.

The corporation has never made any new promise. If it had made one, it would not affect Mr. Chafee, its grantee.

An entry on the books of the company is not in law a new promise.

Wood, Lim. p. 195, and cases there cited.

It is very doubtful whether, even as against the corporation itself, any officer can, merely from his official position, make a new promise which will keep a claim alive. But if such a new promise would be valid as against the corporation, it is clear that, neither such

officer nor the corporation itself could remove the bar of the statute after it had attached, so as to revive the claim and make it valid as against third persons, so as to affect their rights in property before that time conveyed to them by the debtor.

Wood, Lim. p. 480; *Wood v. Goodfellow*, 43 Cal. 185; *Schmucker v. Sibert*, 18 Kan. 104; *New York L. Ins. & T. Co. v. Covert*, 29 Barb. 435; *Day v. Baldwin*, 34 Iowa, 380; *Cason v. Chambers*, 62 Tex. 805.

By the acts and laches of the plaintiff he has placed himself in such a position that this court will not exercise its equitable powers in his behalf.

A person invoking the powers of a court of equity to assist him must apply promptly and without unreasonable delay, especially where fraudulent conduct is charged; and this is particularly the case where, in consequence of such delay, acts have been done or moneys expended which would not have been done but for such delay.

See *Banks v. Judah*, 8 Conn. 161; *Royal Bank v. Grand Junction R. R. & D. Co.* 125 Mass. 490; *Hayward v. National Bank*, 96 U. S. 611 (24 L. ed. 855); *Sullivan v. Portland & K. R. Co.* 94 U. S. 806 (24 L. ed. 324); *Harwood v. Cincinnati & C. A. L. R. Co.* 84 U. S. 17 Wall. 78 (21 L. ed. 558); *Brown v. Buena Vista County*, 95 U. S. 157 (24 L. ed. 422); *Hoyt v. Sprague*, 103 U. S. 618 (26 L. ed. 535).

Any conduct on the part of a creditor which shows an approval of, or assent to, a trust conveyance, is as effectual as receiving notes under it.

See *Ex parte Stray*, L. R. 2 Ch. App. 374; *Rapalee v. Stewart*, 27 N. Y. 310; *Hone v. Henriquez*, 13 Wend. 240; *Phillips v. Wooster*, 36 N. Y. 414; *Pelt v. Tredwell*, 5 Wend. 698; *Johnson v. Rogers*, 15 Nat. Bankr. Reg. 1; *Ashley's Case*, L. R. 9 Eq. Cas. 268; *Lawrence's Case*, L. R. 2 Ch. App. 412; *Alopp's Case*, 1 De G. F. & I. 289; *Oliver v. King*, 8 De G. M. & G. 110.

If a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain.

Duke of Leeds v. Earl of Amherst, 2 Phill. (22 Eng. Ch.) 123.

Pardee, J., delivered the opinion of the court:

The plaintiff is a resident of the State of Rhode Island. He has never been a resident of this State. The A. & W. Sprague Manufacturing Company is a corporation chartered prior to 1873 by the Legislature of the State of Rhode Island, having its legal location in that State. It has never been a corporation resident in this State. Chafee, trustee, defendant, is a resident of the State of Rhode Island.

The A. & W. Sprague Manufacturing Company made default of appearance; Chafee, trustee, appeared.

The following are among the facts reported in the finding:

In the fall of 1873 the A. & W. Sprague Manufacturing Company was unable to meet its liabilities as they became due. It had assets consisting of mills, factories, stock, and goods in Rhode Island and other States,

which were estimated to be worth about \$14,000,000, and it was in debt about \$8,000,000; but it was unable to turn its property into money so as to meet its debts. Thereupon it called a meeting of its creditors, by public notice in the newspapers, to consider its condition and advise what course it had better take; which meeting was largely attended by its creditors, and, among others, by the plaintiff. At this meeting, after considerable discussion, it was unanimously decided that it was desirable for the interests of the creditors that a trust deed should be made by the company; and a committee was appointed to prepare a form of deed, and report it to the meeting, with the names of proposed trustees. The committee on the same day reported to the meeting, recommending that a conveyance in trust, substantially like that hereinafter mentioned, be made by the company, and recommending the names of certain trustees. This report was unanimously accepted by the meeting; and the committee was further instructed to see that such conveyance was made. There was no evidence that Waterman, the plaintiff, took any part in the proceedings of the meeting. They caused the deed to be carefully examined by lawyers of ability, but the persons they wished to have as trustees refused to act. Thereupon the proposed deed was executed by the company and others, and the name of Zachariah Chafee, the defendant, was inserted as trustee, without any objection by the committee, and the deed was delivered and recorded in the land records of the town of Sprague, in this State, on the 2d day of December, 1873. On the 6th day of April, 1874, the company executed and delivered an assignment, to more fully carry out the same object, which was recorded in the land records of that town April 8, 1874. Chafee, soon after the execution of the trust deed, took possession of all the property of the company, including the land now in question in this State, and has ever since held and occupied the same, and managed and carried on the business in the Baltic Mill, in the town of Sprague; and the A. & W. Sprague Manufacturing Company thereupon ceased to actively carry on any business.

Creditors of the company to the amount of over \$8,000,000 took notes under the provisions of the trust deed, which included all the creditors of the company except those holding claims to the amount of about \$115,000, of whom the plaintiff was one. Chafee, as trustee, sold large amounts of the property so conveyed to him, and paid large sums as interest and dividends on the notes. In the year 1876 a considerable portion of the Baltic Mill property was swept away by a flood, and Chafee expended of the trust funds a sum exceeding \$250,000 in the restoration of the property, and repairs upon the same rendered necessary by the flood. Without this expenditure the property could not be used; but by it, it was made as valuable as before the injury, and said Chafee has received the rents and profits thereof from the time of the acceptance of the trust, in 1873, to the present time. At the time of this expenditure the plaintiff was residing in the State of Rhode Island; and there was no evidence that he knew that these repairs were made.

The plaintiff knew of the execution and delivery of the trust deed to Chafee, in December, 1873, and never objected to the same in any way, or to the carrying out of the scheme, until he brought suit in this State and attached the property in question, in May, 1883. He did not come in under the deed and accept notes as therein provided, because Amasa Sprague, then treasurer of the company, promised him that he would pay his claim, and advised the plaintiff not to take the trust notes for that reason. The plaintiff never received any of the notes or agreed to receive the same; nor has he ever received any moneys as interest or dividend from Chafee, or offered to release or extend his claim under the provisions of the deed or the assignment. These provided for the extension of claims for the period of three years, with interest.

On the 22d day of April, 1882, the plaintiff, then and still of East Greenwich, in the State of Rhode Island, brought a suit against the A. & W. Sprague Manufacturing Company, in the supreme court of that State, for work and labor done by him for the company from November 11, 1862, to November 11, 1873, and by the consideration of that court recovered judgment in the suit against the company for \$12,209.57, on the 18th day of December, 1882. The defendant Chafee applied to the court to be allowed to appear in the cause and to set up and prove that at the time the suit was brought it was barred by the Statute of Limitations; but the court refused to allow him to appear, in the manner and for the reasons stated in the report of the cause in the Rhode Island Reports (14 R. I. 43).

The plaintiff brought an action on the judgment to the Superior Court in New London County, by process of attachment bearing date May 8, 1883, and returnable on the second Tuesday of September, 1883,—the judgment being the sole ground of action therein,—and by virtue of the process caused to be attached, as the property of the company, on the 3d and 5th days of May, 1883, the several parcels of real estate, situated in the town of Sprague, in New London County, and in the town of Windham, in Windham County, which are described in the plaintiff's complaint. The process and complaint were duly served and returned and entered upon the docket of the court at its September Term, 1883, and by continuance came to the term held at Norwich on the first Tuesday of November, 1883, when the plaintiff recovered judgment against the company for the sum of \$10,925.70, a part of the original judgment having been paid.

On the 14th day of February, 1884,—this judgment being then unsatisfied,—the plaintiff caused to be filed and recorded in the town clerk's office of the town of Sprague, and on the 18th day of February, in the town clerk's office of the town of Windham, a certificate in the form provided by statute, signed by the plaintiff's attorney, Allen Tenny, and thereby placed a judgment lien in favor of the plaintiff upon the several parcels of real estate attached, to secure the amount of the judgment and lawful interest thereon.

Chafee, trustee, makes the following, among other, averments, by way of answer: "That the judgment rendered in the Superior Court

in New London County is void and of no effect against this defendant, because the same was rendered in a suit upon a certain judgment theretofore rendered in the State of Rhode Island, in favor of said Waterman and against the A. & W. Sprague Manufacturing Company, upon a claim which accrued more than six years before the bringing of the suit in which the judgment was rendered, and which by the laws of the State of Rhode Island was outlawed and invalidated, so that no suit could be legally maintained upon it; that this defendant was not made a party to the suit, and therefore was not able to set up that defense thereto; that he applied to the court in which said suit was pending for permission to be made a party thereto, and to make such defense, but his application was opposed by the plaintiff and denied by the court, upon the sole ground that the judgment would not be binding upon him, but that he would have the right, in any proceeding against him founded upon the judgment, to take advantage of the claim and make the defense mentioned, and to defend in such proceeding in the same manner as he desired to do in the original action; and that the A. & W. Sprague Manufacturing Company neglected and refused to set up that defense, or any defense, in said suit. And this defendant says that thereby the judgment in Rhode Island and the judgment in this State, upon which this proceeding is founded, are both illegal and void as against this defendant, and the attachment in said suit and judgment lien filed therein are, as to this defendant, illegal, null, and void. And this defendant avers that all the creditors of said corporation, except creditors to the amount of about \$115,000, to wit, creditors holding claims to the amount of \$8,000,000, accepted notes issued under the trust deed and assignment, and approved of and acquiesced in the same; and, acting for them as such trustee, this defendant has ever since managed the property so conveyed, and expended large sums of money thereon, and especially in the year 1876 this defendant expended of the moneys so received by him as trustee the sum of \$250,000 in repairing the dam and buildings of the property now in question, which had been injured and carried away by a flood, and which it was necessary to expend to make the property of value, and to keep it in operation,—all which proceedings were well known to the plaintiff, and were acquiesced in and approved of by him, and no action was taken by him to set aside the trust deed and assignment until the date of this complaint. And by reason of the premises the plaintiff is estopped in equity and good faith from now setting up and claiming that the trust deed and assignment are void as against him by reason of any provisions in the same, and for the reasons alleged in his complaint. And this defendant avers that by reason of the laches and delay of the plaintiff in taking any proceedings in attacking the trust deed, and allowing this defendant in good faith to expend so large sums of money upon the property now in question, he is in equity and good faith barred from now attacking the trust deed; and, at any rate, the sums of trust money so expended upon the property by this defendant, with interest thereon, should be first repaid to the defendant out of the avails of the property.

before the plaintiff should have a decree to foreclose the same, as prayed for by him."

These averments are to the effect that the plaintiff is barred from the relief which he seeks, because he actually consented to the possession of the property, by the trustee, under the deeds; that he constructively assented; that his claim has passed under the Statute of Limitations; and that laches is to be imputed to him. We think that neither of these objections is well taken.

The plaintiff has neither in fact nor in law assented to the execution and delivery of either the mortgage or deed of assignment to Chafee, trustee, or to the subsequent appropriation by him of the property, by use and sale. The presence of the plaintiff at the meeting of the creditors has, under the circumstances, no legal significance. His debtor invited him and all of its other creditors to a meeting, to listen to a statement as to its financial condition and a proposition for a postponement of their right to enforce their claims. He attended, listened, and went away, without speech or vote or other act. This he could do without putting in peril any right, either as between himself and his debtor, or between himself and any other creditor. Moreover, all of the creditors who are now represented by Chafee adopted measures designed for the purpose of preventing the question of assent or nonassent by the plaintiff from resting upon his silence or speech or vote, or other act at that meeting or at any subsequent time, other than upon one specified act required of him prior to a fixed date; performance or nonperformance equally certain to be known to them. He was required to agree, on or before the expiration of nine months from a specified date, to postpone for the period of three years his right to enforce his claim, and accept from their agent, the trustee, the notes of the debtor, upon that time, with interest. They then notified him that unless he should, on or before that day, extend his credit in the manner and for the time named by them, he would be barred from all right to or interest in the property which the debtor proposed to convey to a trustee for their benefit.

The proposition, of necessity, implied that they would give him nine months for consideration and determination; it bars out the idea that he was to be held to have irrevocably fixed his condition in the matter by his silence at the meeting. They expressly conceded to him a period of subsequent probation, during which he had their permission to repent of his silence and inaction and become an assenting and participating creditor with themselves. At the expiration of the time for deliberation they knew that he had not fulfilled the requirement made of him by them; that he had not assented. Thus they put upon him the stamp of nonassent, which he has not since effaced. In view of this it is not for them to ask a court to presume that they believed he had assented.

Neither is the fact that Amasa Sprague's promise led him to refrain from the acceptance of the time notes, of any significance in this matter.

Previous to the expiration of the time for consideration and decision, he had two possi-

bilities of payment, one by Amasa Sprague, the other by the trustee. The fact that he regarded the first as worth pursuing is not to be made the basis of an assumption that he intended to throw away the other. Presumably, a creditor retains and exhausts all possibilities, and abandons none until payment. Soon after the execution of the deed the creditors took into their possession and use the entire estate of the debtor, valued at about \$14,000,000, and since that time have sold a portion thereof and used the remainder, taking to themselves the proceeds of sales and profits of use, to the total exclusion of the plaintiff. It would be a violent presumption indeed that he assented, without any consideration whatever, to their exclusive appropriation of this estate, simply because he was testing another possibility. By the law of Rhode Island, the State of residence of all parties to this record, both the mortgage deed of 1878 and the assignment of 1874 are valid and effective instruments for the conveyance of property therein described to the defendant Chafee, trustee. He has a title to property in that jurisdiction beyond impeachment by any creditor. This fact was known to and acted upon by all. Action by the trustee, action and omission to act on the part of the plaintiff, are alike to be interpreted in the light of this knowledge. The former held, used, and sold the property as owner, by a title unassailable by the latter; held it in spite of him, and not at all by any presumed assent or permission on his part. The plaintiff knew himself to be powerless to act; he refrained from any effort to appropriate the property to his own debt, because he thought that to be impossible; his assent is that only which comes from silence and inaction when he was unable either to dispute or act. After the execution of the deeds there was neither necessity nor place for either the trustee or the plaintiff to consider, even, the question whether the latter had or had not assented,—would or would not assent. The only open question was, Would he waive present payment and share in the results of the management of the trustee, or would he retain his right to enforce immediate payment whenever and wherever he could find his debtor's property? The fact that he tested the latter possibility lays no foundation for the presumption that he assented to the appropriation of the entire estate of his debtor by other creditors, being powerless to prevent such action. The law does not presume assent as against him because of his omission to attempt the impossible,—because of his omission to attempt to deprive those creditors of rights lawfully exercised by them. From the day of execution of the deeds he was ignorant, without fault on his part, of the fact that any right in or to any property of his debtor remained to him, which he could put in peril by his omission to act, or defend and save by action. For the reason that he sat still under such circumstances, he did not necessarily, as a matter of law, assent. Courts of equity do not impute laches by an iron rule. Circumstances are allowed to govern every case. The fundamental and only just reason why this plaintiff should be postponed to a grantee under a fraudulent and voidable deed is that the delay of the former in enforcing his claim against the property has

induced the latter to subject himself to some form of peril of loss, or come under some difficulty in protecting his rights, or to assume some burden, let go some advantage, or part with some right or thing of value; in short, to be where he otherwise would not have been. Now there is no finding, no evidence, no averment, even, by the trustee, that he has suffered or done either of these things; none that he has been influenced in the slightest degree by any act or omission on the part of the plaintiff. Indeed, upon the facts, an assumption that he had been would be quite unwarrantable. The assenting creditors represented \$8,000,000; they took from the possession of their debtor property of the estimated value of \$14,000,000; they proceeded at their pleasure to sell and retain the proceeds; to use, and consume in the use, the remainder, and retain the profits. The nonassenting creditors represented about \$115,000. It would be an affront to the common sense and business sagacity of the assenting creditors to presume that they would have abandoned the practical ownership of fourteen millions of property, or would have paused for an instant in their plan to appropriate it to their best advantage, even if they had possessed positive knowledge that they would be compelled to advance the amount of these nonassenting debts to protect themselves in the possession of the vast remainder; and the finding is, as might be expected, that soon after the execution of the deed, without waiting to know whether the plaintiff would accept the terms which they had imposed upon him, their agent, the trustee, took possession of the entire estate.

In 1876 the trustee expended more than a quarter of a million of dollars in the reparation of injuries by a flood to the mill property in Sprague, in this State, the subject of this controversy. But, as before, there is neither finding of fact, nor averment, nor warrant for the supposition, that in making this provident expenditure he was controlled in the slightest degree by any consideration of the plaintiff's assent or nonassent. Regardless of him and of his position in reference to it, an irresistible compulsion was upon him as the guardian of a vast property, in the interest of persons who were either to reap large profits from its use or sale if the mill should be restored, or to bear large losses if it should be left in a state of decaying idleness. He made the expenditure. They have had several years' use of the mill. They have not alleged that the expenditure has not been repaid by use.

Statutes of limitation are no part of a contract; they concern only the form and time of the remedy for a breach thereof. They are local,—of force only within the State which enacts them. This court does not enforce foreign statutes of that description. Our statute provides that no action on simple contract shall be brought but within six years after maturity; but, in computing such period, the time during which the party against whom there may be any such cause of action shall be without this State shall be excluded. A resident of another State, who is sued upon his first entry into this State, is within the scope of this exception equally with a former resident here, subsequently residing in another State, and returning
1 Conn,

to residence here. Under this statute, resident and nonresident creditors and debtors stand upon the same footing.

Under it every creditor, resident or nonresident, is entitled to the full period of six years in this State in which to institute an action upon a simple contract, making such service upon the debtor as will support a personal judgment,—a judgment which will conclusively determine the issue between the creditor and the debtor, and bind both in every jurisdiction. The fact that, during the whole time of such debtor's being so without this State, when no service of process can be made upon him which will support such personal judgment, he held real estate here open to attachment by, and of sufficient value to pay the claim of the creditor, is of no legal significance. Under the statute the presence of such real estate is neither a legal nor sufficient substitute for such residence of the debtor as will enable the creditor to obtain such personal judgment. Of course the creditor, at any time while the debtor is so without the State, can institute his action, and appropriate such property of the debtor as may here be found to the extinguishment of the debt; but this will be only in the nature of a proceeding *in rem*, binding upon the property, but not sustaining a judgment binding upon the person of the debtor in every jurisdiction. *Sage v. Hawley*, 16 Conn. 106; *Hatch v. Stafford*, 24 Conn. 432. The title of the defendant Chafee, trustee, rests upon the validity of the mortgage deed of November, 1873, and of the deed of assignment of April, 1874, from the Sprague Manufacturing Company to him. This court, in *De Wolf v. Sprague Mfg. Co.* 49 Conn. 282, determined that both of these deeds are fraudulent and void as against nonassenting creditors. Of these is the plaintiff. Therefore from 1873 to this present there has been in this State real estate the title to which, as between Chafee, trustee, and the plaintiff, has been in the A. & W. Sprague Manufacturing Company. Yet during this time the company has been continuously nonresident, and beyond the reach of such process within this State as will support a personal judgment binding upon it in every jurisdiction. Therefore neither it nor Chafee, trustee, can invoke the aid of our Statute of Limitations in an effort to prevent the plaintiff from appropriating this real estate to the payment of his debt. Neither can either of them here plead in bar the Statute of Limitations of the State of Rhode Island, for the reason already given.

In form this is a petition for the foreclosure of a lien or statutory mortgage upon real estate as the property of the A. & W. Sprague Manufacturing Company. The lien exists by virtue of the judgment in this State in favor of the plaintiff against that company; this judgment in turn rests upon one rendered in the State of Rhode Island; and this last upon a debt due from it to the plaintiff. There was no legal necessity for the judgment in Rhode Island, and it would have availed Chafee nothing if he had been permitted to appear in that suit and plead the Statute of Limitations of that State; nothing if he had driven the plaintiff out of that court. The latter could still have sent his claim in its original form into this State, and thereon ordered suit, attachment, and approp-

priation of the real estate by levy of execution, if he had desired to do so.

This unnecessary change of form of claim, without change of substance, neither works hurt to the plaintiff nor brings help to the defendant. It cannot be made the occasion for driving the former out of court; in reality he is appropriating the property of his debtor to the satisfaction of a judgment at law based upon a debt, the validity and justice of which both defendants admit.

The law of this State is that, as against the plaintiff, both of these deeds were fraudulent and void, and conveyed no title to the real estate here.

Knowledge of the law of his State of residence is to be imputed to him, but not knowledge of the law of a foreign State.

Upon the record, after the promulgation of the law of this State by this court, he speedily instituted proceedings for the appropriation of the real estate in this State, not effectually conveyed to Chafee, trustee. There was no laches on his part after knowledge of his rights, and

no laches in obtaining such knowledge. He had the right to presume that the law of this State is as the law of his own State. He was under no obligation to assume the burden of a suit for the purpose of learning whether it is so or not.

The plaintiff is not compelled to ask the aid of the equitable powers of the court. Upon the record he has a judgment at law; he is entitled to an execution thereon, in satisfaction of which the real estate of his debtor must be set out to him. He has alternative means of satisfaction,—by lien and foreclosure on the equitable side of the court; or by execution upon a judgment at law. The latter remains within his power; he has lost neither until he obtains payment. Laches is not to be imputed to a suitor in a court of law, who has not offended the Statute of Limitations.

The Superior Court is advised to render judgment for the plaintiff.

In this opinion the other Judges concurred, except **Carpenter** and **Loomis, JJ.**, who dissented.

VERMONT.
SUPREME COURT.

Andrew E. DENNY, Exr.,
v.

Heirs of Harriet PINNEY.

1. It is a **sufficient publication of a will** where the testatrix and the witnesses severally signed it in the presence of each other; although the testatrix did not personally say that it was her will, but the person who drew it for her announced to the witnesses in her presence that it was, and requested them to sign it as witnesses.
2. When one of three attesting witnesses to a will has **deceased**, and another was present in court and testified to the signing, it was **not incumbent** on the proponent to produce the other, who resided in another State and not within reach of process, nor to take his deposition, though he was in this State for a few days during the pendency of the cause.
3. In an action to establish a will, the contestant pleaded **mental incapacity** and **undue influence**, and the proponent introduced evidence in the opening, bearing on both points, to prove capacity; the contestant put in evidence to show that the testatrix was weak in body and mind, to sustain his plea of undue influence, and the proponent offered in rebuttal evidence relating to the health and activity of the testatrix, and her ability to labor. *Held*, that the burden being on the proponent to prove the capacity of the testatrix, but on the contestant to prove undue influence, the **evidence**, though cumulative as to one issue, was rebutting as to the other, and **admissible**.

(Washington—Decided January 23, 1888.)

APPPEAL from the probate of the will of Harriet Pinney. Trial by jury, September Term, 1886, Powers, J., presiding. Verdict sustaining the will. *Affirmed*.

The will purported to be signed by the said Harriet Pinney, and witnessed by F. W. Bartlett, Abbie C. Howes, and Willie F. Baker. It was conceded that said Baker had deceased; and it appeared that said Bartlett, at the time of the trial, was residing in the State of New York, but that, since the cause had been pending, he had been in Northfield for several days, where the testatrix lived the last fifteen years of her life, and where the principal legatee resided; and that the proponent's attorney saw him about taking his deposition, but Bartlett finally went away, and no deposition was taken. The proponent produced in court the said Abbie C. Howes, who testified to the signing of the will by said Harriet Pinney and by herself, and by the other two witnesses, all in the presence of each other. The court ruled that the will was established, and it was admitted in evidence.

The proponent, in the opening of the case, put 1 Vt.

in evidence as to the state of body and mind of the said Harriet Pinney before, at the time of, and after, the execution of the will. After the contestants had closed their evidence, Mrs. Ellen Alvord, the principal legatee, was recalled in rebuttal, and asked the following:

Q. You have heard what was said about her state of health, activity, and labor; tell in short, or generally, how that was during the last year of her life.

Mr. Shurtleff: We raise the question that the proponent, having gone into the state of body and mind at the time the will was made, has put in his testimony, and cannot go into it in the close.

The Court: We understand this matter of varying the rules to be a matter of discretion, but we will rule as a matter of law, so that you can have an exception.

The answer was admitted, which was favorable to the proponent, to which the defendants excepted.

The other facts are sufficiently stated in the opinion.

Messrs. Frank Plumley and S. C. Shurtleff, for contestants:

It was the duty of the proponent to produce and examine all the attesting witnesses.

Thornton v. Thornton, 39 Vt. 123.

There was no publication of the will. It has been held (*Dean v. Dean*, 27 Vt. 746) that no formal publication was necessary; but some act of the testatrix, signifying that she meant to give effect to the paper as her will, was necessary. Here she did not write the will, nor in any way, herself, acknowledge the same to be her will to the witnesses, nor request them to sign it; and so far as they knew, the testatrix had no knowledge of its contents.

2 Greenl. Ev. §§ 675, 677, and notes; Schoul. Wills, 182, 247; *Chandler v. Ferris*, 1 Har. (Del.) 454.

The burden of proof was on the proponent, both as to the execution of the will and the capacity of the testatrix.

Roberts v. Welch, 46 Vt. 164; *Williams v. Robinson*, 42 Vt. 658.

The proponent went fully, in the opening, into the question of the testatrix's capacity, and, under Rule 23, is confined to evidence legitimate to rebut that given by the defense. Our practice is that of the common law, "and the plaintiff's reply is limited to new points first opened by defendant."

1 Greenl. Ev. p. 469; *Parker v. Hardy*, 24 Pick. 246; *Rawlings v. Chandler*, 9 Exch. 687.

Messrs. James N. Johnson and Heath & Willard, for the proponent:

There was no error in admitting the will, as proved, to go to the jury. Bartlett, the subscribing witness, was out of the jurisdiction of our courts, and, under the circumstances, need not be produced in court.

Carrington v. Payne, 5 Ves. Jr. 404, 411; *Bernett v. Taylor*, 9 Ves. Jr. 381; *Boote v. Blundell*, 19 Ves. Jr. 501; Rev. Laws, § 2056; *Dean v. Dean*, 27 Vt. 746; *Thornton v. Thornton*, 39 Vt. 122.

The publication of the will was sufficient. The statute does not require a declaration of the testatrix.

Rev. Laws, § 2042; *Blanchard v. Blanchard*, 32 Vt. 62; *Roberts v. Welch*, 46 Vt. 164; *Dowey*

v. Dewey, 1 Met. 349. See Schoul. Wills, § 329.

The testimony of Mrs. Alvord was rebutting as to the evidence presented by the contestants under their plea setting up undue influence.

Williams v. Robinson, 42 Vt. 658; *State v. Magoon*, 50 Vt. 389.

ROSS, J., delivered the opinion of the court: 1. The testatrix and the attesting witnesses severally signed the will in the presence of each other. The testatrix did not personally say it was her will. Mr. Baker, who drew the will for her, in her presence announced to the witnesses that it was her will, and requested them to sign it as witnesses. This was a sufficient publication of the will, and gave the witnesses full knowledge of the act they were performing. The act of the testatrix, in signing the alleged will in the presence of the witnesses, after they had been informed by Mr. Baker that it was her will, and requested to sign it as such, as well as her silence after the proclamation by Mr. Baker, was an affirmance by the testatrix, and an acquiescence in the announcement by Mr. Baker. It was all the publication required, as it fully informed the witnesses, with the testatrix's implied assent and approval, of the nature of the act they were asked to perform. *Roberts v. Welch*, 46 Vt. 164; *Dean v. Dean*, 27 Vt. 746.

2. It was not incumbent upon the proponent to produce the attesting witness Bartlett in court. He was beyond reach of process. The English practice adopted by this court requires the proponent only to produce and examine such of the attesting witnesses as are within reach of process. *Thornton v. Thornton*, 89 Vt. 122. He must be within reach of process and legally attainable at the trial. It was no more the legal duty of the proponent to procure the deposition of such a witness, who resided beyond the reach of process, than it was the duty of the contestants; nor was it any more his duty to produce the deposition of such a witness because he had an opportunity to take his deposition when the witness happened to be in the State, than if the witness remained all the time without the State, provided the proponent knew his residence. In neither case could he produce the witness upon the trial and examine him. The practice here and in England has never required the production of the deposition of such a witness. To make such a deposition of value, the instrument proposed must be produced to the witness, identified. It will be difficult and objectionable to do this. The proposed instrument is required to be deposited with the probate court, and, for proof before that court, is not within the control of the proponent without an order of the court, even if it is after the allowance of an appeal to the county court. Besides, more or less danger attends the removal of a proposed will from the State for such a purpose. There was no error in the action of the county court in regard to the production of the deposition of this witness.

3. Was the testimony of Mrs. Ellen Alvord rebutting, when recalled after the contestants had closed their testimony?

The contestants, by their pleas, raised two issues,—incapacity and undue influence. As to

the first, the burden of proof was on the proponent. *Williams v. Robinson*, 42 Vt. 658.

When the due execution of the will and testamentary capacity of the testatrix were proved, the law presumed she intended that the legal results of her act should follow. Hence, on the issue in regard to undue influence, the contestants went forward. On the issue in regard to the mental capacity of the testatrix, the state of the health of the testatrix, her activity, and ability to labor bore indirectly. Hence the proponent introduced evidence bearing upon these points in his opening. Just what he showed, the exceptions do not state. But this class of testimony bore also, quite as directly, upon the issue as to undue influence, in regard to which the contestants took the laboring oar. From the question excepted to, put to Mrs. Alvord, it is apparent that the contestants had gone into this class of testimony on the issue in regard to undue influence; for the question only called the witness's attention to the testimony on these points introduced by the contestants. The testimony called for by the question would be in rebuttal to the contestants' evidence on the issue in regard to undue influence. It would also bear cumulatively upon the issue made in the opening by the proponent in regard to the capacity of the testatrix. Hence, in one view it was strictly in rebuttal, and in another, cumulative, depending upon the issue to which it applied. It was therefore legally admissible in rebuttal on the issue in regard to undue influence. It could not be made inadmissible, because, from the nature of the issues, it bore indirectly, and was cumulative upon the issue as to the capacity of testatrix. To hold otherwise would be a too strict and narrow construction of the rule requiring each party to put in his full case on the issues resting upon him, and would often make the rule intended for the furtherance of justice work surprise and injustice. The admission of such testimony, in a case where the issues are thus made, cannot be said to be an infraction of the rule in letter or in spirit.

The judgment of the County Court is affirmed, and ordered to be certified to the Probate Court.

LYCOMING FIRE INSURANCE CO.

2.

Medad WRIGHT & SON.

1. Parol evidence was admissible to prove that a license had been issued by the secretary of state to a foreign insurance company to do insurance business, when the loss of the license was shown, and there was no law requiring it, or the fact that it had been issued, to be recorded.

2. It is presumed that a foreign insurance company duly filed in the office of the secretary of state a copy of its by-laws, when it was proved that the secretary had issued to the company a license to make insurance contracts, and the statute provided that no license should be issued until such copy had been filed; as it must be presumed, until the con-

trary is shown, that the secretary of state did his duty, and would not have issued the license unless the company had complied with the law.

In the Act of 1874, No. 1, § 2, which prohibited a foreign insurance company from taking insurance in this State unless it was "responsible by the laws of the State" in which the company was situated for the acts and neglects of its agents, the word "laws" includes not only the statutory but the common law of that State.*

In an action by a Pennsylvania insurance company to recover an assessment, one question was whether the company, under the laws of that State, was responsible for the acts and neglects of its agents; and the court below found from testimony, as matter of fact, that the law of that State was as reported in certain cases in its Supreme Court Reports,—which were referred to as part of the exceptions,—and rendered judgment for the plaintiff. The cases showed that the company was liable for the neglects of its agents, which, under our statute, enabled it to do business here. Held, that there was no error.

(Washington—Decided January 27, 1888.)

SPECIAL assumpsit to recover three assessments upon premium notes. Plea, general issue. Trial by court, March Term, 1887, *Eazey, J.*, presiding. Judgment *pro forma* for the plaintiff to recover the amount of said assessments, with interest as provided in the charter and by-laws. *Affirmed.*

The policy was issued to the defendants, October 30, 1875, and ran five years. The plaintiff was admitted to do business in this State in 1870, and a license was issued to it for that purpose, and it continued to do business here in 1880.

The exceptions stated that "the licenses issued to this company were lost. * * * A license was issued to the plaintiff company by the insurance commissioners of Vermont, to do business in this State for the year 1875, and for every subsequent year until 1880. This fact as found upon parol evidence, the licenses being lost," etc.

*Act of 1874. No. 1, §§ 2, 9 (Rev. Laws, §§ 9610, 16).

§ 2. All fire insurance companies, other than those chartered by the General Assembly of this State, are prohibited from taking insurance in this State, unless such company or companies shall be responsible by the laws of the State in which such company or companies are situated, or by the Act incorporating such company or companies, or by a proviso to that effect inserted in their policies of insurance, for the acts and neglect of their agents, between said companies and the assured, and as between said companies and the applicants for insurance therein.

§ 9. It shall not be lawful for any [foreign] insurance company embraced in § 7 to transact any insurance business in this State, unless such company shall first obtain license of the insurance commissioners, authorizing the company so to do, before receiving such license, the company shall give to the secretary of state a certified copy of its charter and by-laws, and a full statement, under oath, of its president and secretary, showing the financial condition and standing of the company, according with blanks furnished by him.

Vt.

N. E. R., V. V.

The court found that the plaintiff had complied with the statute as to filing papers with the secretary of state or the insurance commissioners, in order to be entitled to a license to issue policies of insurance in this State, but was unable to find, from the evidence produced, that the by-laws of the company had ever been filed with the secretary of state. The policy was made "subject to the Act of incorporation and by-laws of the said company, which are to be used and resorted to, to explain or ascertain the rights of the parties hereto in all cases not herein otherwise provided."

A question was made, whether, under the laws of Pennsylvania, where plaintiff company was located, an insurance company of that State was liable for the acts and neglects of its agents, as between the company and the insured. It was conceded that there was no statute law of Pennsylvania to that effect; but it was claimed that under the decisions of the highest court of that State an insurance company was so liable at the common law. An officer of the company, but not a lawyer, who had charge of the litigation of the plaintiff in that State, and had for many years made it a part of his business to keep himself familiar with the decisions of that court upon said question, and who testified that he knew what the decisions were in that respect, was allowed, against defendants' objections, to testify as an expert as to the law of Pennsylvania upon the point in question. And he testified that the decisions had been in accordance with the plaintiff's claim, and that the plaintiff company had been so held liable; and referred to the cases, and produced the volumes of Pennsylvania Reports in which he claimed such had been the rulings, and adopted the same as his testimony as to the law of that State on this question.

The defendants improved Mr. Ashton R. Willard, a practicing member of the Vermont bar, as a witness, upon the same question; and he testified that he had examined the decisions as reported in the Supreme Court Reports of that State, and that they did not hold as stated by the other witness. He produced decisions, some of which were the same as referred to by the plaintiff's witness. The exceptions stated: "As both these witnesses fall back upon the reported decisions of the Pennsylvania courts, as a basis of, and adopt the same as, their testimony as to the law of that State upon the point in question, this court found that the law is as held and reported in the Supreme Court Reports of Pennsylvania. (Here was the following amendment inserted upon suggestion of the Supreme Court,— "in volumes 4, page 185; 23, page 72; 51, page 463; 75, page 378; 24, page 320; 100, page 347; 88, page 223; 8, page 464; 50, page 381; and in 7 W. & S. page 848; which are referred to as a part hereof.")

Further facts are stated in the opinion of the court.

Messrs. Senter & Kemp, for defendants:

There can be no recovery, because the plaintiff had not complied with the laws of this State when the premium notes were executed. The court below failed to find that the company had ever filed a copy of its by-laws with the secretary of state, as required by § 9, No. 1, of the Laws of 1874, which was a condition precedent to its right to receive the license.

Section 7 of the same Act prohibits all insurance companies not organized under the laws of this State, from transacting business in this State "until all the laws relating to insurance companies in other States, enacted by this State, shall have been complied with."

These conditions constitute a part of the law, and insurance companies cannot qualify themselves to transact such business without compliance with them.

55 Vt. 526.

The insurance policy issued to these defendants refers specifically to, and makes the by-laws a part of, the contract; these by-laws contain many prohibitions on the assured, and it was very essential that the assured have access to them in case of loss, as they contain the instructions and rules for procedure for the assured in such an event. As this company had not complied with the requirement in regard to filing its by-laws, the insurance contract made by it in this case was prohibited by law, and the premium notes were void.

Etna Ins. Co. v. Harney, 11 Wis. 394; *Williams v. Cheney*, 8 Gray, 206; *Haverhill Ins. Co. v. Prescott*, 42 N. H. 547; *Williams v. Cheney*, 8 Gray, 215; *General Mut. Ins. Co. v. Phillips*, 18 Gray, 90; *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 85; *Lamb v. Lamb*, 6 Biss. 420.

The words "laws of the State," as used in the Act of 1874, mean the positive written statute law of the State.

Swift v. Tyson, 41 U. S. 16 Pet. 18 (10 L. ed. 871). See also *Bouv. L. Dict.* 11, 12; *Burr. L. Dict.* 11, 32; *Abb. L. Dict.* 11, 13; *Gelpcke v. Dubuque*, 68 U. S. 1 Wall. 175 (17 L. ed. 520); *Delmas v. Merchants Mut. Ins. Co.* 81 U. S. 14 Wall. 661 (20 L. ed. 757); *Boyce v. Tabb*, 85 U. S. 18 Wall. 546 (21 L. ed. 757).

Agents of insurance companies in Pennsylvania are not responsible to the degree that the Act in question called for.

Agents of a mutual insurance company cannot prejudice the rights of the company by misrepresentations as to the places where risks were located,—as, that the company does not take risks in the cities.

May, Ins. § 138; Hackney v. Alleghany County Mut. Ins. Co. 4 Pa. 185.

The local agent has no authority to receive notice of loss, and is not bound to communicate it to the company.

Edwards v. Lycoming County Mut. Ins. Co. 75 Pa. 878; *Smith v. Ins. Co.* 24 Pa. 320.

An agent of an insurance company whose duty it is to take surveys, to receive applications for insurance, examine the circumstances of losses, approve assignments, and collect assessments, is not authorized to accept notice of over insurance or waive its consequences.

Mitchell v. Lycoming Mut. Ins. Co. 51 Pa. 402. See *May, Ins. § 145; New York Union Mut. Ins. Co. v. Johnson*, 23 Pa. 72; *Susquehanna Ins. Co. v. Perrine*, 7 Watts & S. 848.

Mr. Charles W. Porter, for plaintiff:

At the time this contract was executed, the company was licensed by the insurance commissioners to transact business in this State; and it is to be presumed that the insurance commissioners had required a compliance with all the provisions of the statute which they, as agents

of the State, considered material or necessary to the protection of the public.

The intent of the Legislature seems to have been, in passing the Act of 1874, to declare what financial condition was requisite to enable a foreign insurance company to do business here; and to enable the courts to get jurisdiction over it.

Sawyer v. North American L. Ins. Co. 46 Vt. 706.

A failure to comply with a statute of a State does not avoid promises to pay premiums to a foreign company.

Clark v. Middleton, 19 Mo. 53.

Whether a statute prohibiting an act renders a contract made in contemplation of the act void depends on whether, in view of the whole statute, the makers meant that the contract should be void in the sense that it could not be enforced.

Harris v. Runnels, 53 U. S. 12 How. 79 (13 L. ed. 901); *Pangborn v. Westlake*, 36 Iowa, 546; *Union Gold Min. Co. v. Rocky Mt. Nat. Bank*, 96 U. S. 641 (24 L. ed. 650); *Union Nat. Bank v. Matthews*, 98 U. S. 621 (25 L. ed. 188); *Morawetz, Corp.* §§ 661-666.

It was expressly declared that a contract entered into in contravention of this statute should be valid.

Gen. Stat. chap. 87, § 13.

And if the contract is valid, the note given as a consideration for it must be valid.

Lester v. Webb, 5 Allen, 573; *Hartford L. & Ins. Co. v. Matthews*, 102 Mass. 224.

Although our statutes since 1850 have declared that our home companies should be held responsible for the acts and neglects of agents, our courts have repeatedly defined the limitations of authority of insurance agents.

Farmers Mut. F. Ins. Co. v. Marshall, 29 Vt. 27; *Carrigan v. Lycoming F. Ins. Co.* 53 Vt. 418.

Under the decisions of the courts of Pennsylvania, made prior to this contract, an insurance company is liable for the acts and neglects of its agents.

Lycoming F. Ins. Co. v. Woodworth, 83 Pa. 223; *Eilenberger v. Protective Mut. F. Ins. Co.* 89 Pa. 464; *Columbia Ins. Co. v. Cooper*, 50 Pa. 331.

The requirement of the Act of 1874, No. 1, § 9, that each company shall file with the secretary of state a certified copy of its by-laws, is merely directory.

Members of a mutual insurance company are presumed to know the terms of the charter and the by-laws of the company, and are bound by them.

Mitchell v. Lycoming Mut. Ins. Co. 51 Pa. 402; *May, Ins. § 552*, and cases cited.

Whether a statute is mandatory or directory depends upon whether the things prohibited or directed to be done are of the very essence of the things required.

Rez v. Loadale, 1 Burr. 447; 81 Pa. 349.

But when the particular provisions of a statute relate to some immaterial matter, where compliance is a matter of convenience rather than substance, they are regarded as directory.

19 Barb. 558; 4 Neb. 386; *Crooby v. School Dist. No. 9*, 85 Vt. 625.

Taft, J., delivered the opinion of the court: Before an insurance company located in a

sister State can make a valid contract of insurance in this State, it must obtain from the secretary of state a license for that purpose, and it must be responsible by the laws of the State in which it is situated, or by its Act of incorporation, or by contract in its policies, for the acts and neglects of its agents, as between the company and the assured and applicants for insurance. Rev. Laws, §§ 3610, 3618; 55 Vt. 536. Before receiving such license the company must file with the secretary of state a certified copy of its charter and by-laws, and a statement of its financial condition. Rev. Laws, § 3610. Three questions are presented by the brief for the defendants.

1. Was parol evidence admissible to show the issuing of the license to the plaintiff? The loss of the license was shown. There was no law requiring a license to be recorded, or requiring the fact that one had been issued to be recorded. It was therefore competent to show the fact by parol.

2. The court found, upon trial, that a license had been issued to the plaintiff, and that prior thereto a copy of its charter, with its financial statement, was properly filed, but was unable to find that a copy of the by-laws had been filed with the secretary of state. It was obligatory upon the plaintiff, before it was entitled to a license, to file a copy of its by-laws. The license was issued. What the effect would be in case the fact was found that no copy of the by-laws was filed, we are not called upon to decide. It does not appear but that a copy was filed, and, in the absence of all showing that it was not, we think the case calls for the application of the rule that acts which purport to have been done by public officers in their official capacity, and within the scope of their duty, will be presumed to have been regular and in accordance with their authority. He who alleges that an officer entrusted with an important duty has violated his instructions must show it. 2 Best, Ev. Morgan's ed. 622, note 1; *Ross v. Reed*, 14 U. S. 1 Wheat. 482 (4 L. ed. 141); *Delassus v. United States*, 34 U. S. 9 Pet. 117 (9 L. ed. 71); *Philadelphia & T. R. Co. v. Skimpson*, 39 U. S. 14 Pet. 448 (10 L. ed. 535). In *Waddington v. Roberts*, L. R. 8 Q. B. 579,—an action to recover under a deed of composition,—a question arose under the Bankruptcy Act, 24 and 25 Vict. chap. 134. The deed, under that Act, could not be lawfully registered unless accompanied by a prescribed affidavit. The objection was made that no proof was given that the affidavit, which the statute required, was filed; but the court said it would "be presumed, until the contrary was shown, that a public officer acting in execution of a public trust would do his duty, and therefore that the registrar would not have registered the deed unless it was accompanied by the necessary affidavit;" and see *Grindell v. Brendon*, 6 C. B. N. S. 698. In Missouri, a foreign insurance company is prohibited from carrying on business until it has filed with the insurance commissioner a certificate stipulating that service may be made upon him; and where it is alleged in the petition that a foreign company is doing business in the State, it will be presumed that it has complied with the law. *Knapp v. National Mut. F. Ins. Co.* 16 Ins. L. J. 798, Sept. 1887. It has been 1 Vt.

held in this State that a public officer acting under the provisions of a statute is presumed to have performed his duty, until the contrary appears. *U. S. Bank v. Trucker*, 7 Vt. 184; *Chandler v. Spear*, 22 Vt. 388. To sustain this objection would require us to presume that the secretary of state was guilty of a gross violation of his duty. In the absence of all showing, the presumption is that he did his duty, and that, prior to issuing the license, the by-laws had been filed in his office.

3. Was the plaintiff responsible by the laws of Pennsylvania, between it and the assured and applicants for insurance, for the acts and neglects of its agents? What the law of that State was, was a question of fact for the county court to pass upon. It did so by finding that the law was as reported in certain cases in the Supreme Court Reports of that State, which are referred to as a part of the exceptions. The cases show that the plaintiff was liable for their agent's acts and neglects, between it and persons doing business with it. In *Columbia Ins. Co. v. Cooper*, 50 Pa. 381, the court says, in speaking of the relations between the company and its agents, that if the assured "has been guilty of no misrepresentation, concealment, or fraud, the company had better pay his loss than to attempt to make him responsible for the blunders of their own agent." In *Lycoming F. Ins. Co. v. Woodworth*, 83 Pa. 223, the main point relied upon by the company to defeat the action was that the agent was not authorized to make the representation which induced the execution of the premium note; and the court held that the company was bound by the representations of its agent in the act of making the contract. It is insisted that this liability must be one created by statute. Although the words "laws of a State" are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, as stated by Story, J., in *Swift v. Tyson*, 41 U. S. 16 Pet. 18 (10 L. ed. 871), we think, in the present instance, that such could not have been the intent of the Legislature or the meaning of the statute. The Act prohibiting the contract unless the company was responsible by the laws of the State where it was located, for the acts and neglects of its agents, was originally passed as No. 47, 1850, and applied as well to domestic as foreign companies. It is declaratory of the common law, which made a principal responsible for the acts and neglects of his agents within the scope of his authority. It is argued that the statute means more than the common law; for, if not, why pass it? Its object undoubtedly was to prevent companies from attempting to abrogate the common law by inserting a clause in their policies or by-laws that an agent taking an application for insurance should be deemed the agent of the assured, and not of the company. This practice, which was common at that time, was the evil to be remedied; and it mattered little to the assured whether the liability of the company was created by statute, or whether it was a common-law obligation resting upon it; in either case the rights of the assured were protected in that respect.

Judgment affirmed.

Benjamin H. STILL *et uz.*

v.

J. W. BUZZELL.

1. A deed absolute in form, but given to secure a debt, and also to cover the grantor's property for the purpose of preventing attachment, is a valid mortgage between the parties; and, on payment of the debt, the grantee will be ordered to reconvey, on the ground that he cannot take advantage of his own fraud upon others to defraud the grantor.
2. Although a bill must be framed to the circumstances that exist when action is brought, yet the decree will be affirmed when it is correct in form and amount, if the bill has been formally amended; thus, when the bill was brought to redeem, the debt had not been paid, but it had been—and there was a balance due the orator—prior to the hearing before the master, by applying on the debt the use of the premises occupied by the defendant in possession under his mortgage. *Held:*
 - (a) That the orator would have been entitled to a decree, if his bill had been properly framed.
 - (b) That the bill should have contained an offer to pay any balance found due the defendant on accounting.
 - (c) That the cause should be remanded for amendment of the bill, and the decree ordering the defendant to redeem and pay the balance due the orator should be affirmed.
3. The orator, after the condition of the mortgage had been broken, rented the premises (a pasture), and the mortgagee notified the tenant that he must pay the rent to him; and the mortgagee also turned some of his own stock in during that season, and afterwards used the pasture to some extent. *Held*, on a bill to redeem, that the defendant took possession, and was accountable for such rents and profits as he ought to have received.
4. When a debtor, owing both a secured and an unsecured debt, makes a general payment, without any direction, and no application is made, it should be applied to the unsecured debt.
5. In a suit to redeem, the defendant was not allowed costs on false issues raised by his answer, and costs were allowed the orator.

(Orange—Decided January 28, 1888.)

BILL praying that the defendant be ordered to re-deed certain lands. Heard on the pleadings, master's report, and exceptions thereto, December Term, 1886, Walker, *Chancellor*. Decree for orators. *Affirmed*.

The prayer of the bill was that defendant be decreed to convey the lands described in the bill to the oratrix, and account for the rents. It was found by the master that the oratrix owned the premises in question, and on October 30,

1878, she and her husband, the orator, conveyed them to the defendant by warranty deed. At this time an overdue mortgage was on the premises, amounting to \$250, due to one Miller, and the defendant agreed to and did take up this mortgage. The deed was not intended to be absolute, but was given and received to secure the Miller mortgage debt, and the defendant agreed to re-deed to the oratrix when that debt was paid. The master also found that one object in conveying the Miller lot, so called, to the defendant, was "to cover this property, and prevent any other creditors troubling the orator and oratrix." The orator owed the defendant a general account, and also two sets of notes, called the Miller notes and the Frary notes; but it was found that the conveyance of the Miller lot was to secure the defendant for taking up the mortgage on that lot, and not the other debts.

It was found, as to the \$31 mentioned in the opinion, that it was paid by E. L. Still, the orator's son, without any agreement as to where it should be applied, and that no application had been made at the commencement of the suit. The bill alleged that the deed was given to defendant to secure him for taking up the Miller notes, and "to prevent the creditors of your orator from interfering in the orator's use of said land;" that defendant agreed to re-deed on payment of said Miller notes; and that they had been paid. The bill was served May 22, 1888.

The decree provided that the defendant took possession of the Miller lot, and should be treated as a mortgagee in possession, and should account to the orators for the reasonable rental value of said lot for four years, commencing from the spring of 1882, which is found at \$25 per year, by the master, leaving a balance due the orators of \$24.06; that if the defendant would excuse himself from accounting for such rents and profits, he must show that he used reasonable means to procure a tenant, or derive benefit from the premises; that it does not appear that the defendant was in fault in not collecting the rent for the year 1881, and the value of the use by the tenant and defendant, respectively, is not found; that the \$31 paid by E. L. Still on account of the orator, without any agreement or direction, be applied upon the general account between the parties, and not upon the Miller debt; that the defendant reconvey to the oratrix the premises described in the bill,—which were conveyed to him by deed, October 30, 1878, as security for the payment of the Miller debt,—free and clear of all incumbrance; that the right of the orators to relief is not defeated by the fact that the deed was executed in part to cover the property from attachment; and that defendant be denied his cost, and the orators recover their cost, subsequent to the filing of the answer.

The other facts are sufficiently stated in the opinion of the court.

Mr. John H. Watson, for defendant:

The \$31 paid by E. L. Still should be applied on the general account, as the rule is that the most precarious security should be extinguished first.

Briggs v. Williams, 2 Vt. 283; *Pierce v. Knight*, 31 Vt. 701; *Allen v. Lyman*, 37 Vt. 30.

Full payment is a condition precedent to re-

demption (2 Jones, Mort. § 1070), and the burden is on the mortgagor to show it.

In the absence of an agreement, there is no legal satisfaction of the mortgage by receipt of the rents. They must be first applied by the judgment of the court.

2 Jones, Mort. § 1115.

The mortgagee is not chargeable so long as the premises are not redeemed.

2 Jones, Mort. § 1116; *Seaver v. Durant*, 39 Vt. 103.

When a tenant is in possession under the mortgagor, the mortgagee must either cause an actual eviction of the tenant, or become his landlord by a new contract, in order to extinguish the liabilities of the mortgagor.

Stedman v. Gassett, 18 Vt. 346; *Partington v. Woodcock*, 5 Nev. & Man. 672; *S. C. 6 Ad. & El. 690*; *Evans v. Elliot*, 9 Ad. & El. 343.

The relation of landlord and tenant cannot be created without the consent of both parties. And when the tenant quits and refuses to pay, there is no express or implied contract, and nothing short of an actual eviction will constitute possession in the mortgagee.

Stedman v. Gassett, *supra*; *Babcock v. Kennedy*, 1 Vt. 462; *Brown v. Storey*, 1 Man. & Gr. 117.

After the premises were vacated by the tenant, the possession was in the mortgagor.

1 Washb. Real Prop. 533.

So long as the mortgagor is in possession, he is entitled to the rents and profits.

Walker v. King, 44 Vt. 601; *Mayo v. Fletcher*, 14 Pick. 525; *Hooper v. Wilson*, 12 Vt. 695.

A mortgagee will not be held for anything more than the actual rent and profits received.

2 Jones, Mort. 1123.

The taking possession must be distinct and unequivocal.

Collamer, J., in *Hooper v. Wilson*, *supra*; *White v. Maynard*, 54 Vt. 575.

The defendant is not liable for interest on the rents.

Breckenridge v. Brooks, 2 A. K. Marsh. 341; 1 Washb. Real Prop. 538.

The right of action must exist when the suit is brought. A decree must be based upon the case as then made.

Barrett v. Sargeant, 18 Vt. 365; *Blaisdell v. Stevens*, 16 Vt. 179; *Downer v. Wilson*, 33 Vt. 1. See 1 Pom. Eq. Jurisp. §§ 388, 1219.

The bill should have contained an offer to pay any balance due.

2 Jones, Mort. 1093.

It was a fraudulent conveyance, participated in by both parties, and was void as to creditors (Rev. Laws, §§ 1955, 4155; *Prout v. Vaughn*, 52 Vt. 451; *McLane v. Johnson*, 43 Vt. 48; Bump. Fr. Conv. 195, 204); but it must stand as between the parties. A right of action cannot arise out of fraud (*Holman v. Johnson*, Cowp. 343).

If a party conveys away his property with intent to defraud his creditors, the law will not aid him to recover it back.

Savage, Ch. J., in *Roberts v. Jackson*, 1 Wend. 478. See *Harvey v. Varney*, 98 Mass. 118; 1 Pom. Eq. Jurisp. 397, 918, 940; 1 Jones, Mort. § 627; *Schmidt v. Opie*, 33 N. J. Eq. 138; 7 Met. 520; Bump. Fr. Conv. 436; *Boulard v. Martin*, 4 Cent. Rep. 760.

The defendant should be allowed his costs, 1 Vt.

according to the general rule in a suit to redeem.

2 Jones, Mort. § 1111.

Mr. S. B. Hebard, for the orators:

The defendant was in possession, and should account for the reasonable rents and profits. He was bound to use reasonable diligence, either in procuring tenants, or in other ways realizing from the premises.

White v. Maynard, 54 Vt. 575; *Shaeffer v. Chambers*, 6 N. J. Eq. 548; *Sanders v. Wilson*, 34 Vt. 318.

The defendant is not entitled to costs. He set up false claims, and failed.

Waterman v. Cochran, 12 Vt. 699; *Stearns v. Whisley*, 30 Vt. 661.

The orators prevailed in the sale issue, and should be allowed costs.

Day v. Cummings, 19 Vt. 496; *Weston v. Cushing*, 45 Vt. 581.

The court will not reverse a decree solely on a question of costs.

Mott v. Harrington, 15 Vt. 185; *Ricker v. Clark*, 54 Vt. 239; *Jostyn v. Parlin*, 54 Vt. 670; *Hastings v. Perry*, 20 Vt. 272; *Sanborn v. Kittredge*, 20 Vt. 633.

Ross, J., delivered the opinion of the court:

The master has found that the deed of the Miller lot, though absolute in form, was, between the orator and oratrix and the defendant, given to secure the defendant for taking up the Miller notes, then resting upon the premises,—which the defendant agreed to do, and did subsequently do,—and to cover the property, and prevent any other creditors from troubling them. The bill is brought to compel the defendant to re-deed the premises, the complainants claiming that they had paid the defendant the entire debt secured by the deed. The defendant contends that he has not been paid what the deed was given to secure, and that, if he has been, the complainants are remediless, because the deed was given and accepted, to prevent any other creditors from troubling them.

Upon the facts found by the master, the debt secured by the deed had not all been paid at the time the bill was brought, but had been at the time of the hearing by the use of the mortgaged premises. The complainants do not offer, in the bill, to pay the defendant any balance which might be found due him on full accounting. This is necessary in a bill to redeem, if the orator would avoid the risk of a balance being found against him. Strictly, the bill must be framed to the circumstances that exist when it is brought; and the orator must recover, if at all, upon the allegations of his bill when applied to the circumstances then existing. In this view, even if the master's findings are approved, the orator and oratrix would not be entitled to relief without amendment of the bill. But as such amendment would affect no rights now, unless it influenced the question of costs, the court of chancery would probably have allowed it to be made, without terms. Hence this question is somewhat unimportant.

The only contention bearing upon whether the mortgage debt had been paid when the master heard the case is whether, upon the

facts found, the defendant is to be charged for the use of the premises from the spring of 1881. The controlling facts on this subject are that, in the spring of 1881, the orator let the pasture to Perry Bacon; the defendant notified Bacon that he must pay the rent to him; and Bacon thereupon abandoned the pasture; the defendant then, or before then, turned some stock into the pasture; and the complainants understood that he had taken possession of it. After that year no one had possession of the pasture, except the defendant, who turned in oxen, but when, or how much, did not appear. We think these facts show that the defendant not only assumed control of the pasture in 1881, as against Bacon, but took possession of it himself, and was thereafter accountable for the rents and profits which he ought to have received from the use of it. After what he did in 1881, if he would divest himself of liability for the use of the pasture, he should have notified the orator that he surrendered the possession to him. No claim is made that the amount allowed by the master is too great, if the defendant is liable to account for the use of the premises during those years. This left, at the time of the decree, a balance due from the defendant, which he was decreed to pay to the orator and oratrix.

We think the court of chancery properly disposed of the item of \$21 paid the defendant by the son of the orator. The decree, on the accounting between the parties, on the facts found, was correct in amount and in form, if the bill had been formally amended to adapt it to the circumstances as they existed when it was brought.

Can the defense prevail because the deed was given and taken, absolute in form, not only to secure the defendant for paying the Miller notes, which were about to be foreclosed, but to cover the property and prevent other creditors from troubling the orator and oratrix? In other words, can the defendant set up his own fraud, entered into with the complainants, to defeat their other creditors? If he can, then the statute to prevent fraud, in equity even, can be made the means of a fraud; for in that case the defendant can receive payment in full for the debt for which the deed was given, and still hold the premises conveyed, as security for the payment of that debt. Rev. Laws, §§ 1955 and 4155 both declare that fraudulent and deceitful conveyances of lands, etc., "shall, as against the person whose right, debt, or duty is so intended to be avoided, his heirs or assigns, be utterly void."

These provisions of the statute have, at common law and generally, been held to make the contracts good and enforceable between the parties, and only void as to creditors whose right, debt, or duty is attempted to be avoided. The opinion in *Carpenter v. McClure*, 39 Vt. 9, is a full and careful consideration of this subject. That case holds that a note given for such a purpose, between the parties, was valid and enforceable at law. In the case at bar the contract between the parties, as found by the master, is a mortgage; and he has further found that the complainants have paid it in full. They are entitled to the premises freed from any claim on the part of the defendant, for that was the legal effect of the contract be-

tween them. Under the decisions of this court the deed, though absolute in form, could be shown, as between the parties, to be a mortgage. Without objection or exception, the deed in this case was shown to be only a mortgage between the parties. It was valid as such between them, though void as to any other creditors of the complainants. It was valid between them as a mortgage, and will be enforced as such; especially when a refusal to enforce it as such, under what has been done under it, would make it an operative fraud in the hands of the defendant, upon the orators, or allow him to take advantage of his own fraud upon others to defraud the orator and oratrix.

The defendant claims that the decree was erroneous in regard to costs. This court rarely disturbs a decree in chancery solely on the question of costs. Costs in chancery are largely in the discretion of this court, dependent upon the circumstances in each case. We should be slow to reverse a decree upon a question of costs alone. This court has not been furnished with a copy of the defendant's answer; but the decree plainly indicates that in that the defendant claimed to hold the premises for debts which were not secured on them, and that he failed in the defense he undertook, and for that reason was refused costs, and the orator allowed costs, on the false issues which he raised in his answer. If this was so, the court properly refused him costs, and allowed the orator costs.

Decree of the Court of Chancery is affirmed, and cause remanded, with right in the orator to ask leave to amend his bill in the particular indicated, on such terms, if any, as the Court of Chancery may impose.

TOPSHAM
v.
WILLIAMSTOWN.

1. *Insanity per se, occurring after a legal residence has commenced,—and which, uninterrupted, would ripen into a legal settlement,—does not, under the pauper law, suspend or hold in abeyance such residence, or affect the acquisition of a settlement, except so far as controlled by statute.*
2. While under the statute (Rev. Laws, § 2813) the time spent by an insane person in a lunatic asylum is not computed in settlement cases, it is computed when he is not in an asylum, though he is under guardianship.

(Orange—Decided January 28, 1888.)

APPEAL from order of removal of one Sally J. T. Ring, a pauper. Heard on an agreed statement, June Term, 1886, Rowell, J., presiding. Judgment that the pauper was unduly removed. *Affirmed.*

It was agreed that said Sally was born and always lived or had her home in Topsham until her marriage in 1869, and ever since, as hereafter appears; that her household goods remained there until the most of them were sold by the overseer of the poor in said town in October, 1884; that the pauper was insane all the

time from the appointment of a guardian, in 1872, and was controlled and supported by the guardian in said Topsham from her own means until the overseer took charge of her, in June, 1884, since which time she has been supported by the town; that she had no fixed home, but her household furniture was stored in said Topsham; that since her marriage said Sally has not had any home in any other town than said Topsham, up to the time of making the order of removal; that she never kept house, and only remained in one place so long as the guardian and those who took care of her could agree; that many times she was compelled by force to stay at a particular place, but generally was controlled by persuasion and devices of all kinds; that sometimes she left said town of Topsham, but was returned by the same means.

The other facts are sufficiently stated in the opinion.

Mr. R. M. Harvey, for plaintiff:

The legal settlement of the pauper is in defendant town, unless she gained one since the death of her husband.

Brookfield v. Hartland, 10 Vt. 424; *Royalton v. West Fairlee*, 11 Vt. 488; *Newark v. Sutton*, 40 Vt. 261; Rev. Laws, § 2811.

It cannot be inferred that the pauper had a home in Topsham because she had no home in any other town.

Middletown v. Poultnoy, 2 Vt. 487; *Newbury v. Topsham*, 7 Vt. 410; *Bristol v. Ruthland*, 10 Vt. 574.

She never had any legal residence in Topsham after the death of her husband, or, at least, after the appointment of the guardian. It does not appear that she remained there continuously for seven years. She never had any fixed home anywhere; and she was incapable of having or intending to have one at any place.

Woodstock v. Hartland, 21 Vt. 568; *Ryegate v. Wardboro*, 32 Vt. 414; *Ludlow v. Landgrave*, 42 Vt. 189; *Brownington v. Charleston*, 32 Vt. 411; *Jamaica v. Townshend*, 19 Vt. 267; *Hartford v. Hartland*, Id. 397; *Tunbridge v. Norwich*, 17 Vt. 493.

Some of the essential elements of a legal residence are, capacity for choosing, the fact that a choice was made and continued, with the fact of continual residence or home for seven years. All these must concur; but neither exists. If the guardian could will and act for his ward, it must appear that he did so as fully as she would be required to in order to gain a settlement. But the guardian could not thus act for her.

It is said in *Holyoke v. Haskins*, 5 Pick. 20: "It is clear that by our laws a guardian has the same power over his ward that a parent has over his child." Admit this, and then the case is with the plaintiff; for a parent cannot change the legal settlement of his unemancipated child by changing the child's residence.

Woodstock v. Hartland, 21 Vt. 568; *Andover v. Canton*, 13 Mass. 547; *Salisbury v. Fairfield*, 1 Root, 181; 72 Me. 204; *Daniel v. Hill*, 52 Ala. 490.

The pauper retains the residence of her husband, because she had not gained one in her own right.

Reibel v. Tunbridge, 13 Vt. 445.

Messrs. Heath & Willard, for defendant:

1 Vt.

It is the rule of law that the old residence continues until a new one is acquired, so that everyone has a residence somewhere.

Abington v. Bridgewater, 28 Pick. 170.

It would be a curious doctrine, and one that would introduce serious confusion into our law on the subjects of taxation, voting, settlement of estates, and jurisdiction of courts, if a person ceased to reside anywhere as soon as he was afflicted with insanity.

Rockingham v. Springfield, 4 New Eng. Rep. 872, 59 Vt. 521.

In Maine, Massachusetts, and Connecticut, under statutes identical with ours, so far as the matter of residence is concerned, it is decided that persons are capable of residing, and do reside, within the contemplation of the pauper law, though insane and under guardianship.

Gardner v. Furmingdale, 45 Me. 537; *Auburn v. Hebron*, 48 Me. 332; *Corinth v. Bradley*, 51 Me. 540; *Chicopee v. Whately*, 6 Allen, 508; *Plymouth v. Waterbury*, 81 Conn. 515.

The Legislature evidently thought that a special statute (Rev. Laws, § 2318) was necessary to prevent the residence of a pauper removed to a lunatic asylum from continuing in the town from which he was removed. This section determined the decision of the court in *Peacham v. Weeks*, 48 Vt. 73.

The guardianship does not suspend the residence.

Rev. Laws, § 281, cl. 5.

If a person is forcibly moved away from the place where he has been residing, his residence still continues at the old place.

Northfield v. Vershire, 38 Vt. 110.

Ross, J., delivered the opinion of the court:

By the agreed facts the pauper, Sally J. T. Ring, before her marriage, had her legal settlement in the town of Topsham. December 25, 1869, she married Moses Ring, whose legal settlement was in the town of Williamstown. During their married life, to December 20, 1871, when he died, they resided in the town of Topsham. After his death she remained sane, and had her residence in Topsham, until May 16, 1872, when she was adjudged to be insane, and a guardian of her person and property was appointed by the probate court. She remained insane from that time until the making of the order of removal, and without aid from the town of Topsham, until June, 1884; and during all that time the only home she had was in the town of Topsham.

On her marriage she took her husband's legal settlement in the town of Williamstown; and that has continued to be her last legal settlement unless she has acquired one in her own right since the decease of her husband. Nothing appearing to the contrary, it must be presumed that her residence in her own right, from choice and intention, was in Topsham from December 20, 1871, to May 14, 1872. *Middlebury v. Waltham*, 6 Vt. 200; *Pittsford v. Chittenden*, 44 Vt. 382; *Stamford v. Readboro*, 46 Vt. 606.

She remained in Topsham, and had there all the residence she had anywhere, for more than seven years from December 20, 1871, without receiving aid from the town; and gained a legal settlement, unless her insanity after May 14,

1872, suspended or held in abeyance her right to gain a settlement when once commenced.

There is no statute governing such a case; and this is the first time, as far as we are aware, that the precise question has been presented to this court for decision. The only statute which has a bearing indirectly upon the question is Rev. Laws, § 2813, which provides that, in the trial of settlement cases, the time a person is a patient in a lunatic asylum, except inhabitants of the town in which such asylum is situated, shall not be computed as a part of the time required by law to gain a legal settlement, but shall be deducted therefrom. If the right and power to gain a settlement is suspended or in abeyance during the time one is insane, there would be no force to the exception in regard to the inhabitants of the town in which the asylum is situated. The entire section leaves upon the mind the same impression which is made by the exception,—that insanity, *per se*, does not suspend or hold in abeyance the acquisition of a legal settlement, except so far as controlled by statute. Under the statute, paupers are included in two classes, resident and transient. A resident pauper is one who has a legal settlement in some town in the State, and is residing in a town in which aid is needed, and liable to be removed to the town of legal settlement, or to an order of removal to such town. It is true that a person having a legal settlement in some town in the State may be in another town in need of aid under such circumstances as to be a transient pauper therein. To be liable to an order of removal, the pauper must have come to reside in the town in which he is in need of aid in such a manner that, but for the aid, the residence, if continued for a sufficient time, would ripen into a legal settlement in that town.

It has been held in *Londonderry v. Windham*, 2 Vt. 149, and in *Randolph v. Braintree*, 10 Vt. 436, that insanity does not prevent an order of removal, although such insane person is under guardianship.

These decisions proceed upon the basis that such insane persons in need of aid were residents of the town making the order of removal, and that their residence was of such a character as, if uninterrupted, would ripen into a legal settlement. This must be so, since it has been held that only one who is a resident is subject to an order of removal. A person having a legal settlement in a town in the State, if in need of aid in some other town where he is not a resident, or, in fact, is suddenly taken sick when on a journey, is held not to be subject to an order of removal, but must be treated as a transient pauper; so, too, must a person who is so idiotic as to be incapable of "coming to reside," or having any choice in regard to his place of abode. *Ryegate v. Wardsboro*, 32 Vt. 411, note; *Woodstock v. Hartland*, 21 Vt. 563. Hence, if by insanity or lunacy, and the appointment of a guardian, the power to acquire a legal settlement is suspended or in abeyance, the paupers should be treated as transient paupers, and not subject to an order of removal, as they were held to be in *Londonderry v. Windham*, and *Randolph v. Braintree*, *supra*. Therefore the effect of the decisions in these two cases, as well as that of Rev. Laws, § 2813, is that insanity occurring after a legal residence has once

been begun,—a residence which, if uninterrupted, would ripen into a legal settlement,—does not interrupt, suspend, or hold in abeyance such residence.

We think that the legitimate result of these two decisions, and of Rev. Laws, § 2813, is to the effect that the pauper, Sally J. T. Ring, acquired a settlement in her own right, in the town of Topsham, by her residence therein subsequently to the death of her husband. This holding is in accord with the decisions of other courts of last resort.

In *Chicopee v. Whately*, 6 Allen, 508, it is held that insanity, occurring after a person has become an inhabitant of a town, will not prevent his acquiring a settlement by living therein the required number of years. The instruction of the trial judge,—that if the pauper, being capable of choosing a residence, went to the town with the intent to reside there, the domicile thus acquired would not be changed or suspended if he afterwards became insane, and that such insanity would not prevent his gaining a settlement,—was held to be without error. The decisions, cited by defendant's counsel, of the supreme courts of Maine and of Connecticut are of the same tenor and effect.

The judgment of the County Court is affirmed.

Oliver W. FARR

v.

Hiram PUTNAM *et al.*

1. On the death of an insane ward, his administrator took possession of his estate, with the consent of the guardian. The whole conduct of the guardian showed that he did not intend to retain a lien on the corpus of the property for what was due him, until after the sale of the property, when it appeared that the estate was insolvent; but he expected to be first paid out of the avails of what was sold. *Held:* (a) That, if the guardian ever had an equitable lien, he had lost it. (b) That he had no lien on the homestead; for that also went into the possession of the administrator, with the guardian's consent.
2. On a bill brought in such case to procure a foreclosure of the lien, the court declined to decide whether the guardian had a superior right to the avails of the property after its sale; or whether, on a bill properly drawn, he had such right.

(Orleans—Decided February 2, 1888.)

PILL to foreclose an equitable lien. Heard on the pleadings and the report of a special master, February Term, 1887, *Veazey, Chancellor*. Decree that the bill be dismissed. *Affirmed.*

The defendants were Hiram Putnam, Sarah B. Farr, J. P. Lamson, and Mrs. J. P. Lamson. On January 9, 1877, the orator, being a son of Hyrcanus Farr, was appointed his guardian by the probate court; and he remained such until the death of said Hyrcanus, August

17, 1878. Soon after the decease of said Farr, the defendant Putnam was appointed administrator of his estate; and on October 29, 1878, commissioners to adjust claims against the estate were appointed. In 1840 the defendant, Sarah B. Farr, was married to one Ruscoe; and they lived together as husband and wife for about four years, when he deserted her and went to parts unknown. In 1852 a marriage ceremony was performed between the said Hyrcanus and said Sarah B., she believing that said Ruscoe was dead, and the said Hyrcanus and Sarah B. lived together as husband and wife until his death, both thinking that she was his lawful wife; and what property he left at his death was acquired by the united exertions of both. But the said Sarah B. was mistaken; and said Ruscoe was alive, and resided in Canada. The said Hyrcanus had no children by the said Sarah B., but had a large family of children by a former marriage. After their marriage said Hyrcanus and Sarah B. lived in Woodbury for about five years, and then they moved to Cabot, having purchased a farm situated in Cabot and Woodbury, and lived on this farm till September 7, 1876. On that day they left their said home for the purpose of visiting his children in Stannard and Craftsbury. When they left they intended to be absent only two weeks, and their sole object was to visit their friends. For some two years prior to this time the said Hyrcanus had been occasionally afflicted with epileptic fits, and was physically and mentally somewhat impaired. Within an hour after reaching the house of the orator in Craftsbury, said Hyrcanus had a severe fit, and was also stricken with paralysis. For a day or two he was unconscious, and remained helpless until his death.

After the paralytic shock he occasionally had fits, and would be out of his head for a while, and then recover his consciousness, but was mentally and physically quite weak. The said Hyrcanus was not in a condition to be removed to his home in Cabot, and so remained with his son, the said Oliver W. Farr, until his decease. During the last six months of his life he was without his reason. The said Sarah B. remained at the orator's house during the sickness of said Hyrcanus, and went to Cabot at the time of his burial, and, remaining there some weeks, she returned to Craftsbury. After a short time she went back to Cabot, and worked out at different places until the homestead was set out to her from the old farm, on the 20th day of November, 1890. The farm was rented to one Yaw while the said Hyrcanus was sick in Craftsbury; but the master found that, if he had been "able to return to his old home, he and the said Sarah B. would have so returned." "I do not think that, at the time of said agreement to lease to Yaw, Hyrcanus had decided to permanently abandon his old homestead as and for a homestead, but he was at that time satisfied he would not for the term of the lease be able to return. And that he then had reason to believe, and did believe, there were grave doubts as to his ever being able to return to Cabot."

The first meeting of the commissioners was at the orator's house, January 7, 1879. The

defendants Putnam and J. P. Lamson, Esq. an attorney, representing certain creditors, were present. The orator and said Putnam and Lamson finally agreed that the orator should be allowed \$750 for "keeping ward and wife, and services of self and family caring for same, two years." The next day the orator settled his guardianship account with the probate court, and said account was allowed at \$750. Immediately after the orator was appointed guardian, January 9, 1877, he took possession of the ward's property, and had control and management of it until the ward's decease. The master found as to surrendering of possession of the property to the administrator by the guardian, as follows:

It is claimed by the defendants that it was agreed at that time that the amount allowed orator by the probate court, on the basis of an allowance of \$750 for board and care, as before stated, should be treated as a common debt, and that he should share with the other creditors in the estate. Still, the defendant Putnam admitted upon the stand that he always supposed the orator was to be paid the amount due him as guardian after payment of charges for settlement of estate and amount allowed the widow, and before other creditors were paid. I am unable to find that said Oliver ever understandingly agreed to stand in common with the other creditors so far as his guardian account was concerned, but I do find that he always supposed and expected his guardian account would be paid first, and in preference to other claims. * * *

At the time of the settlement of said guardian's account it was ascertained that there was considerable personal property on hand, the property of said estate, in the possession of said orator; and the farm at Cabot and Woodbury was still unsold and a part of said estate.

After the expiration of Yaw's term, under his lease of the Cabot farm, the orator, as guardian, leased it to one Henry Wheeler, to carry on at the halves, who was in possession of said farm at the time of the death of said Hyrcanus. Some little time after the decease of said Hyrcanus, appraisers were appointed on his estate. Certain of the personal property of said estate was at the orator's in Craftsbury, and the balance at the old homestead in Cabot. The orator was with the appraisers at Craftsbury when they were in the discharge of their duty, and pointed out the property there belonging to said estate, and was also with them when they appraised the personal property and farm at Cabot.

Said Wheeler was on the Cabot and Woodbury farm at the time the appraisers were there to appraise the property. Wheeler remained on said farm through the winter following the death of the old gentleman, under an arrangement made with the administrator, Putnam, to stay and feed out the hay and take care of the stock; and in the spring of 1879 said administrator rented said farm to Jacob Farr, one of orator's brothers, and said Jacob Farr paid for the rent of said farm to said administrator. The orator knew this, and made no objection thereto.

The administrator took possession of the per-

sonal and real estate of the intestate, and this was done with the consent of the orator. But I find that the orator, at the time the administrator took such possession, understood and expected that said administrator was going to sell said property, and from the avails thereof he was first to be paid, in full, the amount allowed him in the settlement of his guardian account. The administrator supposed and expected that would be the result; but he did not feel authorized in paying said allowance till so directed by the probate court, and he never made any effort for such an order by said court.

In the fall of 1880 Sarah B. petitioned the probate court for the appointment of commissioners to set out a homestead and dower from the premises belonging to said Hyrcanus at the time of his decease.

The commissioners, on the 20th day of November, 1880, set out a homestead to Sarah B. Farr from said premises, and returned their report and warrant into the probate court on the 27th day of December, 1880; and the report was accepted and ordered recorded.

The orator had no knowledge of such proceedings until after the report of the commissioners had been returned to the probate court and accepted by it; but he did learn of the proceedings in time to take an appeal from the decree and order of the court. The appeal was allowed and duly entered in the County Court for Orleans County, at the February Term, 1881, and continued to the September Term 1881. At this term, defendant Putnam was dismissed as an improper party, and it was ordered and adjudged by the court that the decree of the probate court be affirmed; and the cause was ordered to be certified back to the probate court. The master found:

The orator offered testimony tending to show that there was no trial in said cause, that no issue was formed therein, but that said judgment was rendered by the court without any trial.

The defendants objected to the admission of such testimony for the reason that the orator is bound by the record; and that such testimony is immaterial and incompetent, and an attempt to collaterally impeach a judgment of a court of competent jurisdiction, and does not tend to establish any issue made by any of the pleadings.

I deemed it best to, and did, admit the testimony, subject to the objection and exceptions by defendants. I find, from the testimony thus admitted, that at said last-named term of Orleans County Court the orator in this suit, being the plaintiff in that cause, filed an affidavit for a continuance of said cause to the next term of said court; and there was a hearing upon that question, and the court refused to continue the case. The said Farr's counsel announced that he could not try the case, and the court thereupon rendered judgment as hereinbefore stated.

The judgment so rendered and ordered to be certified to the probate court was so certified, and the certificate thereof was filed in the probate court on the 21st day of December, 1881.

The warrant issued to the commissioners commenced:

Whereas Hyrcanus Farr, late of Craftsbury, in said district, deceased, intestate, died seised and possessed of the following described real estate, to wit: It being the home farm where the said Hyrcanus Farr last resided in said Cabot, containing about 160 acres of land, said land being situated in the towns of Cabot and Woodbury, in said county, and out of which Sarah Farr, the widow of said deceased, is entitled to a homestead, and said widow is also entitled to dower; therefore, by the authority of the State of Vermont, you are hereby appointed commissioners, and authorized to appraise all the real estate whereof said deceased died seised. * * * When you have completed your inventory you will then proceed to set out from the dwelling-house, out-buildings, and lands used in connection therewith, and used and kept by said Hyrcanus Farr at the time of his decease, as a homestead, to said Sarah Farr.

As to the administrator's account, it was found that it came under the consideration of the probate court, after due notice, on the 18th day of July, 1881; that although no one appeared to object, at the request of the orator, it was continued to October 26, 1881, and was again continued till December 27, 1881, when said account was examined, sworn to, allowed, and ordered recorded, and is as follows:

Hiram Putnam, Administrator of the Estate of Hyrcanus Farr, late of Craftsbury, Deceased.	
In Account with Said Estate.	
To the Estate,	Dr.
To amt. of real estate and personal property as per appraisal.....	\$2,588 58
To cash rec'd for property not appraised.....	13 50
To income from real estate.....	113 10
	\$2,695 18

To the Same Estate,	
Cr.	
By homestead set to widow out of real estate.....	\$ 500 00
By shrinkage on appraisal, as per "Schedule A".....	1,212 57
By household goods assigned to widow....	129 12

* * * Then this account was examined and sworn to, the question of its allowance being continued, awaiting the result of a matter pending in Orleans County Court.

Attest, O. H. Austin, Judge.

After the homestead was set out to the said Sarah B. Farr, the administrator, having obtained license to sell the real estate of his intestate, advertised for sale, and sold, at public auction, all the residue of the real estate of which the intestate died seised, to the said Sarah B. Farr, for the sum of \$400, she being the highest bidder for the same.

And, in accordance with said sale, said Putnam, as such administrator, under his license aforesaid, executed a deed of the same to the said Sarah B., and she paid him therefor.

And all the personal property belonging to the estate of the said Hyrcanus, which had not previously been disposed of, was sold at the time of said auction. The orator knew that the administrator, Putnam, had applied for, and obtained, a license to sell all the real estate of which the said Hyrcanus Farr died seised, a long time previous to the time said homestead was set out; but he at all times claimed that he must be paid in full the amount of his guar-

dian account from the avails of the property of which the said Hyrcanus died seised.

At the time the defendant Sarah B. bid off the balance of the said premises for \$400, she was in need of funds with which to pay for the same, and she applied to the defendant Abbie A. Lamson for a loan of said money. Mrs. Lamson had money which she held in her own right, and passed over to her husband, J. P. Lamson, a check for the money required by the said Sarah B., and he obtained the currency therefor. At the time the administrator deeded said real estate, so sold at auction, to the said Sarah B., the said J. P. Lamson, acting for and on behalf of his wife, passed over to the said Sarah the sum of \$480. And Mrs. Farr therefor, on the 20th day of April, 1881, executed and delivered a mortgage of said premises, including the homestead, to Mrs. Lamson, to secure the payment of said sum of money, as specified in two promissory notes then executed and delivered to said J. P. Lamson for his said wife.

The prayer of the bill was that defendants be foreclosed from all right in the said estate unless they paid the said \$750.

Mr. L. H. Thompson, for the orator:

The orator, having been appointed guardian of Hyrcanus Farr under the provisions of Rev. Laws, §§ 2436, 2438, until legally discharged from that appointment, had the possession and management of the estate of his ward, the care and custody of his person, and the care and custody of such members of his family as were dependent upon said ward for support.

Rev. Laws, § 2445; *Waterman v. Wright*, 86 Vt. 165.

By his appointment as guardian, the orator became a trustee, and thereby assumed the liabilities, and acquired the legal and equitable rights, of a trustee as to his ward's estate.

Rev. Laws, §§ 2447, 2385; 3 Pom. Eq. Jur. §§ 1088, 1097.

As trustee or guardian, the orator had an equitable lien upon his ward's estate, which took precedence of all other claims against the estate; and all persons taking said property with knowledge of said orator having been guardian took the same subject to his lien.

See Perry, Tr. 1st ed. §§ 907, 910; Schoul. Dom. Rel. pp. 464, 465; 2 Pom. Eq. Jur. § 1085; *Rensselaer & S. R. Co. v. Miller*, 47 Vt. 152; *Field v. Wilbur*, 49 Vt. 165.

The defendant Abbie A. Lamson had constructive notice of orator's rights by virtue of proceedings in probate court. Again, she cannot stand as an innocent purchaser for value without notice, as she had actual notice; as her agent, attorney, and husband, J. P. Lamson, who acted for her, had full knowledge, at the time of taking her mortgage, of the equitable lien of the orator on said real estate.

Story, Ag. §§ 140, 140a; *Hart v. Farmers & M. Bank*, 33 Vt. 253.

A widow takes a homestead by operation of the law which says that, on the death of a housekeeper or head of a family leaving a widow or minor children, "his homestead shall pass to and vest in such widow or children."

Rev. Laws, §§ 1898, 1899.

The widow takes the homestead by virtue of her relation as wife to the deceased, the same

as she does dower which does not depend on the contingency of dower being set out.

Dummerston v. Newfane, 87 Vt. 13; *Johnson v. Johnson*, 41 Vt. 467; *Grant v. Parham*, 15 Vt. 649.

The setting out of a homestead is a proceeding to sever and partition, and not to give title. If no title or homestead exists, the proceeding goes for nothing.

Rev. Laws, § 1870; *Grice v. Randall*, 23 Vt. 243; *Freem. Judg.* § 304.

The orator is not estopped by the judgment in the homestead proceedings.

Freem. Judg. §§ 276, 281, 303.

He stands as a mortgagee of the property he is pursuing. The right under a mortgage is not affected by the setting out of a homestead. *Goodall v. Boardman*, 53 Vt. 92.

The court of chancery has jurisdiction.

3 Pom. Eq. Jur. §§ 1088, 1097; 1 Pom. Eq. Jur. § 100; *Harris v. Harris*, 44 Vt. 320; *Field v. Torrey*, 7 Vt. 373.

Messrs. J. P. Lamson and Bates & May, for defendants:

If the orator had any equitable lien at the time his father died, he lost it by voluntary delivery of property to Mr. Putnam, as administrator, to be administered as assets of the estate.

Richardson v. Merrill, 32 Vt. 27.

The orator is estopped from asserting his present claim.

Stone v. Fairbanks, 53 Vt. 145.

The guardianship ceased on the death of the ward, and it was the duty of the orator then "to pay over and deliver the estate and effects remaining in his hands * * * to persons entitled to same," namely, the administrator.

3 Redf. Wills, p. 457, § 56; Rev. Laws, §§ 2447, 2488.

The probate court has jurisdiction of the appointment, power, duties, and rights of guardians and wards, and settlement of estates.

Rev. Laws, § 2018; *Lathrop v. Hitchcock*, 88 Vt. 496; *Boyd v. Ward*, 38 Vt. 628; 22 Vt. 50.

The decree of the probate court, affirmed by the county court, as to the homestead of Mrs. Farr, concludes the orator both in law and equity.

Atwood v. Robbins, 35 Vt. 580; 32 Vt. 472; 18 Vt. 77; 11 Vt. 143; 34 Vt. 865; *Leach v. Leach*, 51 Vt. 440; 3 Vt. 400; 16 Vt. 813; *Grice v. Randall*, 23 Vt. 239; *Stone v. Peasley*, 28 Vt. 716; *Lenahan v. Spaulding*, 57 Vt. 115; *Caujolle v. Curtis*, 80 U. S. 13 Wall. 465 (20 L. ed. 507); *Roderigas v. East River Sav. Inst.*, 63 N. Y. 460; *S. C.* 20 Am. Rep. 555; *Gates v. Treat*, 17 Conn. 392; *Freem. Judg.* 256, 272, 313; *Thomp. Homesteads*, § 614; 38 Tex. 491; 6 Cal. 234; 2 Bish. Marr. & D. 765; 34 La. 805; 48 Mo. 560; 17 Ind. 183; *Freem. Judg.* § 819a.

The guardian had no right to sell the real estate.

Rev. Laws, § 2477.

If he had such license the wife must join.

Rev. Laws, § 1910.

The real estate of Hyrcanus was never charged to the guardian and was never under his control.

Munroe v. Holmes, 9 Allen, 244; 13 Allen, 109.

There is no such equitable lien as claimed by orator in this case.

1 Story, Eq. Jur. § 506 *et seq.*; 2 Story, Eq. § 1216; Schoul. Exrs. § 264.

But if the unpaid balance is to be treated as a lien upon the property, it should not be paid before the reasonable, necessary expenses of administration are satisfied.

2 Story, Eq. Jur. § 1246.

The case of *Pingree v. Goodrich*, 41 Vt. 47, seems to be a full and complete answer to orator's claim.

In order to render the orders and decrees of the probate court void, it must appear upon the face of the record that the court has proceeded in a manner prohibited or not authorized by law.

Probate Court v. Winch, 57 Vt. 282. See *Byram v. Byram*, 27 Vt. 295; *True v. Morrill*, 28 Vt. 672.

The orator can reach this balance in the hands of the administrator by applying to the probate court, and, if dissatisfied, by appeal.

Davis v. Gaines, 104 U. S. 386 (26 L. ed. 757); *Rorer, Jud. Sales*, § 470.

The decree of the probate court allowing \$172.12 to Mrs. Farr was final.

Richardson v. Merrill, 32 Vt. 27; *Leach v. Leach*, 51 Vt. 440; 8 Vt. 400; 16 Vt. 313. See *Probate Court v. Van Duzer*, 13 Vt. 185.

Rowell, J., delivered the opinion of the court:

Before and at the time of the death of Hyrcanus Farr, an insane person, on August 17, 1878, the orator was his guardian.

By his bill the orator seeks to subject his ward's estate in the hands of the administrator—and of the other defendants, as far as they have had to do with it—to a first charge or lien for the payment of the balance found due him on settlement of his guardianship account in the probate court on January 8, 1879. The bill goes upon the ground that, in the orator's hands, his ward's property was chargeable with the payment of what was due him as guardian; but that the property was unlawfully, and against his will, taken from his possession by the administrator, and therefore is still chargeable in his favor by way of an equitable lien or mortgage for the foreclosure of which he prays.

But the findings of the master do not sustain the allegation that the property was taken from the orator unlawfully and against his will. On the contrary, it appears that the administrator took it with his consent, though with an understanding and expectation, on his part, that it would be sold, and he paid from the proceeds. And the administrator expected the result would be that he would be thus paid; but he did not feel authorized to make payment without an order of the probate court, which he has never attempted to obtain.

It also appears that the orator was with the appraisers when they appraised the property of the estate, and pointed out some of it to them; that before the property was sold he knew the administrator had obtained license to sell the real estate; and that at one time he bargained with the administrator to buy the whole estate for \$1,350, but the trade fell through. During all this time it does not appear that the orator claimed any lien on the property, but only, when

he said anything about it, that he should be first paid out of the proceeds.

The orator concedes that if he never had a lien on the property, or if he had one and has lost it, he cannot maintain his bill. Now, without undertaking to say whether he ever had a lien or not, we think, if he ever had one, he has waived and lost it. See what he has done. Everything shows that he did not intend to retain a lien on the *corpus* of the property itself in the hands of the administrator; for he consented to let it go into his hands, supposing and expecting he would sell it in due course of administration. And his consent was not, as claimed, on condition that he should be paid from the proceeds; but it was unconditional and absolute. How, then, can it be said that he intended to retain a lien on the property? It is clear that he did not so intend, not even as to the homestead; for that went into the hands of the administrator, with his consent, with the rest of the estate, and with the same expectation on his part that he was going to be paid out of the avails of the property sold; and at that time the estate appeared to be ample, aside from the homestead, to pay him, if he was to be preferred to other creditors; and that was what he expected; and he then neither claimed nor expected anything else; but now, the estate having been all sold except the homestead, and converted into money, it transpires that, by reason of the depreciation of the property in value from the appraisal, there is very little left of the avails with which to pay anybody. This makes the idea of setting up a lien on the property look very much like an afterthought on the part of the orator, conceived when, in the course of events, a necessity for it seemed to arise.

We have not inquired whether the orator has a superior right to be paid out of the avails of the property: for, if he has, he cannot assert it under his bill as drawn, certainly,—if he could by a bill properly drawn and against proper parties.

This renders it unnecessary to consider the other points made in argument.

Decree affirmed, and cause remanded.

Charles DEWEY, Inspector of Finance,
v.

ST. ALBANS TRUST CO.

1. The inspector of finance obtained an injunction against an insolvent trust company, restraining it from transacting further business, and also the appointment of a receiver, who was ordered to take possession of the property and administer it according to law. The receiver preferred his petition, praying for the direction of the court as to the distribution of the funds, with reference to one section of the charter, which gave a preference to the debts of minors, insane persons, and married women, in "case of the dissolution of said company by act of law or otherwise." There were more than 2,400 depositors, and more than 1,100 claimed a preference. Notice of the

hearing on the petition was given by publication three weeks successively in a newspaper, and by acceptance of service by the chairman of the depositors' committee. The receiver and counsel for the general creditors, and also counsel for those who claimed a preference, appeared; and after a full hearing it was decreed that there should be an equal distribution of the funds, on the ground that insolvency did not work a dissolution of the corporation. An appeal was taken on behalf of eight married women and four minors, some of whom intervene in this proceeding; and the decree below was affirmed. On a petition brought a little more than a year after the first one, for the purpose of obtaining a preference,—*Held*:

(a) That, although the general rule is that all persons interested in the litigation should be before the court, this case is within the exception that, **where the parties are so numerous as to make it impracticable or greatly inconvenient and expensive, it is sufficient, if such number be joined as will fairly represent the interest of all;** and that, as both classes of depositors were fairly represented in the litigation, all of them were bound by the decree.

(b) That, as the doctrine of **estoppel by judgment** is not applicable to a case ambulatory in its nature, the decree **does not preclude all future inquiry** into the matter; but, in determining whether a dissolution is now shown, the inquiry must be confined to what transpired at a time between the institution of the two proceedings. Relief cannot be granted on **what existed before the first decree**; and it is not sufficient to show a present state of things adequate to relief.

(c) That most of the things alleged in the petition are found by the master to exist at the present time; but it does not appear when those things transpired, except the depreciation of assets, which was large during the last two years; but this does not entitle the petitioners to be heard on the merits; for **insolvency, however hopeless, is not sufficient evidence of the surrender of corporate rights.**

2. The supreme court will look into the whole record of the former adjudication in this case, to see what has been done; and, having been set up in the answer, it is available, though not put in evidence; especially as the petition expressly made the prior proceedings a part of itself, but omitted to set them out, to avoid prolixity.

3. The receiver, in point of fact, represented in court the general creditors, rather than those claiming a preference.

(Franklin—Filed February 5, 1886.)

IN Chancery. Petition of certain depositors of the St. Albans Trust Company, to obtain an order of preference. Heard on the pleadings and the report of a special master, September 1 Vt.

Term, 1886. Royce, *Chancellor*. Decree that the petition be dismissed. *Affirmed*.

The case appears in the opinion.

Messrs. Farrington & Post and A. G. Safford, for petitioners:

Dissolution means a loss of corporate existence, and takes place when there is such a suspension of the company's power to do business as to render it incapable of fulfilling the purpose of its creation and existence.

Plainly, the word as used in the bank charter was intended to mean, either the loss of existence, or the loss of ability and power to act, by reason of its condition. If the former, then no preference can be obtained until these petitioners secure the dissolution by judicial determination; and the Legislature clearly did not intend this. If it did, § 17 of the charter is hardly available,—the machinery is so cumbrous.

Rev. Laws, chap. 72; *Green v. St. Albans T. Co.* 57 Vt. 840.

There is a fundamental distinction between the dissolution of a corporation and the loss of its franchise or legal right to exist.

2 Morawetz, Priv. Corp. §§ 1002, 1004, 1011, 1040.

And the phrase "dissolving a corporation" is used sometimes as synonymous with annulling a charter or terminating its existence, and sometimes as meaning merely a judicial act which alienates the property and suspends the business of the corporation, without terminating its existence.

Re Independent Ins. Co. 1 Holmes, 103.

As relates to creditors, "any inability of the company, by reason of a total want of funds, to exercise its functions, will be deemed a dissolution."

Aug. & A. Corp. 618; *Slee v. Bloom*, 19 Johns. 456; *Penniman v. Briggs*, Hopk. 800; *S. C.* 8 Cow. 387; *Verplanck v. Mercantile Ins. Co.* 2 Paige, 452; *Bank Comr. v. Bank of Buffalo*, 6 Paige, 508; *Bruce v. Platt*, 80 N. Y. 379, 886, and cases cited; 2 Kent, Com. 810, 811; *Folger v. Columbian Ins. Co.* 99 Mass. 267; *Re Independent Ins. Co. supra*; *Central Ag. & Mech. Assn. v. Alabama Gold Life Ins. Co.* 70 Ala. 120; See Ala. Rev. Code § 1760; *Smith v. Huckabee*, 58 Ala. 191; *Perry v. Turner*, 55 Mo. 418; *State Sav. Assn. v. Kellogg*, 52 Mo. 583; Mo. Gen. Stat. 1865, p. 830, § 20; 2 N. Y. Rev. Laws, 6th ed. p. 496, § 7; Act 1811, p. 506, § 47; 3 N. Y. Rev. Laws, 6th ed. p. 748, § 50; *Thomp. Liab. Stockh.* § 810, note 4; 2 Morawetz, Priv. Corp. § 1002.

It is held in *State Sav. Assn. v. Kellogg*, 52 Mo. 583, that an adjudication of bankruptcy against a corporation amounts to a dissolution, so that a suit can be maintained under the statute which provides an action against a stockholder for debts unpaid at the time of dissolution.

Mo. Gen. Stat. 1867, p. 830, § 20; 1 W. S. 893, § 22.

In a remedial statute, the court will carry into effect the clear intention of the Legislature, making the words yield to the spirit.

Henry v. Stilson, 17 Vt. 479.

A thing within the intention is within the statute, though not within the letter.

Potter's Dwar. Stat.

The defendants, under the pleadings and evidence, cannot rely upon a former adjudication.

Rob. Dig. p. 184, § 101; *Simson v. Hart*, 14 Johns. 68.

The records should have been put in evidence. To sustain the estoppel because of a former adjudication, it must appear that the former case was between the same parties, and that the precise question was passed upon; and the burden of proof is upon the defendant.

Pelton v. Mott, 11 Vt. 148; *Aiken v. Peck*, 22 Vt. 255; *Continental L. Ins. Co. v. Courier*, 58 Vt. 229.

The objection that a defense might have been made in a former action must be limited as applicable to such matters only as might have been used as a defense in that action against an adverse claim therein,—such matter as, if considered in a subsequent action, would involve an inquiry into the merits of the former judgment.

49 N. Y. 111; *Jordan v. Van Epps*, 85 N. Y. 427; *Bray v. Hegeman*, 98 N. Y. 351; *Malloney v. Horan*, 49 N. Y. 111-116; *Olemens v. Clemens*, 87 N. Y. 59; *Bruen v. Hone*, 2 Barb. 586-596; *Burwell v. Knight*, 51 Barb. 267; *Cromwell v. Sac County*, 94 U. S. 351 (24 L. ed. 195); *Washington, A. & G. S. P. Co. v. Sickles*, 72 U. S. 5 Wall. 580 (18 L. ed. 550); *Griffin v. Long Island R. Co.* 8 Cent. Rep. 740, 103 N. Y. 449; 25 N. Y. 613; 5 Gray, 316.

Messrs. Hard & Cushman and Stephen E. Royce, for defendant:

A receiver "is equally the representative of all parties in his capacity as an officer of the court."

High, Receivers, § 175.

In all chancery proceedings when a large number of persons have a common interest, it is common practice to make only a part of them parties; and when no collusion is suspected this is treated as sufficient. Parties, "in the larger legal sense, are all persons having a right to control the proceedings, to make defense, to advance and cross-examine witnesses, and to appeal from the decision if an appeal lies" (1 Greenl. Ev. § 585), "and, it may be added, those who assumed such a right" (Bigelow, Estop. 59).

An adjudication is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided as incident to or essentially connected with the subject-matter, coming within the legitimate purview of the original action, both in respect to matters of claim and of defense.

Freem. Judg. § 249 and note.

The discovery of new evidence not in the power of the party at the former trial forms no exception as to an estoppel.

Id.

The former adjudication is conclusive, though the case was improperly managed, and the court misapplied the law.

Freem. Judg. § 260.

The receiver was subject to the orders of the court of chancery, and not only had a right to apply to the court for direction in all doubtful matters, but was in duty bound to do so.

High, Receivers, §§ 177, 188; Rev. Laws, § 3548.

The receiver, under the direction of the court, has distributed a large amount *pro rata* among the depositors; and it is too late to change this

rule, especially without evidence that the remaining assets are sufficient to pay the claims of preferred depositors. A trust company can be dissolved "by act of law" in only one way, namely, by judgment of court upon a *scire facias* brought in the name of the State.

Green v. St. Albans T. Co. 57 Vt. 340.

The only other ways by which a chartered corporation can be dissolved, are: (1) by expiration according to the terms of the charter; (2) by voluntary surrender of the franchise to the State,—this must be by vote of the stockholders, and the surrender must be accepted by the Legislature;—(3) by legislative enactment not in violation of the Constitution.

Morawetz, Priv. Corp. chap. 11.

Insolvency of a corporation does not dissolve it, or operate as a cause of forfeiture (Boone, Corp. § 302; Ang. & A. Corp. 11th ed. § 770; Morawetz, Priv. Corp. ed. 1882, § 636; *Coburn v. Boston P. M. Co.* 10 Gray, 243; *Boston Glass Manufactory v. Langdon*, 24 Pick. 49, 53; *People v. Hudson Bank*, 6 Cow. 217, 219; nor do proceedings in insolvency or in bankruptcy (Ang. & A. Corp. 11th ed. § 770 and note; *Coburn v. Boston P. M. Co. supra*; *Chamberlin v. Huguenot Mfg. Co.* 113 Mass. 532, 536; nor does the appointment of a receiver (Ang. & A. Corp. § 770; *Kincaid v. Duinelle*, 59 N. Y. 548, 552; *Taylor v. Columbian Ins. Co.* 14 Allen, 858).

"Mere nonuser of its franchises by a corporation is not a surrender; nor are courts warranted in inferring a surrender from an abandonment of the franchise in intention only." A surrender must be accepted.

Ang. & A. Corp. § 773; Morawetz, Priv. Corp. §§ 687, 774; Boone, Corp. § 201; *Ottawaquechee Woolen Co. v. Newton*, 57 Vt. 451; *Brandon Iron Co. v. Gleason*, 24 Vt. 228.

Nor does an omission to elect officers work a forfeiture of the franchise or a dissolution of the corporation.

Ang. & A. Corp. § 771; Boone, Corp. § 300.

Even where it is admitted, or conclusively shown, that the contingency has happened which the charter expressly provides shall work a forfeiture of the franchise, nevertheless the corporation cannot be said to be dissolved, or treated as dissolved, until judgment of forfeiture has been rendered in a proceeding brought for that purpose by the State.

Connecticut & P. R. Co. v. Bailey, 24 Vt. 465; *Brandon Iron Co. v. Gleason*, Id. 228; *Vermont & C. R. Co. v. Vermont Cent. R. Co.* 34 Vt. 2, 55; *Briggs v. Cape Cod Ship Canal Co.* 17 Rep. 688; 137 Mass. 71; Ang. & A. Corp. § 777; Morawetz, Priv. Corp. § 631.

A court of equity has no power to decree a forfeiture of the franchises of a corporation.

Ormsby v. Vermont Copper Min. Co. 47 Vt. 718.

"A cause of forfeiture cannot be taken advantage of or enforced against a corporation collaterally or incidentally, or by any other mode than by a direct proceeding for that purpose against the corporation. * * * And the government creating the corporation can alone institute such a proceeding."

Ang. & A. Corp. § 777; Boone, Corp. § 305; Morawetz, Priv. Corp. § 636; Vt. cases, *supra*.

Ottawaquechee Woolen Co. v. Newton, 57 Vt.

451, is entirely conclusive against the petitioners; and the opinion and briefs afford a very full list of authorities, to which may be added the recent cases of—

Atty-Gen. v. Chicago & E. R. Co. 112 Ill. 520; *North v. State*, 5 West. Rep. 585, 107 Ind. 356; *Jersey City Gaslight Co. v. Consumers Gas Co.* 4 Cent. Rep. 390, 40 N. J. Eq. 427; *Seaburgh Turnp. Co. v. Outler*, 6 Vt. 815.

Rowell, J., delivered the opinion of the court:

Although the history of this case prior to the bringing of this petition fully appears in the report of it in 56 Vt. 476, yet it will be matter of convenience to restate it here as far as necessary to bring out the point now decided.

On August 17, 1883, the inspector of finance proceeded in chancery against the defendant company as an insolvent corporation, and obtained an injunction restraining it from transacting any further business as a trust company, and from all custody of or interference with its books and property, except to keep and preserve the same, until further order. He at the same time obtained the appointment of a receiver, who was ordered to take possession of the property of the company at once, and to administer it according to law, subject to the further order and direction of the court.

The charter of the company provides that, in case of its "dissolution * * * by act of law or otherwise," the debts due from it, "incurred by deposits in favor of minors, insane persons, or married women,—such deposits having been made for married women in their own right,—shall have a preference, and be satisfied before any other debts due from said corporation are paid."

The receiver took possession of the property, and began to administer it, and on November 10, 1883, for the purpose of obtaining the direction of the court in respect of such administration, he preferred his petition in the case, setting forth that on October 4, 1883, the court ordered that all creditors of the company should present and prove their claims by December 1, 1883; that, pursuant to said order, a large number of creditors had proved their claims, and that he had reason to believe that the rest of them would prove theirs within the time limited; and further setting forth the provision of the charter above recited, and that a considerable number of persons had proved claims for debts due for deposits in favor of minors, insane persons, and married women in their own right, and insisted that said claims should be preferred and be satisfied before any other debts due from the company were paid; that he had realized a considerable amount of money from the assets of the company, and expected to realize more therefrom from time to time; and that it was for the interest of the creditors of the company that the funds realized, and to be realized, should be paid and distributed to and among them according to their legal rights, as soon as might be; that the creditors who claimed no preference insisted upon an equal and a ratable payment and distribution of the funds to and among all the creditors; and praying for an order directing him in the premises, and prescribing in what order, proportion, and manner, payment and distribution should be

1 Vt.

made with reference to the demands for which preference was claimed, and with reference to the other debts of the company.

Notice of hearing on this petition on December 4, 1883, was given to all persons interested, by publication of the petition and an order of notice three weeks successively in the *St. Albans Messenger & Advertiser*, and by acceptance of service by the chairman of the depositors' committee; and at the hearing the receiver and counsel appeared and represented the general creditors, and counsel appeared and represented parties who claimed a preference, and a full hearing was had. Whereupon it was ordered and decreed that all the depositors who had proved or should prove their claims as such stood, and should stand, "on terms of perfect equality of right to share in the division and distribution of the funds or assets of said company; and that no depositor or class of depositors is entitled to any preference over others;" and the receiver was ordered to pay out and distribute the funds and assets accordingly. From this decree some of those claiming a preference appealed to this court, where the decree was affirmed and the cause remanded. Subsequently, and in December, 1884, Mr. Kent and his wife—who was a depositor in the company in her own right, and had proved her claim pursuant to order—preferred this petition in the case on behalf of themselves and all others in like interest who might choose to come in and share the expense, for the purpose of obtaining a preference, under the charter. And divers other persons of like interest have come in, some of whom appealed from the former decree, and so were unquestionably parties to that adjudication.

The ground for claiming a preference before was and now is, not that the corporation has been dissolved by a judicial forfeiture of its charter, but that its state of suspended animation is death within the meaning of the charter, sufficient for the right of preference to attach.

The present petition is defended on two grounds; namely, that the former decree is conclusive, and that there is no dissolution within the meaning of the charter shown.

As to the first ground of defense: It is claimed that the former adjudication cannot be availed of here, though set up in the answer, because the record of it has not been put in evidence. But this was not necessary. That decree was made in this present case, the whole record of which was before the court of chancery, and this appeal has brought it all before this court (Rev. Laws, § 778); and the court can properly look into it, to see what has been done in the case, without requiring proof in the ordinary way. *Armstrong v. Cobby*, 47 Vt. 859. And, besides, the petition expressly makes all prior proceedings in the cause a part of itself, but omits to set them out, to avoid prolixity.

It appears that some of the parties that have here intervened were real parties to the proceedings that resulted in the former decree and so are bound by it to some extent certainly; but it is said that these petitioners, and the rest that have intervened, are not bound by it at all, as none of them were real parties to it; and that it does not appear that they had notice of the pendency of the proceedings, so they could appear had they desired to.

The depositors bear to the company the relation of creditors rather than of *cestuis que trust*. *Pope v. Burlington Sav. Bank*, 56 Vt. 284. And although under our statute the receiver probably stands as a representative of all the creditors (High, Receivers, § 814; *Talmage v. Pell*, 7 N. Y. 328, 347), yet, as here are conflicting interests between different classes of creditors, and as a right of appeal is given to all persons in interest, as in other cases (Rev. Laws, § 3556), there might be some incongruity in saying that the receiver was in court for all in a way to bind all; and more especially so, as the decretal order shows that the receiver and Messrs. Noble & Smith appeared and represented the general creditors, and that Mr. Edson and Mr. Tenney appeared and represented parties claiming to be preferred creditors,—from which it would seem that the receiver, in point of fact, represented the general creditors, rather than those claiming a preference.

But the depositors are very numerous, there being more than 2,400 of them, and more than 1,100 claim a preference. Many of them are undoubtedly dead, some having, and some not having, personal representatives; and many may have removed from the State or originally lived out of it, so that it would have been entirely impracticable, if not impossible, to give personal notice to all; and the notice that was given was the only one that could well have been given. Under this notice there was an appearance before the chancellor on behalf of divers persons standing in the same interest as these petitioners and those who have intervened, and a full hearing was had, and an appeal was taken on behalf of eight married women and four minors, some of whom, as we have seen, intervene here; and the case was argued for them in this court by the same counsel who now argue it for the petitioners; and it can be justly said that the rights of the whole class claiming a preference were then fairly represented and fully and honestly maintained and tried. Therefore, on well-recognized principles, that decree ought to be held binding upon the whole class.

Although the general rule in equity is that all persons having an interest in the subject-matter in litigation should be before the court, to the end that complete justice may be done and future litigation prevented, yet there is of necessity an exception to this rule when a failure of justice would ensue from its enforcement. It is said that the want of parties does not affect the jurisdiction, but addresses itself to the policy of the court; that the rule was made by the court for the promotion of justice, and may be modified by it for the same purpose, and is always more or less a matter of discretion, depending on convenience. *Stimson v. Lewis*, 36 Vt. 91. Cases in which the parties in interest are so numerous as to make it impracticable or greatly inconvenient and expensive to bring them all before the court form an exception to the rule. And this exception applies to defendants as well as to plaintiffs. Take the case of a voluntary association of many persons. It is sufficient, in a suit against them, that such a number be made defendants as will fairly represent the interests of all standing in like character and responsibility. *Story*, Eq. Pl. § 116.

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In *London v. Richmond*, 2 Vern. 420, which was a bill against the assignee of a lease for the payment of rent and the performance of covenants, it was held that, by dividing his interest into a great many shares, the assignee had made it impracticable to have all the sharers before the court.

In *Chancey v. May*, Finch, Prec. Ch. 593, one reason given for overruling the demurrer for want of parties was "that it would be impracticable to make all the proprietors parties; and there would be constant abatements by death and otherwise, and no coming at justice, if all were to be made parties."

In *Lloyd v. Loaring*, 6 Ves. Jr. 779, Lord Eldon said he had seen in the manuscript notes "strong passages, as falling from Lord Hardwicke, that, when a great many individuals are interested, there are more cases than those—which are familiar—of creditors and legatees, in which the court will let a few represent the whole." He said there was a very familiar case in which the court allowed a very few to represent the whole world.

In *Adair v. New River Co.* 11 Ves. Jr. 429, he shows how one having a general right at law to demand service to his mill from the inhabitants of a large district sues in equity. "His demand is upon every individual not to grind corn for their own subsistence except at his mill. To bring actions against every person for subtracting that service is regarded as perfectly impracticable. Therefore a bill is filed to establish the right, and it is not necessary to bring in all the individuals; not because it is inexpedient, but because it is impracticable. The court therefore requires so many that it can be justly said they will fairly and honestly try the legal right between themselves, all other inhabitants, and the plaintiff; and when the legal right is thus established, the remedy in equity is very simple,—merely a bill stating that the right has been established in such a proceeding; and upon that ground a court of equity will give the plaintiff relief against the defendants in the second suit, represented only by those in the first suit." See also *Moux v. Matby*, 2 Swanst. 277.

So the creditors of an insolvent debtor, who execute the assignment, being numerous and some of them out of the Commonwealth, need not be made parties to a bill that concerns the assets. *Stevenson v. Austin*, 3 Met. 474.

In a suit by the receiver of a trust and banking company to foreclose a mortgage, the court said it would be oppressive to require all the creditors and stockholders to be made parties. *Mann v. Bruce*, 5 N. J. Eq. 418.

The general rule in equity is, that a nominal trustee cannot bring a suit in his own name alone, but must join the beneficiaries; still, it is said that the court will in its discretion dispense with the rule in cases of great inconvenience or of unnecessary expense. *Willink v. Morris C. & B. Co.* 4 N. J. Eq. 377.

Thus, in *Van Vechten v. Terry*, 2 Johns. Ch. 197, which was a bill for the sale of premises mortgaged to the plaintiff by the defendants, who were trustees for 250 copartners, the court said it would be intolerably oppressive and burdensome to compel the plaintiff to bring in all the beneficiaries, and the delay and expense in-

cident to such a requirement a reflection upon the justice of the court.

Stimson v. Lewis, 36 Vt. 91, was a bill to dissolve a partnership consisting of a great many members, and to close up its affairs and compel contribution; and it was held that all need not be made parties, though it was not said that absentees would be bound.

Here we have a current of authority adopting, more or less, a general principle of exception by which the rule in equity, that all persons interested in the subject-matter of the litigation must be made parties, yields when justice requires it, in the instance of either plaintiffs or defendants. A rigid enforcement of the rule would lead to perpetual embarrassment, and in many cases to an absolute denial of justice; and we think this case, in respect of the binding quality of this decree, comes necessarily within the exception.

But to what extent is the decree binding? Certainly not to the extent of precluding all future inquiry into the matter, based upon things that have transpired since the institution of the former proceedings; for the doctrine of estoppel by judgment has no application to a case that is ambulatory in its nature, and has ceased to be the same by progression. *People v. Merce*, 3 Hill, 899.

Thus, a judgment for the defendant in an action of trespass *quare clausum* is not conclusive upon the right of possession at a subsequent time, because intervening events may have restored the plaintiff to possession, or terminated the possession or the right that the defendant had at the former trial. *Thayer v. Carew*, 13 Allen, 82. And intervening events affecting the issue may be shown, to prevent a former judgment from being conclusive, even when the title has been tried in a writ of entry. *Perkins v. Parker*, 10 Allen, 22.

The case turned before on the ground that no dissolution was shown; and the only proper inquiry on this point now is whether one is now shown, produced by that which did not then exist, but has since transpired; and here we must be confined to the time between the institution of the two proceedings, which is a little more than a year.

This petition alleges that, before and at the time of the appointment of the receiver, the company was not merely temporarily embarrassed and unable to meet its liabilities as they matured, but was hopelessly insolvent in fact; that, since the appointment of the receiver, no meetings of the stockholders or of the directors have been held; that the directors have neglected to repair the capital stock by assessments, as required by the charter; that the president has absconded and is insolvent; that neither the officers nor the stockholders expect ever to resume the business of the company; that the funds and assets of the company are all gone, and its insolvency so hopeless that the depositors must suffer loss by reason thereof; and that legal remedies against it are unavailing; that it has become and is a mere nominal, inert body, incapable, from its insolvency and lack of funds, of hereafter carrying its franchise into effect; that on the appointment of the receiver it ceased to own any real or personal estate, and has acquired none since, and does not expect to acquire any; that since his appointment it has

done no one act manifesting an intention to resume the exercise of any of its corporate functions; and that the design and being of the corporation has been fully and finally determined.

It will be noticed that some of these things are alleged to have existed before and at the time of the appointment of the receiver; some, from that time; and some, to now exist,—without saying when they transpired, much less that they transpired since the institution of the former proceedings, unless as matter of inference and by way of continuation from an earlier period.

Nor does essential time appear from the report. Most of the things alleged are found to exist at the present time*; but it does not appear when they transpired, except as to the depreciation of assets from former estimates, which is found to have been gradual and large during the last two years. But, for aught that appears, these things may all have antedated the former proceedings to some extent, though probably intensified since by the mutations of time.

It is claimed that this changed condition in the value of assets is, of itself alone, sufficient to entitle the petitioners to be heard here on the merits. But mere insolvency, however hopeless, has never been held sufficient evidence of a surrender of corporate rights,—and this is the theory on which the cases go; and, besides, it does not appear that the company was not before insolvent in fact. That the assets have since depreciated from former estimates does not show it. In the former proceedings the real financial condition of the company did not appear; but, as we have seen, this petition alleges that it was hopelessly insolvent before then; and this is probably true. It is not sufficient to show a present state of things adequate to relief,—allowing that such a state is shown, which we do not undertake to say,—without avoiding the force of the former decree by showing that those things have since transpired; otherwise we might override that decree, and grant relief for that which existed before, but was not made to appear,—which would be in effect a rehearing.

This makes it unnecessary to consider the other question involved, as to which we express no opinion.

Decree affirmed, and cause remanded.

*The master found "that the present financial condition of the trust company is that of hopeless insolvency;" that its embarrassment "is not temporary but permanent;" that none of the stockholders or officers "intend to repair the impairment of the capital stock or to resume the business of the company;" that the "trust company has not attempted to perform any of the functions of a corporation since the appointment of a receiver;" that the company "has become inert, and has at present a mere nominal existence," and from lack of funds is "incapable of performing its functions."

"It appeared that during the last two years, and since the appointment of a receiver, the value of the assets has steadily depreciated below the estimates of that time. In November, 1883, the personal property alone, connected with the Norwood Lumber Co. property, was valued at \$123,323.78, and the real estate at \$208,501.50,—much greater than its present estimated value; * * * that the receiver's present estimate of the value of what remains of the Norwood Lumber Co. property (the personal property having been sold, except \$20,000 worth) is but \$123,000; in order to get the title to the property the receiver had to surrender \$122,000 of its paper." [Ed.]

Ralph E. WELLER
v.
City of BURLINGTON.

The plaintiff while traveling on a street in the defendant city, was injured by a collision with a sled on which were several persons engaged in coasting. The city's charter conferred upon it authority over its streets, and compelled it to keep them in sufficient repair. Coasting was prohibited by an ordinance; but it was found that its practice where and at the time the accident occurred had been permitted to become a dangerous public nuisance, known to the mayor and the other officers, or which might have been so known by the exercise of reasonable diligence; that it was also known to the greater part of the citizens and taxpayers, and approved of by them; that a majority of the board of aldermen expressly approved, though not by official action, of using the street for coasting, and that the minority did not object. Held, that the city was not liable, on the ground that, there being no express statutory liability, there was not an implied one, arising from the acceptance of the charter, for injuries resulting from defective streets.

(Chittenden—Filed February 7, 1888.)

TRESPASS on the case. Plea, general issue. Trial by court September Term, 1886, Taft, J., presiding. Judgment for the plaintiff. *Reversed.*

The case appears in the opinion.

Messrs. W. L. Burnap, H. Ballard, and Robert Roberts, for defendant:

There is no other contract or obligation, between the State and municipal corporation accepting a charter, than such as the charter imposes.

Dill. Mun. Corp. §§ 965, 980, 1000, 1018. See *Welsh v. Rutland*, 56 Vt. 228; *Hill v. Boston*, 122 Mass. 844; *Detroit v. Blackeby*, 21 Mich. 84; *Western College v. Cleveland*, 12 Ohio St. 375.

Corporate officers, though deriving their appointment from the corporation,—as a convenient method of exercising a function of government,—are the officers and servants of the public at large, and not of the municipality. There is therefore no corporate liability growing out of either nonfeasance or malfeasance on their part.

Dill. Mun. Corp. 974, 975.

Granting, then, that this coasting was a nuisance, its suppression was a police duty, and not one in which the corporation, as such, had either any peculiar interest, or from which it could derive any corporate benefit.

Faulkner v. Aurora, 2 Am. & Eng. Corp. Cas. 520; *Schultz v. Milwaukee*, 49 Wis. 254.

New Jersey holds that, without a statute creating it, there is no liability even for acts of positive malfeasance on the part of a municipal corporation.

Pray v. Jersey City, 32 N. J. L. 394.

See also *Hyde v. Jamaica*, 27 Vt. 443; and *Baxter v. Winoski Turnp. Co.* 23 Vt. 114; *State v. Burlington*, 36 Vt. 521.

Suppose the city had passed no ordinance on this subject, it would not have been liable upon the authority of *Hutchinson v. Concord*, 41 Vt. 271. See also *Ray v. Manchester*, 46 N. H. 50.

The following cases were also cited for the defendant:

Levy v. Mayor, 1 Sandf. 465; *Bailey v. Mayor of N. Y.* 8 Hill, 531; *Lorillard v. Monroe*, 11 N. Y. 892; *Mitchell v. Rockland*, 53 Me. 118; *Buttrick v. Lowell*, 1 Allen, 172; *Clark v. Waltham*, 128 Mass. 567; *Fisher v. Boston*, 104 Mass. 87.

Messrs. E. R. Hard and J. E. Cushman, for plaintiff:

The distinction between cities existing by special charter, and ordinary towns, in respect to their obligations and liabilities, is recognized by all the authorities; the former being held to a much more extended liability than the latter.

1 Dill. Mun. Corp. §§ 22, 23, 26; 2 Dill. Mun. Corp. § 961; 2 Add. Torts, 1298, 1300; Cooley, Const. Lim. 303, 304.

This distinction renders the case of *Hutchinson v. Concord*, 41 Vt. 271, and other similar cases in which towns have been held not liable, of no force as authorities in favor of the defendant in the present case.

The right of the plaintiff to recover upon the facts stated in this record is distinctly recognized and affirmed in the following cases: *Baltimore v. Marriott*, 9 Md. 160; *Taylor v. Cumberland*, 64 Md. 70; *Little v. Madison*, 42 Wis. 643. See *Stanley v. Davenport*, 54 Iowa, 463; 19 Am. L. Reg. 11.

Without any express legislation to that effect, cities are held liable for injuries to travelers caused by defective highways within their limits; this liability being based, in the decisions, upon an implied duty resulting from power and authority of cities over the highways; while on the other hand it is held with equal unanimity that quasi corporations are not so liable without express legislation.

2 Dill. Mun. Corp. §§ 998, 999, 1017, 1018; Whart. Neg. §§ 956, 959; 2 Add. Torts, 1306; Cooley, Const. Lim. 305; Cooley, Torts, 635.

In *Gordon v. Richmond*, Va. Ct. App. June, 1887, S. E. Rep. 727, the plaintiff in error, in passing along a street in Richmond, fell and was injured by reason of the want of repair of a sidewalk. The court said: "It is the duty of a municipal corporation, which by its charter has the power, to keep its streets and sidewalks in safe condition."

See *Rushville v. Adams*, 5 West. Rep. 63; 107 Ind. 475; *Kuns v. Troy*, 6 Cent. Rep. 49; 104 N. Y. 844; *Barnes v. District of Columbia*, 91 U. S. 540 (23 L. ed. 440); *Weightman v. Washington*, 66 U. S. 1 Black, 39 (17 L. ed. 52); *Nebraska City v. Campbell*, 67 U. S. 2 Black, 590 (17 L. ed. 241); *Mayor of N. Y. v. Sheffield*, 71 U. S. 4 Wall, 189 (18 L. ed. 416). See also *Deering*, 4 New Eng. Rep. 550; *Grove v. P. Wayne*, 45 Ind. 429.

Rowell, J., delivered the opinion of the court.

This is an action on the case to recover for injuries received by the plaintiff while traveling on Main Street, in the defendant city, by being run into by a sled on which some persons were coasting down the street.

The charter confers upon the city authority

over its streets, and makes it its duty to keep them in suitable and sufficient repair, but imposes no greater duty in this behalf than is imposed upon towns in respect of their highways. It also provides for the raising of money for the performance of this duty, and empowers the city to prevent the practice, in its streets, of any amusements that have a tendency to injure or annoy persons passing thereon, or to endanger the security of property.

At the time in question there was an ordinance in force forbidding, under penalty, coasting on any of the streets and highways of the city, except such as the mayor and the board of aldermen should designate for that purpose; and Main Street had not been thus designated, so that coasting thereon was unlawful; and constables and all police officers were especially directed by the ordinance to see that its provisions were enforced.

The charter makes the mayor the chief executive officer of the city, and charges him with the duty of using his best efforts to see that the laws and the city ordinances are enforced, and that the duties of all subordinate officers are faithfully performed.

On the evening the plaintiff was injured, several persons other than those whose sled injured him were coasting down Main Street; and the street had been similarly used by many persons, mostly residents of the city, for three or more evenings within the last ten days; and the practice of coasting on the street had become and was a dangerous public nuisance. The use of the street for coasting was all the while known to the mayor and the other officers of the city, or would have been known to them by the exercise of reasonable diligence on their part, and was also known to the greater part of the substantial citizens and taxpayers of the city, and approved of by them. It was also expressly approved of by a majority of the board of aldermen, though not by official action, and the minority of the board did not object to it.

A few days before the accident, the mayor publicly designated certain streets for coasting and sliding, and gave notice that coasting and sliding on all other streets of the city were forbidden by ordinance; but this was only the official action taken for its enforcement, and it is found that the city was negligent in this behalf; and the plaintiff claims that, as the city is a municipal corporation proper, as distinguished from a *quasi* or other public corporation, it is liable for injury resulting from such negligence.

It is said that this case is distinguishable from all others on this subject, in that here a majority of the citizens and taxpayers approved of the practice of coasting. But this makes no legal difference; for a city cannot be affected in such matters by the individual action of its citizens, any more than a town can be by such actions of its citizens, and it has always been held that a town cannot be thus affected.

It is true that there is a difference between cities, which are voluntary corporations existing by special charters, and towns, which are involuntary incorporations, with privileges and duties more limited and restricted than those of cities; but does that difference go to the extent

claimed here?—for it is certain that a town would not be liable in a case like this.

The fundamental proposition of the plaintiff is that, inasmuch as the law confers upon the city power and authority over its streets, it therefore, by implication, imposes upon it a duty to prevent the nuisance of coasting thereon; and that for an injury resulting from a negligent omission of such duty an action lies,—in other words, that the duty creates the liability; and the argument is that the grant to cities of corporate franchise is usually made only at the request of the citizens to be incorporated, and is supposed to be a valuable privilege, and a consideration for the duties imposed; that larger powers of self-government are given to them than to towns and counties; larger privileges in the acquisition and control of corporate property; special authority to use their streets for peculiar convenience of their citizens in various ways not otherwise permissible; that a grant from the State of a portion of its sovereign power, and an acceptance thereof for these beneficial purposes, raised an implied promise on the part of the corporation to perform its corporate duties, not for the benefit of the State only, but for the benefit of every individual interested in their performance as well; and that, having accepted a valuable franchise on condition of performing certain public duties, they stand like private corporations aggregate, and are held to contract for the performance of those duties.

The decisions in this country on this subject are not uniform, and Judge Dillon groups them into the following classes: (1) those in which neither chartered cities nor counties are held to an implied civil liability; (2) those in which both chartered cities and counties are thus held for neglect of duty; (3) those in which municipal corporations proper—such as chartered cities—are thus held for damage caused to travelers for defective and unsafe streets under their control, but which deny that such liability attaches to counties and other *quasi* corporations in respect of highways and bridges under their control. He says this last distinction has received judicial sanction in a large majority of the States where legislation is silent as to corporate liability, but that the reason for the distinction is not so satisfactory as could be desired. But in New England, he says, towns and cities are treated alike in this respect; and that there is no implied liability here upon either for injuries resulting from defective streets and sidewalks, but that such liability is wholly statutory. And in this he is borne out by the cases, as will be seen by reference to *Hill v. Boston*, 122 Mass. 844, where they are largely collated and commented upon.

The New England idea is that creating villages and cities by legislative action does not, by implication, impose upon them civil liability for the neglect of corporate duties in respect of those matters that are governmental in their nature, and which they administer, as it were, for and in behalf of the State, such as the control of streets and the like; while on the other hand, in respect of those matters that are not governmental in their nature, but are for the private advantage and emolument of the municipality,—such as waterworks and the

like,—they are held liable much as an individual or a private corporation aggregate would be.

But it is unnecessary to pursue the subject further, for we regard the question settled in this State by *Welsh v. Rutland*, 56 Vt. 228.

The only answer the plaintiff makes to that case is that the village was only a *quasi* municipal corporation, and was so regarded by the court, and that the case was such as to render seemingly unnecessary the discussion as to the liability of such corporations in respect of such matters.

But the village of Rutland is as much a municipal corporation proper as the city of Burlington is, and its chartered powers and privileges are much the same, barring the form of government; and, although in that case the chief justice speaks of *quasi* corporations as if the village was one, yet the court did not so regard it, and he evidently is speaking in a general way of public corporations as distinguished from private corporations aggregate, not intending to assign the village to that class of public corporations technically called *quasi* corporations, because, on account of the limited number of their corporate powers, they rank so low in the scale of corporate existence. Counties, school districts, and perhaps towns, are of this class. But cities and incorporated villages are nowhere called or treated as *quasi* corporations, but as municipal corporations proper, as having the most of corporate life; but they are all public corporations, and agencies in the administration of civil government. And further on in the opinion the chief justice speaks of municipal corporations, and argues along the line of the law applicable to such corporations proper; which shows that the case was not put upon the ground that the village was a *quasi* corporation.

As to its not having been necessary for the court to discuss the subject, it is sufficient to say that the case was treated as involving the question, and the point was fully discussed and decided; and, on this further discussion and consideration, we are confirmed in the correctness of our former views, and reaffirm them.

Judgment reversed, and judgment for the defendant.

Powers, J., was absent.

Charles C. BROMLEY

v.

Eli J. HAWLEY.

1. The surrender of an overdue note, enforceable against one of two indorsers, though not against the other or the principal, is a **valuable consideration for a new note** signed and indorsed by the same parties with an additional indorser.
2. The plaintiff was the owner of a \$4,000 note which he purchased of one of the directors of a marble company which issued it, and, a little more than two months after it was due, he was induced by the same director to exchange the old note for a new one, signed by the same party as the old one, and with

the same indorsers, with the defendant as an additional indorser. *Held*, under the circumstances of the case, that the facts that the note was overdue; that it amounted to \$4,000; that it had different numbers on it,—one placed there by the maker and the other by a bank,—were not sufficient to put the plaintiff upon inquiry; it appearing that he took the note in good faith, and that the party with whom he negotiated was a man of extensive business, and his character and financial standing high.

8. The rights of an indorser of a note are not such that a purchaser is bound to inquire, unless the circumstances are such as ought to excite the suspicion of a prudent and careful man, as to its validity, as between the parties to it.

(Rutland—Filed February 8, 1888.)

ASSUMPSIT on a promissory note given for \$4,000 by the Dorset Marble Company, dated July 21, 1883, payable in five months after date, at the National Bank of Rutland, Vermont, to the order of J. B. Hollister, treasurer of said company, and indorsed by J. B. Hollister, treasurer, E. J. Hawley, the defendant, and J. B. Page, and numbered 445 by said company. Plea, general issue and notice. Trial by court, September Term, 1886, Veazey, J., presiding. Judgment for the plaintiff. *Affirmed*.

The following facts were found: One Borden, of Philadelphia, was the owner of the note, and sued it in the name of the plaintiff, for convenience. The defendant was an accommodation indorser of the note, and of other notes, for the Marble Company. This note was issued by said company and indorsed by defendant, and delivered to said Page by the company, with right to use it only to raise money or to pay other notes indorsed by the defendant. Page had no authority to use the note for his private purposes, or for any purpose, except as specified above. He was one of the directors of the company, and accustomed to negotiate some of its notes. The defendant was president of the company; and neither he nor the company received any money on this note, nor was it used to pay any paper on which the defendant was indorser, or liable to pay; nor had defendant any knowledge of Borden, or of any dealings by Page with him. Page, at the date of this note, was president of the National Bank of Rutland. Prior to January 31, 1883, said bank held and owned said company's note, No. 257, for \$4,000, indorsed by said Hollister and Page. On that day, said note maturing, it was renewed by said bank discounting for the Marble Company note No. 328, at four months, for the same amount, indorsed by the same parties as the other note, whereby the bank became the owner of No. 328. Page, being president of that bank, on February 9, 1883, took the note to Philadelphia and delivered the same to said Borden, who then and there paid to Page therefor the sum of \$4,000, less the discount. It did not appear what Page did with the money, further than, from the books of said bank, that the

note was entered thereon as paid to the bank under date of February 18, 1868, and there was an entry of "paid" on the bills payable on the books of the Dorset Marble Company. Mr. Borden did not notice the bank numbering (18,157) on this note when he took it; and testified that that would not suggest to him that the note had been used. It appeared that Borden continued to hold the note No. 828, and forwarded it for collection through several banks to the Rutland County National Bank, which caused it to be duly presented at its maturity, and protested June 3, 1868, and to be returned to Borden; that Borden notified the company that he held the note, and urged payment, and threatened suit thereon; that on August 23, 1868, Page took the note in suit to Borden, and, representing that it would be paid at maturity, and that the defendant was perfectly responsible, induced Borden to give up the overdue note which he then held, in exchange for the note No. 445, thus extending the time of payment until December 24, 1868; that Borden had no notice or knowledge of the terms and conditions on which defendant indorsed the note, nor of any fact now claimed to be inconsistent with the propriety of such exchange and extension, other than as herein stated. Said note No. 828 was then returned to the Marble Company and credited to Page, as shown by the books of the company, and then ceased to be a liability of the company. Said bank did not get the note No. 828 re-discounted in any other way than as above stated. In case of re-discount, the bank indorsed the notes to be re-discounted. This note did not so show this. Borden, whose deceased wife was a relative of Page, had previously had transactions with him and lent him money. Borden did not at the time know what had been done with the note (No. 828) before he bought it, nor for what purpose Page wanted the money on it. On December 24, 1868, the note in suit fell due, and it was duly presented, protested, etc., and due notice was given the defendant, and it has never been paid. It was also found that Page was not only a director of the Marble Company, but he owned nearly one third of the stock thereof, and was agent for the raising of funds for the company; that the company was a corporation organized and located in Vermont, owning marble quarries and mills there, and produced, manufactured, and sold large quantities of marble; that its method of raising funds needed in its business was by issuing commercial paper, like the note in suit, indorsed by its officers and stockholders, and by Mr. Gleason; that this paper was largely put into the hands of Gov. Page to negotiate for the use and benefit of the company as he saw fit; but he had no authority to use it for his private benefit; that Page was president of a bank in Rutland where the company did its bank business, and where more or less of its paper was discounted; and that Page not infrequently advanced money for the benefit of the company by paying its checks or debts when it was out of funds. At the time the note was negotiated, and for many years prior thereto, Gov. Page was a man of very high standing in public and financial circles, and was engaged in railroad, manufacturing, and banking enterprises on a large

scale, and was known in the eastern cities as a man of integrity and high character.

Mr. W. H. Smith, for defendant:

This was the first note that plaintiff had had of these parties, and as a "prudent and careful man" he should have made inquiry.

Langdon v. Baxter Bank, 57 Vt. 1.

The law applicable in this case, in this State, seems well settled in *Roth v. Colvin*, 32 Vt. 125, 135, 137, 138, and has been repeatedly adhered to by this court since.

See *Gill v. Oubit*, 10 Eng. C. L. 154; *Prindle v. Phillips*, 5 Sandf. 157.

As to suspicious circumstances, see—

Gould v. Stevens, 48 Vt. 125.

Mr. Henry A. Harman, for plaintiff:

The question as to the consideration of the note in suit is not nearly so strong for the defense as in—

Churchill v. Bradley, 58 Vt. 408.

On the facts, Mr. Borden became in August, 1868, a *bona fide* purchaser of the note in suit, for value, and without notice of any equity here claimed by the defendant. He gave up to an officer of the Dorset Marble Company a note which was overdue; he forebore to sue the maker and indorser for a period of nearly four months. He had no knowledge or notice of the terms and conditions on which defendant indorsed the note No. 445. Such an exchange is made for a valuable consideration, and precludes the introduction of any such defense.

Presumptive Bank v. Goss, 31 Vt. 815; *Dixon v. Dixon*, Id. 450; *Quinn v. Hard*, 48 Vt. 375; *Russell v. Splater*, 47 Vt. 273.

And this is true, although the note may be sued in the name of an accommodation plaintiff.

Russell v. Splater, *supra*; *Bennington v. Park*, 50 Vt. 209.

Taft, J., delivered the opinion of the court:

1. It is claimed by the defendant that Borden paid no consideration for the note in suit, for that the former note, No. 828, upon and for the surrender of which the note in suit was taken, was of no value in his hands. Whatever rights he may have had against the bank, or any of the parties to the note save Mr. Page, it is certain that the note was a valid claim against the latter, in the hands of Borden. He had taken it from Page, under Page's indorsement, and advanced him the amount of it in money; and however great the fraud, if any there was, on the part of Page, in taking the note from the bank and transferring it to Borden, it would not affect the validity of the claim of the latter against Page as indorser. Page could make no defense to such claim. The note No. 828 was therefore of value in Borden's hands, and its surrender would constitute a valuable consideration for taking the note in suit. *Churchill v. Bradley*, 58 Vt. 408.

2. The defendant further claims that the note in suit was taken under such circumstances as to deprive Borden of the character of a *bona fide* holder without notice of any equities existing in favor of the defendant. The rule in this respect is well stated in Rob. Dig. p. 100, § 127: "The purchaser of negotiable paper must exercise reasonable prudence and caution in taking it. If the circumstances are such as ought to excite the suspicion of a pru-

dent and careful man as to the validity of the paper, as between the parties to it, or the propriety of the transfer, and the purchaser takes it without inquiry, he does not stand in the position of a *bona fide* holder, but in the position of the party from whom he takes it, though he may have paid value for it." The question then arises, whether there were any circumstances attending the taking of the paper by Borden which ought to have excited the suspicions of a prudent and careful man, as to the paper or the propriety of its transfer. If there were, Borden is chargeable with such facts as he would have learned had he actually made inquiry. If he had inquired, he would have learned that Page had no right to transfer the note, except for certain specified purposes; and, admitting that it was not taken by Borden for such purposes, it is incumbent upon us to say whether any of the facts reported by the court ought to have put him upon inquiry. In this respect but two suggestions are made by the counsel for the defendant. First, the fact that the note for which the one in question was taken was overdue, and that the one offered for it was good, and would be paid at maturity. The overdue note was given by the Dorset Marble Company, a corporation owning quarries and mills in Vermont, and producing annually a large quantity of marble, and raising funds by issuing commercial paper like the note in suit. Page was a man of high standing, financially, engaged in great enterprises, with large financial dealings, and was known as a man of integrity and high character. Borden had therefore had pecuniary transactions with him, and had loaned him money. Now, although the fact that the note No. 328 was not paid at maturity might import insolvency in the sense in which the word is sometimes used, it was far from importing that the paper was worthless; and the fact that, to take up the note in question, another was offered, with a name on it that was represented as perfectly responsible, with the further representation that the note would be paid at maturity, would tend to allay suspicions that might otherwise arise. The defendant was president of the company making the paper, and Borden might well think he was interested in sustaining its credit. Second, the defendant contends that the amount of the note, \$4,000, would suggest more careful scrutiny than if the amount had been small. In this case we do not think it would; whether it would or not in any given case would, to a great extent, depend upon circumstances. While it might excite suspicion if a man of no means and of no business should offer a piece of commercial paper for thousands

of dollars for sale, none would naturally arise, caused by the amount of the paper, when offered by a man of large enterprises, and who would naturally need large sums in carrying on an extensive and varied business. More careful scrutiny would be suggested if the paper was small; for if Mr. Page, standing as he did financially, engaged in banking and other enterprises, had been endeavoring to raise money on a note for \$100, instead of one for \$4,000, and that in a place so far away from his home and business as Philadelphia, it would naturally suggest,—at least in regard to him, and we think the paper,—that something was wrong. We fail to see that there was any fact that attended the taking of the note by Borden that should have put him upon inquiry. The defendant's counsel contends with great vigor that this case is within the rule enunciated by Duer, J., in *Pringle v. Phillips*, 5 Sandf. 137, in stating what the principle of the doctrine of constructive notice is, viz.: "When a person is about to perform an act by which he has reason to believe that the rights of a third party may be affected, an inquiry into the facts is a moral duty, and diligence an act of justice. Hence he proceeds at his peril when he omits to inquire, and is then chargeable with a knowledge of all the facts that by proper inquiry he might have ascertained,"—and that it was incumbent upon Borden to make inquiry, at all events, the defendant being a third party. We do not think this rule applies to a surety or indorser upon a note offered for discount or sale, irrespective of any circumstances which should have put the party to whom it is offered upon inquiry. The rule, with the application to the extent claimed in this case, does not prevail in this State, if anywhere. If it did, then whoever takes from the holder a note with a surety or indorser takes it subject to all equities existing between the principal and surety or indorser,—i. e., if he must inquire in all cases where the rights of an accommodation party are involved. That such is not the law, see *Harrington v. Wright*, 48 Vt. 427. The surety upon a note is not a third party as to whose rights the taker must inquire, unless the circumstances and facts are such as require it under the rule as above stated. We think it is affirmatively shown by the case that Borden took the note in good faith, and stands as a *bona fide* holder without notice.

Upon the facts reported by the County Court, we think there was nothing to put Borden upon inquiry, and no error in the judgment, and it is affirmed.

Royce, Ch. J., and Powers, J., did not sit in this case, being absent.

RHODE ISLAND.

SUPREME COURT.

William A. BARRON

v.

Byron H. ARNOLD.

1. Where the plaintiff owned certain liquors kept by him for sale in a saloon under a license granted to his agent, and the defendant attached the liquors, in a suit against the agent, as his property, and the plaintiff replevied them; and, at the time of the attachment, no one other than a registered pharmacist or his assistant could sell liquor without license; Pub. Stat. chap. 87, § 65,—declaring that “no action of any kind shall be had or maintained in any court of this State for the possession or value of any liquors held, purchased, or sold contrary to the provisions of this chapter.”—does not prevent a recovery in the replevin suit. As the provision is in derogation of ordinary rights in regard to property, it should be strictly construed. It does not strip liquor of its character as property, and prohibit actions for the possession or value of all liquors; but it relates solely to actions for liquors held, etc., contrary to law. The section was intended to apply to that class of actions where a plaintiff seeks to recover the possession or value of liquors which, by some act of his own, or some act or contract to which he is a party, are held to have been disposed of in violation of law. The transaction which is the subject of the suit must be illegal, or one entered into for illegal purposes, to bring it within the prohibition of the statute.

2. Where the debt under which the attachment is levied was contracted before the agent went into the saloon, there is no estoppel against the plaintiff from asserting his title because he allowed the agent to hold himself out as the proprietor of the liquor.

(Providence—Decided November 18, 1887.)

SUIT to replevy liquors attached as the property of the agent of the plaintiff. *Exceptions overruled.*

Mr. G. J. West for plaintiff.

Mr. C. F. Baldwin for defendant.

Stiness, J., delivered the opinion of the court.

The statement of facts shows that the plaintiff owned certain liquors, kept by him for sale in a saloon under a license granted to his agent, Brown. The defendant attached the liquors, on a suit against Brown, as his property, and the plaintiff then replevied them in this suit. The defendant pleads property in Brown, and avows his taking under the attachment. At the time of the attachment no one other than a registered pharmacist or his assistant could sell liquor without a license. Under a similar

law it has been held, in Massachusetts and Maine, that such property is not attachable. It cannot be sold without a violation of the law. The attachment, therefore, cannot be perfected by sale under execution. If it cannot be sold, and its proceeds applied to the execution by the officer, the reasonable conclusion is that it cannot be attached; for all that could be done with it on attachment without sale would be to hold it indefinitely. *Ingalls v. Baker*, 13 Allen, 449; *Nichols v. Valentine*, 86 Me. 322. See *contra*, *House v. Stewart*, 40 Vt. 145.

The defendant contends that Pub. Stat. chap. 87, § 65, prevents the plaintiff from maintaining his action, because, having no license, he was keeping the liquor for sale illegally. The section is: “No action of any kind shall be had or maintained in any court of this State, for the possession or the value of any liquors held, purchased, or sold contrary to the provision of this chapter.” As this provision is in derogation of ordinary rights in regard to property, it should be strictly construed. It does not strip liquor of its character as property, and prohibit actions for the possession or value of all liquors; but it relates solely to actions for liquors held, etc., contrary to law. What then is the force of the word “held” as applicable to this case? We think the section must have been intended to apply to that class of actions where a plaintiff seeks to recover the possession or value of liquors which, by some act of his own, or some act or contract to which he is a party, are held or have been disposed of in violation of law. The section cannot mean an illegal holding by the defendant alone; for, if liquors were in a defendant’s possession legitimately, without any violation or connivance at violation of law on the part of the plaintiff, clearly the defendant’s unlawful act should not deprive a plaintiff of his remedy; for this would enable a defendant to take advantage of his own wrong. But if a plaintiff had sold or delivered liquors to a defendant to be sold without license, so that both, to some extent, were parties to the violation of the law, then, under this section, the plaintiff could not maintain his action for the possession or value of the liquor so held by the defendant. The provision is based upon the principle that the law will not aid a party in enforcing an illegal transaction. To apply the principle, however, the transaction which is the subject of the suit must be illegal, or one entered into for illegal purposes. The case before us calls for no enforcement of an unlawful transaction as between the plaintiff and defendant. Admitting that the plaintiff was keeping this liquor for sale without a license,—as, under the agreed facts, undoubtedly he was,—the question is whether his property so held can be taken to pay another man’s debts; whether the Legislature intended, in such a case, to lay open his property as free booty to anyone who might seize it. We do not think the provision was intended to go to this extent. In *House v. Stewart*, *supra*, the plaintiff had sold liquor to one Kirk, to be disposed of by him contrary to law, and it was attached as Kirk’s property. The plaintiffs replevied, claiming they had stopped the goods *in transitu*. Upon agreed facts the court decided that the property had become Kirk’s by

arrival at its destination, and that it could be attached. This was enough to dispose of the case; but the court added that the section prohibiting actions for liquors unlawfully held denied the plaintiff any right of action, even if the goods were *in transitu*. This, however, is not inconsistent with the view we have taken of the section, for the plaintiffs were seeking to enforce a right under a contract the purpose of which was known to be in contravention of law. In Iowa the question came exactly as in this case, under a similar statute. A majority of the court held that the plaintiff could maintain his action. The scope of the section is fully and very vigorously considered in both opinions in the case, but we think the conclusion of the majority of the court is the sounder. *Monty v. Arneson*, 25 Iowa, 383.

The defendant further claims that the plaintiff is estopped from asserting his title, because he allowed Brown to hold himself out as the proprietor of the saloon. There is no estoppel in this case. The defendant attached Brown's interest in the property, and it is admitted that he had none. If the creditor of Brown were a party to the suit, the fact that his debt was contracted before Brown went into the saloon would be enough to dispose of the question of his estoppel.

Exceptions overruled.

Thomas BURLINGAME

v.

Byron J. COWEE, Town Treasurer of
Town of Scituate.

1. Where a verdict has been rendered for plaintiff in an **action for damages for a personal injury**, a new trial should not be granted on the ground of **newly discovered evidence** presented by the defendant as tending to show that the **damages recovered were excessive**, unless it is very clear that, if the new testimony had been before the jury, the verdict would be so manifestly excessive that the defendant would be entitled to a new trial on that account.
2. **Counter-affidavits** may be received on a motion for a new trial.

(Decided December 15, 1887.)

ON defendant's petition for a new trial. *Denied.*

The facts are sufficiently stated in the opinion of the court.

Messrs. Nicholas Van Slyk, Charles H. Page, and Franklin P. Owen for defendant.

Messrs. Francis W. Miner and William G. Roelker for plaintiff.

All the questions raised in the case were peculiarly questions for the jury, and their verdict on these matters this court has refused to disturb wherever there was a conflict of evidence, as in this case.

Watson v. Tripp, 11 R. I. 108.

The testimony of the affidavits offered by the defendant is cumulative, and there are counter-affidavits filed by the plaintiff.

Judge Story says in *Ames v. Howard*, 1 Sumn. 491: "And under such circumstances the court will always decline to interfere; because it will not undertake to measure the weight of the new testimony on either side, or to send the parties again to litigation upon the chances of a verdict, upon new conflicting evidence."

See also *Francis v. Baker*, 11 R. I. 112.

In *Dexter v. Handy*, 18 R. I. 476, this court says: "The petition does not show that the testimony might not, by proper diligence, have been had at the trial. Moreover the testimony is of but slight importance, and goes rather to the matter of damages than to the questions primarily at issue."

Durfee, Ch. J., delivered the opinion of the court:

This is an action to recover damages for injuries sustained by the plaintiff in the town of Scituate in consequence of the defective condition of a bridge in that town. Some of the rails which guarded the side of the bridge were gone, and the plaintiff, while crossing the bridge in the dark, stepped aside, at a place where they were gone, to avoid a carriage which he heard approaching, and, being unable to see where he was, stepped off the bridge and fell down the side, injuring his spine. The jury returned a verdict in his favor for \$4,000. The defendant petitions for a new trial; one ground assigned—and the only ground which is pressed—being that since the trial he has discovered new and material testimony. The new testimony, as disclosed by the affidavits, applies only to the damages recovered, which the defendant contends are excessive. In *Schlenker v. Risley*, 4 Ill. 483, and in *Ham v. Taylor*, 22 Tex. 228, it was held that, when the newly discovered evidence is applicable only in mitigation of damages, a new trial will not be granted. We are not prepared to go to the full length of these decisions, but, nevertheless, in such a case we think the court ought to be extremely careful, and not grant a new trial unless it is very clear that, if the new testimony had been before the jury, the verdict would be so manifestly excessive that the defendant would be entitled to a new trial on that account.

The plaintiff testified at the trial that, before the accident, he had never been confined to the house in his life, and had never considered himself nervous; and his wife testified that before it he was perfectly well. The new testimony controverts these statements. It comes mainly from men who worked with the plaintiff in a machine shop from 1880 to 1884. They testify that during that time he complained much of his back, said it was lame; that he could not do heavy work, especially lifting; that he had been a sailor in his youth and suffered from shipwreck, and had been in a hospital; and they also testified that he suffered much from piles; and that he lost time from sickness.

Some of this testimony is merely cumulative, a witness called by the defendant having testified at the trial that he heard the plaintiff complain of his back in 1884. This of course weakens it as a ground for new trial, and furthermore the plaintiff has introduced counter-affidavits. Affidavits covering the time from 1880 to 1884 have been given by the employers of the plaintiff, who were also employers of the

petitioner's affidavits. They testify that the plaintiff appeared to be a strong, healthy man; that he did hard and heavy work; that they never heard him complain; and that he lost little or no time from sickness. Other counter-affidavits were even stronger. They lead us to think that much of the defendant's new testimony may be merely an exaggeration,—unconscious, perhaps,—of complaints which it is quite common for men to make who have to do hard or heavy work in stooping or cramped postures, especially if they happen to have a cold or rheumatism. They do not show that he then complained of the troubles of which he chiefly complains now, namely, serious nervous debility and disorder.

There was some question at the hearing as to whether counter-affidavits were admissible, the court expressing the opinion that it was not the practice to receive them. Our impression has not been confirmed by subsequent inquiry. In cases where a defendant has failed to answer, or has been defaulted by reason of accident or mistake, and petitions for a trial, supporting his petition by affidavits to show that he has a meritorious defense, it is not the practice to receive counter-affidavits on that point. In *Ames v. Howard*, 1 Sumn. 482, 491, counter-affidavits appear to have been received, and *Judge Story* refused a new trial because of the conflict of evidence which they disclosed. In *Parker v. Hardy*, 24 Pick. 246, affidavits were received to impeach the veracity of the petitioner's new witnesses. See also *Williams v. Baldwin*, 18 Johns. 489; *Pomroy v. Columbian Ins. Co.* 2 Cal. 260. In *Burr v. Palmer*, 28 Vt. 244, the court regarded such affidavits as loose and unsatisfactory; but said they were generally pressed on the court, and always received. In *McGosack v. Brown*, 4 Hump. 251, the court says that there is no rule of law which will exclude cross-affidavits either in civil or criminal cases, though the practice of introducing them in civil cases ought not to be encouraged. Of course the court will always use such affidavits circumspectly when received, to enlighten, not control, its discretion.

There is another consideration. The plaintiff has lived in Scituate since 1842, and near the place of the accident since 1870. If he was subject to serious infirmities prior to the accident, it could hardly fail to have been known to his neighbors. The defendant, though he was informed of the nature of the plaintiff's claim, made no inquiry among them, and the affidavits which he now produces come chiefly from persons living elsewhere.

We are not satisfied that the verdict would be materially reduced on a second trial. On the contrary, all things considered, it is not clear to us, in the light of our experience, that it might not be increased rather than reduced.

New trial denied.

Joseph WHALAN

v.

William L. WHIPPLE.

1. A count for damages, arising from injuries caused while working defective machinery, which does not allege that

1 R. I.

defects were unknown to plaintiff, nor that the same were of such a nature as to be dangerous to the operator exercising due care, is demurrable.

2. A count which alleges that defendant, his servants and agents, promised plaintiff that the machinery should be repaired, and that plaintiff, relying upon such promises, continued to operate the machinery until he was injured by reason of its defects; but which does not allege that reasonable time had elapsed, after making such promises, for defendant to make the repairs,—is demurrable.

(Providence—Decided November 19, 1887.)

ACTION to recover damages for personal injuries. On general demurrer to declaration. *Demurrer sustained.*

The declaration contained two counts. The first stated that "on the — day of —, 1886, at Woonsocket, the plaintiff was engaged at his ordinary occupation in the employment of the defendant in a certain mill in said Woonsocket, and, while using due care, was greatly injured by having his hand crushed by a certain machine upon which said plaintiff was put to work by the superiors of said plaintiff, who were the agents of the defendant, the said agents well knowing that the said machine was defective, and liable to cause injury to any person working on the same, and also well knowing that the plaintiff was unacquainted with said defects; by reason of which negligence the plaintiff's hand was crushed, broken, and greatly injured, causing the plaintiff great pain, permanent injury, and much expense."

The second count stated that, "whereas the plaintiff was employed by the defendant's agents and servants to work upon a certain machine, known as a washing-machine, in a mill operated by the defendant at said Woonsocket under the name of the "Standard Worsted Mill," on the — day of —, 1886, which said machine was defective and connected with defective machinery; and whereas the said defendant and his servants and agents, the superiors over the plaintiff in said mill, well knew the defective condition of said machine and machinery, and promised the plaintiff that the same would be repaired, and thus he would not be liable to be injured while working on the same; by reason of which promises the plaintiff continued to operate the same, relying on said promises, and on said — day of —, 1886, the said plaintiff, while working at said machine, and while using great care, was greatly injured by reason of the defective state of said machine and machinery, which caught the hand of the plaintiff, and drew it into said machine, and greatly crushed, bruised, and broke the same, by reason of which injury the plaintiff lost the fingers of his said hand, and suffered other great losses of time and money in nursing and doctoring said hand, and is forever maimed."

The defendant demurred generally to the declaration.

Messrs. H. J. Carroll and T. J. McFarlin, for plaintiff.

Messrs. George J. West and S. S. Lapham, for defendant.

Per Curiam:

This case is submitted to the court for decision upon general demurrer to the declaration, without argument or briefs upon either side, the court being left to find the defects in the declaration, if any, by itself.

The declaration contains two counts, both of which are very informally drawn. The first we think is clearly insufficient. We also think that the second count must be held to be insufficient. It begins by alleging that the plaintiff was employed by the defendant's agents and servants, instead of alleging that he was employed by the defendant, or even that he was employed by the defendant's agents or servants in the defendant's behalf. We think this is a defect, although, by reason of what is alleged in the remainder of the count, it might not be a fatal defect. The count alleges that the machinery on which the plaintiff was employed was defective, but does not allege that it was defective in such manner as to be dangerous to the operative, he using ordinary care.

The count alleges that the defendant, his servants and agents, promised the plaintiff that the machinery should be repaired, and the plaintiff continued to operate it, relying on said promises, until the — day of —, 1886, when he was injured while working said machinery, by reason of its defectiveness; but does not allege that a reasonable time had elapsed, after the making of the promise, for the defendant to make the repairs. For anything that the declaration shows, the injury may have occurred within a day of the promise and without the lapse of such reasonable time. The count contains clerical deficiencies which ought to be supplied.

Demurrer sustained.

Michael MAGUIRE

v.

R. B. LITTLE & CO.

Proof that plaintiff, while in employ of defendants, went, at their request, into a hayloft used by defendants, to do certain work; that directly in the doorway through which plaintiff had to pass was an unguarded opening through the floor, known to defendants, but unknown to plaintiff, into which plaintiff fell while engaged in his work.—*Held*, sufficient to sustain an action for damages for negligence.

(Providence—Decided December 17, 1887.)

ON plaintiff's exceptions. *Sustained.*

The action was brought to recover damages for personal injuries alleged to have resulted through the negligence of defendants.

Defendants occupied a certain building used by them as a hayloft. In it was an opening or scuttle which they allowed to remain open, unmarked and unguarded, and of which they had notice. The plaintiff, being an employee of the defendants, but not employed in and about the hayloft, was commanded by them to go into the hayloft to perform certain work for the defendants. The plaintiff did go into the

hayloft to perform the work,—being wholly ignorant of the scuttle,—and, while in the performance of such work, fell through the scuttle to the floor below, and was injured.

Upon the trial, at the conclusion of the plaintiff's testimony, the plaintiff, upon motion of the defendants, was nonsuited. To this ruling the plaintiff excepted.

Messrs. C. H. Page and F. P. Owen, for plaintiff.

Mr. S. A. Cooke, Jr., for defendants.

Per Curiam:

The testimony shows that the opening into which the plaintiff fell and was injured was directly in the doorway through which he had to pass in going to the loft to which he was sent. The plaintiff, having no knowledge of the loft, would not naturally expect to find an opening in such a location, and might, in our opinion, fall into it without negligence, unless he was notified of its existence. The evidence does not show that it was so dark that it was necessary for him to carry a lantern to guide his movements. We think, these being the circumstances, that the nonsuit was erroneous, and the exception must be sustained, and a new trial granted.

STATE of Rhode Island

v.

Bernard J. COLLINS and James H. Gannon.

Pub. Stat. chap. 10, § 11, provides that in all elections for general officers, representatives in Congress, electors of President and Vice-President of the United States, and whenever the vote is taken by ballot in the election of senators and representatives in the General Assembly, the ballots may be deposited in the ballot box in an envelope or without an envelope, at the option of the voter, provided "that all ballots given by any voter on the same voting day in said elections, and in all elections, when enclosed in envelopes, shall be enclosed in one and the same envelope." **Pub. Stat. chap. 37, § 17**, provides that "no envelope shall be used in the election of mayor, aldermen, common-council-men, wardens, or ward clerks in cities. *Held*:

(a) That, in view of the prohibition contained in chap. 37, § 17, the proviso in chap. 10, § 11, can not be construed as allowing voting in envelopes for city officers, as well as for the officers designated in said § 11, even if they happen to be voted for at the same election.

(b) That ballots for such city officers, enclosed in an envelope, are illegal, and can not be counted, although ballots for officers who may legally be voted for in an envelope are also in the envelope.

(c) That **Pub. Stat. chap. 10, § 25**, making it an offense for election officers to transmit a part only of the ballots cast, refers to ballots which can be legally received and counted.

(d) Hence, that the action of a warden and clerk of a ward in rejecting and failing to send to the city clerk ballots for mayor and other city officers, found in envelopes containing ballots for officers who could legally be voted for in envelopes at the same election, was not an offense under the statute.

(Providence—Decided December 24, 1887.)

ON defendants' exceptions to the court of common pleas. *Overruled in part and sustained in part.*

At the March Term, 1887, of the Court of Common Pleas, an indictment was found against the defendants, charging that on the 7th day of December, 1886, at Pawtucket, meetings of the qualified electors of the several wards of the city of Pawtucket for the election of a representative in the General Assembly of said State, and of a mayor and other municipal officers of said city, having been duly warned and called according to law, were then and there holden; and that at the meeting of the electors of Ward 5, one Bernard J. Collins was warden, and one James H. Gannon was clerk; and that Collins and Gannon, with force and arms, did then and there maliciously, unlawfully, and knowingly seal up, direct, and send to the city clerk of Pawtucket a part only of the ballots cast for mayor of said city at said meeting, against the form of the statute in such case made and provided, and against the peace and dignity of the State.

The indictment was found under Pub. Stat. chap. 10, § 25, which is as follows:

"Every moderator, warden, or town, ward, or district clerk, who shall neglect to seal up and direct the ballots, or to send the same, as hereinbefore or by the Constitution provided, or who shall knowingly seal up, direct, and send a part only of the ballots, shall be fined not less than \$100 nor more than \$3,000, or be imprisoned not more than three years, either or both, at the discretion of the court which shall try such offender."

The defendants asked the court of common pleas to quash the indictment because:

1. The legally set time for electing representatives in the General Assembly is in April of each year; and as this indictment alleges that on December 7, 1886, there was held an election "for representative, etc." the indictment is bad for not stating whether said election was a special or a called election.

2. The indictment, alleging that the election was "for * * * mayor and other municipal officers," is bad for not specifying that municipal officers were to be voted for.

3. The indictment charges the defendants jointly. They should have been severally indicted.

4. The indictment alleges that the defendants returned "a part only of the ballots cast for mayor at said election," and does not state whether the ballots not returned were ballots legally cast. The indictment should have stated that the defendants returned a part only of the ballots legally cast at said election.

5. The voting lists used at said election were signed by Frederic Clark Sayles, Mayor. Said

Sayles was not a member of, nor the presiding officer of, the Board of Canvassers of said Pawtucket; hence there was no legal election in said Pawtucket December 7, 1886.

The motions to quash were refused, and the defendants excepted. At the trial before a jury in the court of common pleas, it appeared in evidence that, at said election when the ballots were counting, envelopes containing ballots were taken from the ballot-box, and that these envelopes contained ballots both for representative to the General Assembly and for mayor. The defendants, acting on the advice of lawyers present, did not count, and did not return, the ballots for mayor found in the envelopes.

Pub. Stat. chap. 10, § 11, is as follows:

"In all elections for general officers, representatives in Congress, electors of President and Vice-President of the United States, and whenever the vote is taken by ballot in the election of senators and representatives in the General Assembly, the ballots may be deposited in the ballot-box in an envelope such as aforesaid, or without an envelope, at the option of the voter; provided that all ballots given by any voter on the same voting day in said elections, and in all elections, when enclosed in envelopes, shall be enclosed in one and the same envelope."

Pub. Stat. chap. 87, § 17, is as follows: "No envelopes shall be used in the election of mayor, aldermen, common-council-men, wardens, or ward clerks of cities."

The defendants asked the presiding justice to charge the jury:

1. If the jury finds that the ballots unreturned were not legal ballots, the defendants are innocent.

2. As an election for representative in the General Assembly was holding, and as the voters had a right to vote for representative in an envelope, the warden and clerk could only assume that the voters knew the law, and were only voting for representative; and then, when, counting the ballots, they first discover that there are ballots in the envelopes for mayor, etc., they can only then decide whether to count said ballots or not; and if these facts are proven the defendants are not guilty.

3. As the defendants requested and followed legal advice, they are innocent.

The presiding justice refused these requests for instructions to the jury, and charged that, if the defendants knowingly returned a part only of the ballots cast for mayor, they were guilty.

To the refusal to charge, and to the charge given, the defendants excepted. After verdict of guilty, they filed in this court an allowed bill of exceptions, and a motion in arrest of judgment because the indictment does not state to whom and where the defendants returned "a part only of the ballots cast for mayor in said election."

Messrs. Hugh J. Carroll and Thomas J. McParlin for defendants.

Mr. Clarence A. Aldrich, Asst. Atty-Gen., for the State.

Stiness, J., delivered the opinion of the court:

The question before us is whether the proviso in Pub. Stat. chap. 10, § 11, allows voting

in envelopes for city officers, as well as those therein designated, if they happen to be voted for at the same election. We do not think the proviso was meant to extend this privilege so as to include voting in an envelope for officers which another part of the statute prohibits. The proviso evidently means that, in all elections where envelopes are used, each voter shall enclose in one envelope his ballots for all such officers as may be voted for in that way. The purpose is to prevent double voting for one officer. If two or more envelopes were used, no moderator could know that each did not contain a ballot for the same officer. So, if one were in an envelope and one open, there would be no way to determine whether they were duplicates. Hence, the statute means that all ballots which a voter may enclose shall be in one envelope, and then, if there are duplicates, the vote is to be rejected. If the statute were held to mean, as the prosecution contends, that in all elections, if an envelope is used, all the ballots cast by the voter shall be enclosed, there would be an obvious difficulty, in the city of Providence, for example, in case a member of the General Assembly, or representative in Congress, etc., should be voted for at a city election. If, as is customary, only one ballot-box be used, how could it be known whether the envelope of a registry voter contained a vote for members of the city council? Taxpayers could vote for both classes of officers; registry voters for only one class; and yet their envelopes would mingle indiscriminately in the ballot-box. In an election solely for city officers, it is plain that a moderator could not receive ballots in an envelope; for they would be offered in a manner contrary to law. If, then, as we think, the right to vote in an envelope is not changed or extended by the fact that another officer who may be voted for in an envelope is to be voted for at the same time with city officers, ballots for these officers in an envelope are equally illegal, and therefore cannot be counted. But if they cannot be counted, we see no reason why they should be returned. It follows, then, that Pub. Stat. chap. 10, § 25, under which the defendants are indicted for sending a part only of the ballots, must refer to ballots which can be legally received and counted. This is evident, also, from other parts of the chapter.

Pub. Stat. chap. 10, § 14, requires the moderator or warden and clerk to open the envelopes, count the ballots, and announce the result; and § 15 provides for the rejection of double ballots for the same office. These are illegal ballots, and must be then and there rejected in order to announce the result. For the same reason, other ballots, plainly illegal, should also be rejected. In doing this no judicial action is called for on the part of the moderator or clerk. It is simply a matter of inspection. If the ballots do not conform to law, they cannot be received; or if received without knowledge of their illegality, as in the case of ballots in envelopes, they must be re-

jected when their illegality becomes apparent. If they do not conform to the law they are no votes. We think, therefore, that the warden and clerk had the right to reject the ballots for mayor and other city officers, found in envelopes, and consequently that they were not bound to return them.

As we understand the second request to charge, it raises this point. It is quite vague, and, taken strictly, the exception based upon the request might, without impropriety, be overruled. In view, however, of the plain question in the case to which this request was doubtless intended to apply, we think the exception should be sustained.

The motions to quash were properly overruled, as the indictment states a case under the statute. The facts relating to the votes in envelopes appear only from the evidence.

Exceptions to second request to charge, sustained. Other exceptions and motions to quash, overruled.

UNION COMPANY

v.

Charles H. PECKHAM *et al.*

1. To make a **highway by dedication**, there must be the **assent of the owners** of the land to its appropriation for a public highway, and its **use by the public** for such purpose, and for such length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment. The assent of the owners may be inferred from silence and acquiescence in the public use.
2. But if the act of dedication be unequivocal, it may take place immediately.
3. The **layout of a way**, which is a **thoroughfare**, and not a mere court, or way terminating on private property, is regarded as significant. Some cases assume that the **intention to dedicate** may be implied from the opening of such thoroughfare, where nothing appears to the contrary.
4. **Dedication**, once complete, **cannot be revoked** so long as the public use is maintained and public accommodation and private right might be affected by an interruption of the enjoyment.

(Providence—Decided January 7, 1893.)

ACTION of trespass *quare clausum fregit*. Heard by the court, trial by jury having been waived. *Judgment for defendants.*

The action was brought by plaintiff, claiming to be sole and exclusive owner of a private way, known as Narragansett Avenue, in the town of Cranston, against defendants, for tak-

*§ 14. After the voting in any town, city, ward or district, for the officers herein mentioned, or any of them, shall be closed, the moderator and town clerk, or the warden and ward clerk, or the moderator and district clerk, shall, in open town, ward, or district meetings, proceed to open the envelopes and count the ballots; and the moderator shall announce the result, and the clerks of the towns not

divided into districts shall give certificates to the persons elected.

§ 15. If any envelopes shall contain more than one ballot for the same person for the same office, or ballots for different persons for the same office, either on the same piece of paper or on different pieces of paper, all such ballots shall be rejected, and not counted.

ing down and removing certain fences which plaintiff had placed across Narragansett Avenue, and for other trespasses.

Defendants justified their acts on the ground that they were acting as servants and agents of a certain corporation which then was and now is the owner of Narragansett Park, which was situated next to said avenue; that said corporation had a right to pass over said avenue to get to the park, and that they were therefore in the lawful exercise of their rights in taking down the fences and opening the way to the park.

Further facts appear in the opinion.

Messrs. Rathbone, Gardner and C. Frank Parkhurst, for plaintiff:

There is no evidence that the avenue has ever become a public highway, either (1) by action of the town council, under Pub. Stat. chap. 64, §§ 1-17; (2) by twenty years' use, and action by town council, under Pub. Stat. chap. 64, §§ 18-24; (3) by conveyance, under chap. 64, § 25; or (4) by dedication or user at common law, under chap. 64, §§ 26, 27.

By description in deed, bounding estate on "easterly line" of Narragansett Avenue, the fee of the avenue is excluded.

Hughes v. Providence & W. R. Co. 2 R. I. 503; Ang. & D. Highw. § 815, p. 419, note 2, and cases cited.

Dedication, to be complete, must be made by the owner of the fee to the general use of the public, and must be accepted by the public at large. A user by a limited portion of the public will not be evidence of a dedication, but rather of a mere revocable license.

Ang. & D. Highw. §§ 184-141, and cases cited in § 140.

Where the way is opened as a private pass-way, and that fact clearly appears, it cannot be converted into a public highway by the mere use thereof, no matter how long that use may be continued.

Hall v. McLeod, 2 Met. (Ky.) 98; *White v. Bradley*, 66 Me. 254; *Remington v. Millard*, 1 R. I. 98; *Barker v. Clark*, 4 N. H. 380.

Without a clear and unequivocal manifestation of an intention to dedicate, dedication will not be presumed until after a twenty years' user by the public.

Ang. & D. Highw. §§ 142, 143, 146, 147, and cases cited.

There is no evidence that any right of way, strictly "appurtenant" to Narragansett Park, ever existed.

No easement, properly so called, of a way over Narragansett Avenue to Narragansett Park ever existed at any time.

The quasi easement did not pass, by the sale by the original proprietor of the quasi dominant estate, with the "appurtenances."

Whalley v. Thompson, 1 Bos. & P. 375; *Langley v. Hammond*, L. R. 8 Exch. 161; *S. C.* 37 L. J. Exch. 118; *Thompson v. Waterlow*, L. R. 6 Eq. 86; *S. C.* 37 L. J. Ch. 495; *Worthington v. Grinson*, 2 El. & El. 618; *S. C.* 29 L. J. Q. B. 116; *Pearson v. Spencer*, 1 B. & S. affirmed 3 B. & S. 761; *Polden v. Bastard*, L. R. 1 Q. B. 156; *S. C.* 35 L. J. Q. B. 92; *S. C.* 7 B. & S. 180; *Barker v. Clark*, 4 N. H. 380; *Gayetty v. Bethune*, 14 Mass. 49; *Grant v. Chase*, 17 Mass. 443; *Persons v. Johnson*, 68 N. Y. 62; *Evans v. Dana*, 7 R. I. 806; *Providence Tool Co. v. Cortiss* ; R. I.

S. Engine Co. 9 R. I. 564; *O'Rorke v. Smith*, 11 R. I. 259; *Goddard, Easem. Bennett's Am. ed.* p. 100 *et seq.*

The right of way here claimed is not a "way of necessity;" for it appears that Narragansett Park has a frontage of 1,500 feet on a public highway (Park Avenue), where a gate does in fact exist, and where there is sufficient space for all purposes of entrance and exit.

A "way of necessity" can be acquired by implied grant only when the grantee has no other way to his ground. Convenience alone, even great convenience, is not sufficient to raise the implication of a right of way.

Goddard, Easem. Bennett's Am. ed. 267, 268 *et seq.*; *Valley Falls Co. v. Dolan*, 9 R. I. 489; *Kvans v. Dana*, 7 R. I. 806; *Providence Tool Co. v. Cortiss S. Engine Co.* 9 R. I. 564; *O'Rorke v. Smith*, 11 R. I. 259; *Nichols v. Luca*, 24 Pick. 102; *Fetters v. Humphrey*, 18 N. J. Eq. 260; *Stuyvesant v. Woodruff*, 21 N. J. L. 133; *Holme v. Goring*, 2 Bing. 76, 2 L. J. C. P. 184; *Proctor v. Hodgson*, 10 Exch. 824; 24 L. J. Exch. 195; *Dodd v. Burchell*, 1 H. & C. 113, 31 L. J. Exch. 364; *Lawton v. Rivers*, 2 McCord, 445; *Gayetty v. Bethune*, 14 Mass. 55; *Lide v. Hadley*, 36 Ala. 627; *Viall v. Carpenter*, 14 Gray, 126; *Alley v. Carleton*, 29 Tex. 74; *Trask v. Patterson*, 29 Me. 499; *Anderson v. Buchanan*, 8 Ind. 132; *Hall v. McLeod*, 2 Met. (Ky.) 98; *Ogden v. Grove*, 38 Pa. 487; *Oliver v. Pitman*, 98 Mass. 50; *Allen v. Kincaid*, 11 Me. 155.

Messrs. Charles Bradley and Walter F. Angell for defendants.

Stiness, J., delivered the opinion of the court:

Two questions are raised in the case: First, whether the strip of land called Narragansett Avenue is a public way by dedication; and second, whether, otherwise, the plaintiff is estopped, by reason of the deed of a common grantor prior in date to the plaintiff's deed, from interfering with its use as a way by the Rhode Island Society for the Encouragement of Domestic Industry, under whose authority the defendants justify the alleged trespass.

The rule in regard to highways by dedication is thus stated by Greene, *Ch. J.*, in *Hughes v. Providence & W. R. Co.* 2 R. I. 498, 499: "To make a highway by dedication, there must be the assent of the owners of the land to its appropriation for a public highway, and its use by the public for such purpose, and for such a length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment." The owner's intention to dedicate must appear; and the acceptance of such dedication, by using it, on the part of the public, must also appear. Where these two facts concur, the dedication is complete. *Fairfield v. Morrey*, 44 Vt. 239, 243. "Time, therefore, though often a material ingredient in the evidence, is not an indispensable ingredient in the act of dedication. If the act of dedication be unequivocal, it may take place immediately." *Ogle v. Phila. W. & B. R. Co.* 8 Houst. (Del.) 273; Ang. Highw. 8d ed. § 142.

The question, then, is whether the facts show a dedication within these rules. In 1866 the A. & W. Sprague Mfg. Co. owned the strip of land in dispute, and a considerable tract on

each side of it. On the east side of the strip the company built a trotting-park, with entrances opening on the strip, along which the path extended upwards of a thousand feet. Through Amasa Sprague, an officer of the corporation, a survey and plat of the land was made, on which the strip was laid out as Narragansett Avenue. This plat was not recorded, however, nor was it referred to in the deeds of the land subsequently given. The avenue was opened and worked to a grade; a substantial bridge was built over a railroad across which the avenue ran; the fence and entrance to the park were built along its line; tracks for horse cars, running from the city of Providence, were laid upon it; and the way thus laid out and built extended from the main road between Providence and Cranston Print Works, at one end, to the road to Knightsville, at the other. Between these highways there was no other connection, except by a long detour. The layout of a way which is a thoroughfare, and not a mere court, or way terminating on private property, has always been regarded as significant in respect to dedication. There was considerable question in England whether a street of the latter kind could be deemed a public highway, until the case of *Bateman v. Bluck*, 14 Eng. L. & Eq. 69, which seems to have settled the question by deciding that it can be. While upon this point there has been a diversity of decision in this country, yet the cases generally turn upon the inference to be drawn upon such a layout and situation. In some of the cases it seems to be assumed that an intention to dedicate may be implied from the opening of a thoroughfare between public roads or public places, where nothing appears to the contrary. Thus Brayton, J., in *Simmons v. Mumford*, 2 R. I. 172, 188, says, referring to the claim of dedication: "To this point the counsel for the plaintiff replies that the land claimed to be dedicated as a public highway terminates at private land, and, if laid open, would not constitute a thoroughfare. * * * The way claimed to be dedicated, though it opened northerly into South Street, extended to no other way on the south, and extended neither to mill, nor to market, nor to any public place. Had it been opened, it would constitute a mere court, in which the public could have no necessity to travel, and to whom it could be of no use whatever."

So Best, Ch. J., in *Jarvis v. Dean*, 3 Bing. 448, says: "In *Wood v. Veal* the road was only used by the tenants of particular houses. There was no thoroughfare, and there were circumstances to show that the owners of the soil never had assented to the way being used as a public road. There were no such facts in the present case; on the contrary, it was beneficial to their property that there should be a public approach to this street from the public roads at both ends of it. As it had been used for four or five years as a public road, the jury were warranted in presuming that it was used with the full assent of the owners of the soil."

In the present case, Mr. Sprague testified that Narragansett Avenue was intended to be a public highway, and to extend to Greenwich Street, farther on; but this part of it was never opened. He also testified that since its open-

ing it has been used by the public as a highway, and was repaired at the expense of the town when he was surveyor of highways. Others testify that they have used it, chiefly, however, in going to the park. While the extent to which the public have used it is not very clearly shown, this testimony is uncontradicted. The advantage to the public is apparent from the connection opened between the two roads, and the town would not be likely to repair it unless it was used by the public.

We think the evidence is sufficient to show both the intention to dedicate, and acceptance; and thus it covers both the essential elements of a complete dedication. The only evidence offered by the plaintiff to rebut the inference of dedication is that in 1869, three or four years after the avenue had been opened, a notice was posted: "This road is private property." If such a notice had been put up when the road was opened, it would have tended to rebut the inference of dedication, and to indicate simply a permissive use by the public. But dedication, once complete, cannot be revoked, so long as the public use is maintained, and public accommodation and private right might be affected by an interruption of the enjoyment. *Hughes v. Providence & W. R. Co.* 2 R. I. 493, 499; Ang. Highw. 3d ed. § 167, and cases cited. Upon the undisputed testimony in this case, Narragansett Avenue had already become a public highway, and the posting of such a notice afterwards could not change its character. The notice probably meant no more than a warning that the road had not been declared a public highway, by the town, so as to make the town liable for its repair, under the statute. See R. I. Rev. Stat. chap. 43, § 25.

The plaintiff further urges that no authority has been shown from the corporation owning the land to Amasa Sprague to open and dedicate the road. He was an officer of the company, and one of its principal stockholders, acting for the company in the improvements made at that time. The assent of the owner may be inferred from silence and acquiescence in the public use. *Hughes v. Providence & W. R. Co. supra*.

It follows that the act of the defendants, the servants of the society owning the land on one side of the avenue in question, in removing an obstruction to a public way, was not a trespass, and that judgment must be given in their favor. It is unnecessary, in this view of the case, to consider the question of estoppel.

Judgment for the defendants.

Daniel W. BRAYTON

v.

Samuel S. DEXTER.

Where an appeal from a justice court to the common pleas has been dismissed in the common pleas because the appeal bond was not duly executed, an order for a new trial in the common pleas can not be obtained on a petition therefor to the supreme court.

(Providence—Decided January 7, 1888.)

ON defendant's petition for a new trial. *Denied.*

The case is stated in the opinion of the court.
Mr. W. B. Tanner, for plaintiff.
Mr. J. Osfield, Jr., for defendant.

Per Curiam:

This is an action of trover, brought originally in the Justice Court of the Town of Lincoln, where, on trial under the plea of not guilty, judgment was rendered on March 6, 1886, for the plaintiff for \$34.98 damages, and 4.70 costs. The defendant appealed to the court of common pleas, the appeal bond being signed, however, not by the defendant personally, but in his name by his attorney of record as his attorney. In the court of common pleas the appeal was dismissed on motion of the plaintiff, because the bond was not duly executed, the attorney of record, as such, having no power to sign it in the name of his client. See *Murray v. Peckham*, 2 New Eng. Rep. 508. The defendant now petitions for a new trial, "because, by reason of accident, misfortune, and mistake, he was prevented from having a full, fair, and impartial trial in said court of common pleas." The plaintiff opposes the petition, and contends that the court has no power to grant it.

He contends that the court cannot grant a new trial in the justice court, because the only power given to grant a trial in a justice court is given by Pub. Stat. chap. 221, ¶ 8, and is expressly limited to cases where no trial has been had. And see *Vaughn v. Allen*, 3 R. I. 122. This is clearly so. The defendant, however, if we understand his petition aright, asks for a new trial, not in the justice court, but in the court of common pleas.

The only provision under which it can be claimed that a new trial is grantable in the court of common pleas is Pub. Stat. chap. 221, ¶ 2, which authorizes this court to grant a trial, or a new trial, in certain circumstances or contingencies, in a suit "which shall have been tried or decided" in the court of common pleas within one year previous to the application for such trial or new trial.

The plaintiff contends that the petitioner here is not within this section, because the action never was "tried or decided" in the court of common pleas, since the appeal was void. We think this is so. The bond being void, the appeal was at least voidable, if not utterly void; and when dismissed on the plaintiff's motion it was as if it had never been taken. The fact is the defendant, having failed to accomplish his appeal in regular form, is endeavoring to accomplish it under the form of a petition for a new trial. The General Assembly has not made any provision for this, nor has it empowered the court to give further time for appeal to appellants who, by accident or mistake, have failed to perfect their appeal as allowed by statute. The statutes remain now as they were when the civil jurisdiction of justices of the peace, or justice courts, was limited to actions in which the debt or damages demanded did not exceed \$20, though now, owing to the greatly enlarged jurisdiction, the consequences of such accident or mistake is very much more serious.

New trial denied.

1 R. I.

Robert SHERMAN, Trustee,

v.

Charles A. COBB.

Before a tenant who is holding under a lease which provides for fixing by appraisal the amount of rent to be paid can be sued, without appraisal, for a merely reasonable rent, the landlord must have tried and failed to get the rent fixed pursuant to the terms of the lease.

(Providence—Decided January 21, 1888.)

ACTION for rent. Heard by the court, jury trial being waived. *Judgment for defendant.*
 The facts are stated in the opinion of the court, and in the opinion delivered when the case appeared at a former hearing, 4 New Eng. Rep. 794.

Mr. James Tillinghast, for plaintiff.

Mr. Patrick J. McCarthy, for defendant.

Per Curiam:

The plaintiff in this action, having failed to recover on the award, now seeks to recover on a count for use and occupation. The defendant, as appeared at the former hearing, is in occupation under an indenture of lease for five years, with covenant for renewals, five years by five years, for seventy-five years longer. It stipulates that the rent, after the first five years, shall be fixed by appraisal for each succeeding five, and be paid by the lessee as appraised. No appraisal has been made for the current five years. The defendant contends that he is liable for rent only according to the terms of the lease, and offers to join the plaintiff in the appointment of referees to make the appraisal. The plaintiff contends that the attempt already made to fix the rent by arbitration having failed, he is entitled to recover a reasonable rent in his pending action. To this point he cites the following cases: *Shippen v. Stickney*, 8 Met. 384, 389; *Stoss v. Heissler*, 8 West. Rep. 441, 445; *Uhrig v. Williamsburgh City Fire Ins. Co.* 2 Cent. Rep. 415, 101 N. Y. 302.

These cases hold that, when a price under a contract to sell, or a rent under a lease, is to be fixed by appraisal, then, if the referees appointed under the contract or lease to make the appraisal are unable to make it, the vendor or lessor will be entitled to sue for a reasonable price or rent. It will be seen that, according to these cases, the plaintiff's right to sue for a reasonable rent depends upon a condition precedent, namely, his having tried to get the rent fixed in pursuance of the terms of the lease, and failed to do so. The plaintiff contends that he has complied with this condition, by joining the defendant in the appointment of arbitrators, whose authority the defendant revokes. In our former decision, however, we sustained the revocation, on the ground that the appointment was not pursuant to the terms of the lease; for, if it had been, the revocation would have been unavailing. We still adhere to that view. For anything that appears, a reference under the lease will be effectual; and we think the defendant, if he is to be regarded as still occupying under the lease, which is not ques-

tioned, is entitled to such a reference before he is sued, without appraisal, for a merely reasonable rent.

Judgment for defendant for costs.

Joel A. WEBB

v.

Wanton R. CARPENTER *et al.*, Exrs.

A will gave several bequests to different persons, and the residuum to a certain nephew and others, to be divided between them. A codicil was to the following effect: "Thinking I have not given my nephew as much as I wanted to, * * * I want a good monument, and, when all my expenses are paid, I want my nephew to have all of the money that is left, if there is any. I want him to have instead of having it divided as it was written in my will." *Held*, that this codicil was not so inconsistent with the bequests made in the will as to work a revocation of them, and throw the amount thereof into the residuum; but that its intent and effect was merely to give the nephew all the residuum, after payment of such bequests, instead of dividing it among him and the others as originally provided in the will.

(Providence—Decided January 7, 1888.)

ACTION of assumpsit to recover money alleged to be due plaintiff under the provisions of a will. On demurrer to the pleas. *Overruled.*

The case is stated in the opinion of the court.

Messrs. Nathan W. Littlefield, Charles H. Page, and Franklin P. Owen, for plaintiff.

Messrs. Ziba O. Slocum, A. P. Crafts, and F. W. Tillinghast, for defendants.

Stiness, J., delivered the opinion of the court:

The plaintiff sues for money which he claims is due to him as residuary legatee, under a codicil to the will of Hannah Barrows, late of South Kingston, deceased. The defendants, executors of the will, plead, setting forth the will; that they have paid certain legacies, given by the will, and have also paid all the balance remaining to the plaintiff, as residuary legatee. To this plea the plaintiff demurs, thus raising the question whether the codicil revoked the bequests in dispute, and entitled the plaintiff to receive them as a part of the residuum.

The will gave several bequests of money and personal property to nephews, nieces, and others, and the residuum to the children of a sister, to the plaintiff, and another, to be equally divided between them. In the codicil, after saying, "thinking I have not given my nephew Joel Audubon Webb as much as I wanted to," she gave him certain articles of household furniture, and finally said: "I want a good monument, and when all of my expenses is paid, I

want J. Audubon Webb to have all of the money that is left, if there is any. I want him to have instead of having it divided as it was written in my will."

The plaintiff claims that the codicil revokes all the pecuniary legacies of the will, and gives to him all the money that is left after payment for the monument and expenses. The defendants contend that this clause of the codicil affects only the residuary clause of the will, by giving the residuum to the plaintiff instead of dividing it as therein provided.

A will and a codicil are to be construed together, as one testamentary act, and dispositions in the will are not to be disturbed any more than is necessary to give effect to the codicil. 1 Jarm. Wills, 5th Am. ed. from 4th Lond. ed. 348. "A will or codicil may operate as a revocation of a prior testamentary instrument, by the effect, either of an express clause of revocation, or of an inconsistent disposition of the previously devised property." *Derby v. Derby*, 4 R. I. 414, 426; 1 Jarm. Wills, 5th Am. ed. from 4th Lond. ed. 336.

In this codicil the pecuniary legacies of the will are not expressly revoked. The question, then, is whether the words, "all of the money that is left, if there is any, I want him to have, instead of having it divided as it was written in my will," are so inconsistent with the former disposition of the money as to imply a revocation of the bequests. We think not. Such an implication must be clear and certain. If the codicil can as well be construed to refer to the residuary clause, without affecting the particular bequests, as otherwise, we are bound to give it that construction. Not only can it be so construed, but we think the language used evinces an intention to limit it to that, without disturbing the other legacies. The testatrix says she thinks she has not given the plaintiff as much as she wanted to; but the natural import of this statement is not that she wanted to give him all. By giving him all that is left, if there is any, she indicates that possibly nothing will be left. Under the facts as set out in the pleadings and admitted by the demurrer, it appears that there was a surplus over all the legacies. In view of the amount of these legacies, it is difficult to suppose she would have intimated a doubt as to the surplus, if only the monument and expenses were to be considered. But, however it might have been if the clause had stopped there, the concluding words seem to show clearly what the testatrix had in mind. It was that the plaintiff was to have all that was left under the will, instead of having it divided into several parts, as it would have been but for the codicil. Legacies of unequal amounts would not be likely to be spoken of as a division. The use of the word "divided" points clearly to the residuary clause. This accords with the terms of both will and codicil, and shows what was the increase she wanted the plaintiff to have, namely, the whole of the residuum instead of a part of it. Since, then, there is no necessary or implied revocation of the bequests of the will, in this clause of the codicil, but an apparent intention to the contrary, they must stand as valid bequests, which were properly paid by the executors.

The demurrers are therefore overruled.

STATE of Rhode Island

v.

William FITZPATRICK.

The provision of **R. I. Pub. Stat. chap. 634**, of May 4, 1887, § 1, which prohibits any person from keeping any intoxicating liquors "for the purpose of sale," is not, for the reason that it may incidentally interfere with foreign or interstate commerce, obnoxious to the Federal Constitution, art. 1, § 8, which confers upon Congress exclusive power "to regulate commerce with foreign nations and among the several States."

(Providence—Decided January 7, 1888.)

ON constitutional questions certified to the Supreme Court under R. I. Pub. Stat. chap. 220, §§ 1-9.

The case is stated in the opinion.

Mr. **Clarence A. Aldrich**, *Asst. Atty.-Gen.*, for the state.

Mr. **Hugh J. Carroll**, for defendant.

Durfee, Ch. J., delivered the opinion of the court:

This case comes before us from the District Court of the Tenth Judicial District, by certificate, on a constitutional question. It is a complaint under R. I., Pub. Laws, chap. 596 of May 27, 1886, and chap. 634, of May 4, 1887, against the defendant, for keeping without lawful authority intoxicating liquors "for the purpose of sale," in violation of chap. 634, § 1, in amendment of chap. 596, § 1, charging the offense substantially in the language of the statute. In the district court the defendant made the following motion, to wit:

"The defendant moves that the above-entitled complaint be dismissed, because it is brought under § 1 of chapter 634 of the Public Statutes, which attempts to prohibit the keeping, for the purpose of sale, of any of the liquors enumerated in said section, without making any distinction as to whether the sale is to be within or without this State; and he claims that he has a right to keep the same for the purpose of sale without this State. U. S. Const. art. 1, § 8."

The district court overruled the motion, and, having found the defendant guilty, has certified the question involved in it to this court for decision.

Chap. 634, § 1, so far as it is necessary to restate it for the purposes of the question, is as follows, to wit:

"No person shall manufacture or sell, or suffer to be manufactured or sold, or keep, or suffer to be kept, on his premises or possessions, or under his charge for the purpose of sale, any ale, wine, rum, or other strong or malt or intoxicating liquors, a part of which is ale, wine, rum, or other strong or malt or intoxicating liquors, unless as hereinbefore provided."

The corresponding sections in earlier statutes, whether license or prohibitory, contained the words "within this State" after the words "for the purpose of sale," thus making the keeping illegal only when it was for the pur-

pose of selling the forbidden liquors within the State. The defendant contends that, in consequence of the alteration, the keeping is prohibited if the liquors are kept in the State for the purpose of sale, even though they are intended to be sold out of the State; and that the section is therefore repugnant to the Constitution of the United States, art. 1, § 8, which confers upon Congress a variety of powers, and, among them, power "to regulate commerce with foreign nations and among the several States."

It will be well to determine the scope and import of the question thus raised before we proceed to consider and decide it. First, then, when is it that liquors which are in the possession of a person in this State are kept by him for the purpose of sale, within the meaning of the statute? They are clearly not so kept when they are kept by him for his own use, without any intention of selling them. Suppose he has the liquors in the State, in the act of transporting them through this to another State for the purpose of selling them in the latter; are they then being kept by him for the purpose of sale, within the meaning of the statute? We think not; for though in a general sense he keeps such liquors for the purpose of sale, it is not the purpose for which he is keeping them in this State,—the purpose for which he keeps them here being not sale, but transportation. If such a person were complained of for illegal keeping, the charge would be that in some particular town he did, without lawful authority, keep the liquors for the purpose of sale, and he could truly reply that he did not keep them in that town for that purpose, and was therefore not guilty. The same construction will hold if intoxicating liquors are kept in this State for storage simply, though they are intended to be ultimately carried elsewhere and sold. But if keeping in either of these ways is not prohibited, then the operation of § 1, in so far as it can interfere with commerce with foreign nations and among the States, is extremely limited. We do not say, however, that liquors may not be kept in this State for the purpose of sale in other States, in such way that the keeping would violate § 1. For instance: If intoxicating liquors were kept in this State to be sold on orders received or procured in other States, or to customers coming from other States, we think the keeping would be within the prohibition, even though the sales were meant not to be completed in this State. In such a case, the place of keeping would be the headquarters of the traffic, or at least the place from which, if not at which, the sales would be made. Making the sales would be the purpose for which the liquors were kept there, and we think the General Assembly must be held to have intended that no such place should be tolerated in the State. But no other way occurs to us in which liquors not intended for sale in this State can be kept here so that the keeping would be within the prohibition of § 1. The question presented, then, is whether, because such keeping is prohibited, § 1 is in conflict with the Constitution of the United States.

It will be seen that the question, as presented, assumes that the prohibition, if it be unconstitutional,

tutional as it applies to intoxicating liquors kept in this State for sale elsewhere, is likewise unconstitutional as it applies to such liquors kept in this State for sale within it. This is not clear to us. *State v. Amery*, 12 R. I. 64. Nor are we clear that the question presented can be properly raised by a mere motion to quash. *Mugler v. Kansas*, 123 U. S. 623 (31 L. ed. 205). But passing these points, which have not been argued at the bar, we proceed to consider the question in the larger way in which it has been discussed.

We deem it perfectly well settled, by the decisions of the Supreme Court of the United States, that the several States have power to restrict, and even to prohibit altogether, the sale of intoxicating liquors for use as a beverage within their borders, and consequently, of course, to prohibit the keeping of them for sale to the same extent. *Cooley*, Const. Lim. 582, 588, and cases cited; *Mugler v. Kansas*, *supra*. The power to do this has been denominated a police power; a power not delegated to the general government, but remaining to the States, to enable them to regulate for their own welfare, as they understand their welfare, their internal or domestic concerns. The power is signally exercised in legislation designed to promote popular education; to protect the public health and morals; to punish and prevent crime; to alleviate and prevent pauperism; and, especially, to diminish and prevent the demoralization and impoverishment and the numberless vices and miseries which are the sure concomitants and consequences of a free traffic in intoxicating liquors, by restraining or prohibiting it. The power was exhaustively discussed and considered in the Supreme Court of the United States in the *License Cases*, 46 U. S. 5 How. 504 (12 L. ed. 256), with particular reference to its exercise in legislation for the restraint of the liquor traffic; and while the justices did not fully agree in the reasons given by them for decision, they did agree in fully affirming the authority of the States within their own borders. *Chief Justice Taney*, and *Justices Catron and Nelson*, rested their judgment distinctly on the ground that the power of the States to pass restrictive laws in the matter was complete, notwithstanding the laws might indirectly interfere with interstate commerce, so long as they did not come into conflict with any law or regulation of Congress; and some of the other justices,—enough to make a majority of the court,—unless we misunderstand their opinions, concurred with them, though they preferred to take their stand upon a still deeper and broader ground of State rights. If this doctrine of *Chief Justice Taney* and *Justices Catron and Nelson* be correct, and is still adhered to by the Supreme Court of the United States, the defendant's contention of course cannot prevail, for it is not pretended that there is any federal regulation of interstate commerce with which the provisions under which he is complained of comes into conflict. But, not to put too much reliance on this view, we will proceed to the broader consideration of the question.

As we have seen, there can be no doubt of the power of the States (under the decisions of the Supreme Court of the United States) to prohibit altogether the sale of intoxicating li-

quors within their borders, and yet it is perfectly evident that such a prohibition does obstruct the freedom and lessen the extent of commerce among the States. For example: A manufacturer of intoxicating liquors of another State could not send the product of his manufactory to a prohibitory State and sell it there. He could not even receive orders for his liquors from such a State, and fill them, if a delivery in such State were necessary to a complete compliance with the orders. Nor could a person living in another State go into such a State and purchase intoxicating liquors there to carry home with him, though it might be very advantageous for him to do so if he were not prevented by the law. In the *License Cases*, 46 U. S. 5 How. 504 (12 L. ed. 256), a law of New Hampshire, under which a sale in that State of gin imported from Boston was punished, was held not to be void for interfering with the power of Congress to regulate commerce among the States, though the gin was sold in the cask in which it was imported. In the same case, in reply to the argument that the restrictive legislation tended to lessen importation, *Mr. Justice McLean* said that "a law of a State is not rendered unconstitutional by an incidental reduction of importation; and especially not when the State regulation has a salutary tendency on society, and is founded on the highest moral considerations." And he further remarked: "When, in the appropriate exercise of their Federal and State powers, contingently and incidentally, their lines of action run into each other, if the State power be necessary to the preservation of the morals or safety of the community, it must be maintained." The doctrine of the justices who took the broader view, if we rightly understand their opinions, was that a State law passed in good faith for the suppression of intemperance or of the traffic in intoxicating liquors could not be condemned as unconstitutional because it might incidentally, among its effects, hamper the freedom or lessen the extent of interstate commerce. And see *State v. Peckham*, 3 R. I. 289. The question which we now propose to consider is whether this State has transcended the power thus conceded to it, by the enactment under which the defendant was complained of.

In considering this question we will, in the first place, recur to a matter to which we have already adverted; namely, that the quantity of intoxicating liquors kept in this State solely for the purpose of selling them elsewhere must, from the nature of things, be very small. For what is there to induce any person who has liquors to sell in other States to keep them in this State for that purpose? Some such persons there may have been when the law first enacted under the prohibitory amendment went into effect, but that law did not prohibit the keeping for the purpose of sale out of the State, and there was ample time to dispose of liquors so kept before this present law went into effect. There might be such persons if the manufacturing of intoxicating liquors were permitted, but manufacturing is prohibited equally with selling. In its practical operation, therefore, the enactment can have but little effect on interstate commerce.

In the second place, we remark that the more unlimited the prohibition is, the more effective it is likely to be; for if intoxicating liquors can be lawfully kept in the State for the purpose of sale elsewhere, the fact that they can be so kept is liable to be availed of as a blind or feint under which to cover a keeping of them for sale in this State. The State borders would afford a favorable ground for the practice of such an evasion or circumvention of the law. Moreover, if the traffic be an evil, can the State permit itself to be the starting point from which the evil shall proceed into other States, without some loss of the moral prestige and power which it must preserve in order to secure for its laws that popular homage and respect without which they cannot be effectually enforced? Certainly the State would have full power to follow its own judgment, and to legislate as it has done in this matter, unless it thereby encroaches unwarrantably upon the power of Congress; and in that regard we find it difficult to see how a law which forbids the keeping of intoxicating liquors in one State for sale in another interferes with interstate commerce, any more than a law which forbids the sale of such liquors in one State, which have been imported from another; and yet, as we have seen, a law of the latter description has been held to be a proper exercise of the police power of the States by the Supreme Court of the United States. And see *Pearson v. International Distillery* (Iowa), 34 N. W. Rep. 1.

We see no reason for doubt that our law was passed in perfect good faith, for the purpose of carrying the prohibitory amendment into effect, or to suppose that, if it interferes with foreign or interstate commerce, the interference is other than a merely incidental effect or consequence. It is our duty to uphold it as constitutional until we are satisfied that it is unconstitutional. We are not satisfied that the provision of our Prohibitory Law under which the defendant has been complained of is unconstitutional. We sustain it as valid, and send the case back to the District Court for sentence.

Order accordingly.

Re William FITZPATRICK'S LIQUORS.

1. On certificate of constitutional questions the court will only consider such questions as involve the constitutionality of some Act of the General Assembly.
2. Pub. Laws, chap. 596, authorizing the seizure and forfeiture of intoxicating liquors is not unconstitutional in that it does not require the warrant of seizure to definitely describe the place to be searched and the thing to be seized.
3. The Constitution authorizes the General Assembly to confer upon district courts jurisdiction of proceedings to condemn prohibited liquors, without regard to the value of the property seized, subject to the limitation that final jurisdiction shall not be conferred upon courts sitting without a jury; and in this

respect Pub. Laws, chap. 684, is not an unauthorized exercise of legislative authority.

4. In view of the duty imposed on the General Assembly by the fifth amendment to the Constitution, "to provide by law for carrying the amendment into effect," the statutes in question are not repugnant to the Constitution in that they authorize unreasonable searches and seizures.
5. The limitations prescribed by the first ten amendments to the Federal Constitution are applicable only to the government of the United States.

(Decided January 7, 1888.)

CONSTITUTIONAL questions certified to the Supreme Court under Pub. Stat. chap. 220, §§ 1-9.

The case is stated in the opinion.

Mr. Clarence A. Aldrich, Asst. Atty-Gen., for the State.

Messrs. Hugh J. Carroll and Thomas J. McParlin, for claimant.

Durfee, Ch. J., delivered the opinion of the court:

This is a proceeding under Pub. Laws, chap. 596, of May 27, 1888, and chap. 684 of May 4, 1887, for the seizure and forfeiture of certain intoxicating liquors, and of the vessels containing them. The proceeding was begun in the District Court of the Tenth Judicial District by complaint and warrant, under which certain liquors claimed by the defendant were seized and brought before said court. The defendant moved the court to quash the proceeding, for the reason that it and the law purporting to authorize it are illegal and unconstitutional. The court overruled the motion, and the cause now comes before us upon its certificate of the constitutional questions raised.

The only questions which can be brought before us by such certificate are questions involving the constitutionality of an Act of the General Assembly, and therefore any question in regard to the legality or constitutionality of the proceeding cannot properly be considered here, unless the question is, in effect, a question in regard to the constitutionality of the Act under which the proceeding was instituted or carried on. The better mode of presenting such questions is to present them directly as questions in regard to the Acts or parts of Acts meant to be impeached, mentioning the Acts or parts of Acts.

The first ground assigned for quashing the proceeding is because "it does not definitely describe the liquors to be seized and condemned, nor does it definitely give the value of the same; for which reason it does not appear that a district court has the power to condemn by forfeiture the goods seized." The objection, on the face of it, is simply an objection to the sufficiency of the complaint, and therefore, unless we go below the face, does not present any proper question for decision on certificate. The complaint, however, follows substantially the form given to be used in proceedings for seizure and forfeiture, in Pub. Laws, chap. 596, § 27; and it is therefore constitutional if the section is constitutional.

We will treat the objection as if made to the Act.

The first point made is that the liquors to be seized are not definitely described. The description begins: "A certain quantity of rum, being about, and not exceeding, 100 gallons," and goes on to specify whiskey, gin, brandy, ale, wine, strong beer, lager beer, describing them severally in the same manner; also "other strong and malt and intoxicating liquors, being about, and not exceeding, 100 gallons," etc.; and adds, by way of further description, "contained in barrels, kegs, jugs, jars, bottles, decanters, and other vessels." The Constitution of the State requires that a search-warrant, when issued, shall describe "as nearly as may be the place to be searched and the persons or things to be seized." We think the description given in the complaint and warrant in this proceeding is full enough and definite enough, considering what were the objects of the search, to answer the requirements. In *Com. v. Certain Intoxicating Liquors*, 97 Mass. 63, the liquors to be seized were described as certain quantities of rum, gin, brandy, whiskey, strong beer, ale, and wine, being "about, and not exceeding, 500 gallons" each. The officer made return that he had searched and seized "the liquors described in the within warrant; to wit, about 125 gallons of whiskey, about 49 gallons of gin, about 57 gallons of rum, and about 13 gallons of wine." The court held that the description of the liquors intended to be seized was sufficient, and that the variation between the quantities described and seized was not cause enough for dismissal of the complaint. See also *Downing v. Porter*, 8 Gray, 539; *Com. v. Certain Intoxicating Liquors*, 13 Allen, 52, 58.

The second point is that the liquors mentioned are not valued, and therefore the complaint does not show that the proceedings are within the jurisdiction of a district court. This point, so far as it is proper matter for consideration, will be more appropriately considered under the second ground.

The second ground assigned for quashing the proceeding is "because Pub. Laws, chap. 634, § 15, is unconstitutional in giving power to district courts to condemn prohibited liquors, 'whatever may be the value of the property seized.'" Under this ground, the question is whether there is any thing in the Constitution to prevent the General Assembly from conferring original jurisdiction on district courts in proceedings like this, whatever the value of the property seized may be. We know of nothing. The Constitution, art. 10, § 2, declares that "the several courts shall have such jurisdiction as may from time to time be prescribed by law." The power is broadly given, and we do not know of any limit upon it except such as may result from provisions in the Constitution which secure the right of jury trial. These provisions debar the General Assembly from conferring final jurisdiction in many matters on courts sitting without jury; but it is well settled that they do not debar the General Assembly from conferring original jurisdiction over civil and criminal cases, subject to appeal to courts sitting with jury, except criminal cases, in which the accused can only be put on trial "on presentment or indictment

by a grand jury." *Weaver v. Sturtevant*, 12 R. I. 537; *Beers v. Beers*, 4 Conn. 535; *Stewart v. Baltimore*, 7 Md. 500; *Morford v. Barnes*, 8 Yerg. 444; *Jones v. Robbins*, 8 Gray, 329, 341; *Hapgood v. Doherty*, Id. 378; *O' Loughlin v. Bird*, 128 Mass. 600. Prior to the adoption of our Constitution, the civil jurisdiction of justices of the peace was limited to actions in which the debt or damages demanded did not exceed \$20.

Since then, the jurisdiction of justices, or tribunals substituted for them, has been several times increased, and every increase has been unconstitutional unless the appeal permitted has been sufficient to satisfy the constitutional provisions referred to. In proceedings for seizures and forfeiture, under chapters 596 and 634, a right to appeal to the court of common pleas is reserved. And see *Re Liquors of McSoley*, Index A. A. 95.

The third and last ground assigned is "because the proceeding is contrary to art. 1, §§ 6 and 14, of the Constitution of Rhode Island, and art. 4-7 in amendment of the Constitution of the United States." So far as this ground depends on the Federal Constitution, it suffices to say that it is well settled that the first ten amendments to that Constitution are limited in their operation to the government of the United States. *Barron v. Baltimore*, 32 U. S. 7 Pet. 243, 247 (9 L. ed. 672); *State v. Paul*, 5 R. I. 185, 194; *State v. Keenan*, Id. 497; *Fox v. Ohio*, 46 U. S. 5 How. 410, 434 (12 L. ed. 213); *Edwards v. Elliott*, 88 U. S. 21 Wall. 532, 537 (22 L. ed. 487); *Ex parte Spies (Anarchists' Case)*, 123 U. S. 131 (31 L. ed. 80); *Cooley*, Const. Lim. *19.

Article 1, § 6, of the State Constitution, is as follows, to wit: "The right of the people to be secure in their persons, papers, and possessions against unreasonable searches and seizures shall not be violated; and no warrant shall issue but on complaint in writing, upon probable cause, supported by oath or affirmation, and describing as nearly as may be the place to be searched and the persons or things to be seized." The defendant does not point out any particular in which the proceeding violates this section, except that which we have already passed upon, namely, an alleged want of definiteness in the description of the liquors intended to be seized. We do not think that the searches and seizures which are authorized by chapters 596 and 634, if conducted in due form, can be regarded as unconstitutional because they are unreasonable, especially in view of the duty which it imposed on the General Assembly, by the fifth or prohibitory amendment, to "provide by law for carrying the amendment into effect."

Article 1, § 14, declares: "Every man being presumed innocent until he is pronounced guilty by the law, no act of severity which is not necessary to secure an accused person shall be permitted."

No particular whatever is indicated in which this declaration is violated. We have not discovered any.

The questions, therefore, which are presented for decision by the certificate must be answered adversely to the defendant, and the case sent back to the District Court for further proceeding in pursuance of the decision.

Order accordingly.

Leander C. BELCHER *et al.*

v.

Joseph H. BELCHER *et al.*

1. General pecuniary legacies are not chargeable on **specific devises** of land, although such specific devises are found in the **residuary clause**.
2. A devise of land in satisfaction of a debt due from a testator is entitled to be preferred to general pecuniary legacies.
3. A will, after making certain legacies and bequests, gave each of testator's sons \$10,000, and empowered the executor to sell testator's real estate (excepting that thereafter included in the share of his son J.) as might be necessary to pay legacies; it then gave all the residue of the estate to testator's sons in equal shares,—"the share of the said son J. to include the estate where he now lives, situated on the southerly side of Dudley Street, in said Providence, consisting of four lots of land, with the buildings and improvements thereon, said estate to be taken at a valuation of \$11,500, and no claim to be brought by the said J. against my estate for any sum which may have been by him expended in improving said estate." It appeared that the son J. had expended money in improving said estate, which the testator had promised to refund to him, and not refunded. *Held*, that the **devise** of such estate on Dudley Street to J. was **specific**; and that for that reason, and because it was devised to J. partly in satisfaction of a debt due from the testator, and because of the testator's declared intention to except it from sale to pay legacies, it was **not liable**, on partial failure of assets, to be charged for the purpose of completing the **payment of pecuniary legacies**.

(Providence—Decided January 14, 1888.)

BILL in equity to charge realty with legacies, and for an account. Heard on bill, answer, and an agreed statement of facts. *Bill dismissed*.

The last will of Joseph Belcher, duly proven before the Municipal Court of the City of Providence, after making several legacies and bequests, provided as follows:

I give and bequeath to my three sons, Joseph H. Belcher, Leander C. Belcher, and Newell W. Belcher, to and for their own use, benefit, and behoof forever, the sum of \$10,000 each, the same to be paid to them by my executor, hereinafter named, within four years from the probate of this my will.

I give and bequeath to my daughter Charlotte Elizabeth Belcher, to and for her own use, benefit, and behoof forever, the sum of \$10,000, the same to be paid to her, by my executor, hereinafter named, within four years from the probate of this my will. * * *

I hereby authorize and empower my executor, hereinafter named, by and with the consent and approval of the Municipal Court of said Prov-

idence, to sell and dispose of such of my real estate (excepting only that hereinbefore devised to Emily Ann Reynolds, and the estate hereinafter included in the share of Joseph H. Belcher) as may be necessary for the payment of legacies and division of my estate.

I give and devise and bequeath all the rest, residue, and remainder of my estate, real and personal, wherever or however situated, and including therewith all such other real estate as I may hereafter acquire, of which I shall die seised, possessed of, and entitled to at the time of my decease, in equal shares, to my three sons, Joseph H. Belcher, Leander C. Belcher, and Newell W. Belcher (the shares of the said Joseph H. Belcher in and to my estate to include the estate where he now lives, situated on the southerly side of Dudley Street, in said Providence, consisting of four lots of land, with the buildings and improvements thereon; said estate to be taken at the valuation of \$11,500, and no claim to be brought by the said Joseph H. Belcher against my estate for any sum which may have been by him expended in improving said estate), to have and to hold the same, with all the rights and privileges thereof, in equal shares as aforesaid, to my said sons, Joseph H. Belcher, Leander C. Belcher, and Newell W. Belcher, their heirs and assigns forever.

The agreed statement of facts was as follows:

The following are agreed upon as facts, for the purposes of this trial only:

1. That the legacies bequeathed by the will of the late Joseph Belcher cannot be paid in full without resorting to the Dudley street estate.

2. That in the year 1873, and prior to the date of the testator's will, the defendant Joseph H. Belcher had expended about \$3,000 in improvements upon said Dudley-street estate, upon an agreement with his father that the expense of said improvements to the amount of \$3,000 should be shared equally between them; that the testator never paid his half of the amount so expended for improvements; and that the said defendant has never made any claim upon his father's estate for any part of said amount.

3. That said Joseph H. Belcher, at and before the time said improvements were made, occupied the whole of said Dudley-street estate as tenant under his father, and continued so to occupy it until his father's decease, paying him rent at the rate of \$25 per month from January 7, 1868, to August 7, 1869, and after this latter date, on account of his father's having put gas in the house, at the rate of \$26 per month.

Mr. James Tillinghast, for complainant:

The legacies are by the will, in deficiency of the personalty, charged upon the residuary real estate.

Re Mathewson, 12 R. I. 145.

The question, then, is whether this Dudley-street estate is a part of the residuary estate, or is itself specifically devised to the defendant. If it is a part of the residuary, it is so charged.

See *Thorman v. Hilhouse*, 5 Jur. N. S. 563.

That the title of the Dudley-street estate passed only under this residuary devise, there can be no doubt; and it passed to all three of

the sons equally, so as to require a lease from the other two to Joseph to fully vest it in him; and the mere fact that, in the estimate that the testator evidently put upon his estate, he directs that this part of it, at a fixed value, shall "be included in" Joseph's share, is not enough to make the devise of it specific, and thus take it out of the residuary, and exempt it from the common charges.

Francis v. Clemow, Kay, 485; *Skinner v. Haisman*, 24 L. T. N. S. 745; *Thorman v. Hilhouse*, *supra*; *Peacock v. Peacock*, 12 L. T. N. S. 299; *Bray v. Stevens*, L. R. 13 Ch. Div. 162. See also *Fielding v. Preston*, 1 De G. & J. 444, 445.

And the estate itself being held to contribute, its rents and profits (or, as it has been exclusively occupied and enjoyed by Joseph alone, its fair occupation and rents in his hands) are chargeable, and are to contribute also.

Pond v. Allen, 1 New Eng. Rep. 879, 15 R. I. Index X, 12, and cases cited; *Sibley v. Simonton*, 20 Fed. Rep. 784.

Messrs. George B. Barrows and Charles Bradley, with **Messrs. Edwin Metcalf and Walter F. Angell**, for defendant Joseph H. Belcher:

A testamentary gift of real estate is a specific devise.

2 Redf. Wills, 144.

Real estate is never charged with the payment of legacies, unless the testator has expressly so charged it, or his intention to charge it can be fairly, and perhaps necessarily, inferred from the will.

2 Redf. Wills, 208.

A clearly expressed intention in one portion of the will is not to yield to a doubtful construction in any other portion of the instrument.

1 Redf. Wills, 434.

The court cannot remodel the will in order to meet a contingency not in the mind of the testator.

1 Redf. Wills, 433. See also *Walker v. Parker*, 38 U. S. 13 Pet. 166 (10 L. ed. 109); *Robinson v. McIver*, 63 N. C. 645; 2 Wms. Exrs. 1364; Schoul. Exrs. § 490, note 4.

Per Curiam:

We think the Dudley-street estate, given to Joseph H. Belcher by the will of the late Joseph Belcher, is not liable to be charged for the purpose of completing the payment of the pecuniary legacies; for, though it is included in the residuary clause, it does not go by that clause to the residuary devisees in common as a part of the general residuum, but it is separated, so as to go, subject to certain conditions, to Joseph H. individually, and consequently so as to be, subject to these conditions, a specific devise to him. The language of the residuary clause which particularly refers to the Dudley-street estate is as follows, to wit: "The share of the said Joseph H. Belcher, in and to my estate, to include the estate where he now lives, situated on the southerly side of Dudley Street, in said Providence, consisting of four lots of land, with the buildings and improvements thereon; said estate to be taken at the valuation of \$11,500, and no claim to be brought by the said Joseph H. Belcher against my estate for any sum which may have been

by him expended in improving said estate." Evidently this means, not simply that the Dudley-street estate shall be included in Joseph H.'s share in the residuum, but that, if taken, it shall be taken instead of the \$10,000 legacy, and beyond that to the extent of \$1,500, not only for his share of the residue, but also in satisfaction of any claim which he may have against the estate for his improvements. Joseph H. has accepted the devise on the terms on which it was given, and we do not see how it can be consistently reclaimed. The will bears date February 6, 1875. The agreed statement of facts shows that the Dudley-street estate was in possession of Joseph H., as tenant, from January 7, 1868, at \$25 per month, to August 7, 1869, and subsequently at \$25 per month; and that in 1873 Joseph H. had expended about \$3,000 in improvements on it, upon an agreement with the testator that the expenses, up to \$3,000, should be shared equally between them; and that the testator had not paid his part. Clearly the estate was given to Joseph H. by the will on account of the special interest which he had in it, both because it had been so long his home, and also because he had expended so much in improving it for his purposes. The will cannot be carried out if the estate is alienated from Joseph H. by sale. If it is sold to somebody else, his share under the will will not include it; and, even if it were bought by himself, it would come to him as purchaser, not as his share under the will. And that any alienation of it from Joseph H. would defeat the intention of the testator is further shown by the grant of power to the executor, contained in the will, to sell so much of the real estate as may be necessary for the payment of legacies, inasmuch as the grant specially excepts out of its operation the estate specifically devised to his daughter Emily Ann Reynolds, and the estate included in the share of Joseph H., thus recognizing them both as standing on the same footing, as estates which were to go specifically as devised. Doubtless the testator's intention to have his sons take equally will be disappointed by this construction; but it will be disappointed because the estate is less valuable than he supposed; and the construction cannot be abandoned for that reason, if the devise to Joseph H. is to be regarded as specific. In *Robinson v. McIver*, 63 N. C. 645, the decision was that general pecuniary legacies are not chargeable on specific devises of land, though found in the residuary clause. Moreover, the devise to Joseph H. is partly in satisfaction of a debt due from the testator, and is entitled to be preferred to the pecuniary legacies on that account. 2 Wms. Exrs. 1364; Schoul. Exrs. § 490, note 4.

The bill must be dismissed, but, considering the nature of the question, without costs.

HORACE DODGE

c.

OSMOND C. GOODELL, Deputy Sheriff.

1. Where a vendor of personal property remains in possession after sale, his statements, explanatory of his possession or of his relation to the property.

1 R. I.

are original evidence against the vendee for the purpose of showing fraud in the sale.

2. The declarations of a person having property in his hands which is attached as his, respecting the ownership thereof, are evidence for an attaching creditor against a third party claiming it of the sheriff.

3. Where a conspiracy between a debtor and others, to put his property out of the reach of an attaching creditor, had been proved in an action of replevin, brought by a vendee of the debtor's property, to recover it from the sheriff, holding it under attachment,—*Held*, that evidence as to attempt of the debtor to put part of his property out of the reach of his creditors, and as to his declaration of hostile feelings and intentions towards the attaching creditor, was admissible.

4. No exception lies to the admission of competent evidence because admitted out of the regular order.

(Decided January 7, 1888.)

ON plaintiff's exceptions to the Court of Common Pleas. *Overruled*.

The facts are fully stated in the opinion of the court.

Messrs. Charles H. Paige and Franklin P. Owen, for plaintiff.

Mr. Lemuel H. Foster, for defendant:

Where a vendor remains in the actual possession of the goods after the sale, his statements, explanatory of such possession, and of the relation which he then holds to the property, are admissible as original evidence for the purpose of showing fraud in the sale.

Grant v. Lewis, 14 Wis. 487. See also *Selsby v. Reddon*, 19 Wis. 17.

The declarations of the person in whose hands the property is attached as belonging to him, respecting the ownership thereof, are evidence for the defendant in a suit by a third party claiming the property against the sheriff.

Ross v. Hayne, 8 Iowa, 211. See *Avery v. Clemons*, 18 Conn. 306. See, especially, *Sarle v. Arnold*, 7 R. I. 582-585.

Courts are not disposed to limit the evidence to the act itself, the validity of which is impeached, but allow a wide range of investigation when a fraudulent intent is charged; for, ordinarily, such intent can be shown, not by any one circumstance, but by a variety of circumstances.

1 Stark. Ev. 58.

In questions of this kind, objections to testimony as irrelevant are not favored, since the force of circumstances depends so much upon their number and connection.

Castle v. Bullard, 64 U. S. 23 How. 187 (16 L. ed. 429). See *Rosley v. Bigelow*, 12 Pick. 311; *Ireing v. Molly*, 7 Bing. 548.

Durfee, Ch. J., delivered the opinion of the court:

This case comes up from the court of common pleas on exceptions. It is replevin for two mares, a wagon, a buggy, and divers other chattels, which, when replevied, were in the 1 R. I.

possession of the defendant, a deputy sheriff, who had attached them shortly before as the property of one Charles E. Read, at the suit of one Stephen S. Shepard. They were replevied August 27, 1886. It appeared at the trial that Shepard had been a copartner in business with Read, and had taken from him, on retiring, his note for \$950 for money due from him to Shepard; that the suit in which the attachment was made was brought to recover this debt; that previously, to wit, in March, 1886, said Shepard had caused the property of Read to be attached in a suit for the same purpose; and that this prior attachment had been dissolved by an assignment made by Read, in pursuance of the statute, for the benefit of his creditors. This assignment was made to one Sidney H. Robinson, March 16, 1886. The plaintiff claimed the property replevied under this assignment, claiming it by virtue of a bill of sale from one P. H. Corr, who, he claimed, had bought it of the assignee. He testified that he bought the property April 12, 1886, when the bill of sale was given, and that he paid \$600 for it in his own promissory notes, subsequently taken up by him and paid.

The defense was that the assignment was part of a scheme contrived by Read for the purpose of defrauding Shepard, by withdrawing the property replevied from his first attachment, and preventing any later attachment by pretended sales; and that the plaintiff, together with Corr and the assignee, co-operated with Read in carrying out this purpose,—the alleged sales to Corr and by Corr to the plaintiff being merely paper or fictitious transfers under which the property was still left with Read to be used by him and enjoyed as his own; and that as to Shepard, if not as to everybody else, it still remained, in law as in fact, his own. To establish this defense, testimony was introduced to show that when the assignment was made Read was not insolvent; that the property replevied remained in his possession and use after the assignment as before, and was in his possession when attached; that while Read so had it in his possession he declared to different persons at different times that it was his own; that he told Shepard: "I own it, every dollar of it, and nobody owns it but me; and I would like to see you get a dollar of it;" that during the summer following the assignment, Read had the wagon in suit in use in his business, with his own name painted on it; that the plaintiff visited Read's place of business twice during the same period, but not for purposes connected with the ownership of the property; that after Shepard's first attachment, and before the assignment, Read, having one horse and wagon which, being out, were not attached, assigned them over to his bookkeeper, Sidney H. Robinson, the same to whom he afterwards made his general assignment; and after that, thinking that Robinson, who was a minor, could not hold them, sent them to Corr in Taunton; that he also had a legacy of \$500 due him, and, fearing that it might be attached or pass under his assignment, made it over to his uncle; that Corr and Read were intimate friends; that Corr put in a claim for \$2,500 under the assignment, but accepted a dividend on \$279; and that the plaintiff was also on terms of intimacy with Read.

CORR was not called as a witness. Robinson was a witness, but did not testify in regard to the sale to CORR. The jury found a verdict for the defendant. While the testimony was going in, the plaintiff took numerous exceptions to the admission of portions of it. Some of these exceptions were to the allowance of questions which did not elicit any testimony at all, or any testimony which could injure the plaintiff. Of course these exceptions are immaterial, and furnish no ground for a new trial.

The other exceptions may be reduced to two classes. The first class relates to the statements made by READ in regard to the ownership of the property in suit, while it was in his possession, after the assignment, and after the alleged sale to the plaintiff. The cases cited by the defendant show that, where a vendor remains in possession after sale, his statements, explanatory of his possession or of his relation to the property, are original evidence against the vendee for the purpose of showing fraud in the sale; and also that the declarations of a person having property in his hands which is attached as his, respecting the ownership thereof, are evidence for the attaching creditor against a third party claiming it of the sheriff; such statements and declarations being regarded as characterizing the possession, and thus constituting a vital part of it. *Selsby v. Redlon*, 19 Wis. 17; *Grant v. Lewis*, 14 Wis. 487; *Ross v. Hayne*, 3 Iowa, 211; *Avery v. Clemons*, 18 Conn. 306. Under the authority of these cases, the first class of exceptions must be overruled.

The second class of exceptions relates to the testimony given in regard to attempts made by READ, before the assignment, to put parts of his property out of the reach of his creditors, and to his declarations of hostile feelings and intentions toward SHEPARD. There can be no doubt that, in a case between SHEPARD and READ, the testimony, though to some extent collateral, would be admissible to show the intent with which READ acted toward SHEPARD in the matter in controversy, and that it was fraudulent; his acts before and after the assignment appearing to have some general purpose. The question is whether it was admissible in the same way against the plaintiff in the case at bar. We think it was. The defense was that the plaintiff had acted in concert with READ and CORR to defraud SHEPARD, or, in other words, had entered into a conspiracy with them for that purpose. In such a case, upon *prima facie* proof of the fact of conspiracy, or upon the production of evidence tending to establish it, the rule as to hearsay and *res inter alios* is greatly relaxed; every act and declaration of every conspirator in pursuance of the concerted plan, or with reference to the common object, being regarded in law as the act and declaration of all, and therefore as original evidence against each of them.

"It makes no difference," says Mr. Greenleaf, "at what time any one entered into the conspiracy. Everyone who does enter into a common purpose or design is generally deemed, in law, a party to every act which had before been done by others, and a party to every act which may afterwards be done by any of the others in furtherance of the common design." 1 Greenl. Ev. § 111; *Lincoln v. Claplin*, 74 U. S. 7 Wall. 182 (19 L. ed. 106); *Sarle v. Arnold*, 7 R. I. 582.

The question, then, is whether, independently of the acts and declarations of READ here in debate, there was other testimony tending to establish a conspiracy, which was sufficient to warrant the admission of this testimony relating to said acts and admissions. We think the record, taken as a whole, clearly shows a sufficiency of such testimony, though probably, if the attention of the presiding judge had been drawn to the rule applicable to cases of conspiracy, he would have required the observance of a somewhat different order in the introduction of it.

Some of the testimony excepted to was introduced in the course of the rebuttal or in surrebuttal, and is excepted to on the ground that, if admissible at all, it should have been adduced as testimony in chief. It is discretionary with the presiding judge to admit competent testimony at any stage of a trial, and an exception will not lie because he admits it out of the regular order. *Hampson v. Taylor*, 3 New Eng. Rep. 640 R. I. Index Z, 51. If any miscarriage of justice results, the remedy is by petition for new trial.

Exceptions overruled.

John G. CLARKE, Admr. of Jonathan N. Hazard, Deceased, et al.,

v.

Attmore ROBINSON.

1. **A mortgaged personal property to B and C to secure distinct debts due to the mortgagees severally; the mortgage was foreclosed, and C thereafter transferred his claim and interest in the property to B, and B subsequently sued A for the whole amount of the original mortgage debt due him, and obtained judgment. Held, that the distinct debts were not merged by the foreclosure, and that the effect of the judgment obtained by A for his original debt opened the foreclosure for a redemption of the mortgaged property pro tanto only, and not wholly.**
2. **Where personal property is mortgaged by a single instrument to two mortgagees, to secure distinct debts owed to them severally, they will be held in equity (although at law joint tenants of the property) to hold the property as trustees for each other, proportionately to their respective claims, without survivorship between them.**
3. **In such case if one of the debts is paid in part, the mortgagees will thereafter hold as trustees for each other pro rata.**
4. **The English doctrine of tacking does not prevail in this State; and a complainant in a suit in equity to redeem a chattel mortgage will not be required to pay other debts owing to the mortgagee, in addition to the mortgage debt, before being permitted to redeem.**

(Washington—Decided February 18, 1888.)

BILL in equity to redeem a mortgage of corporate stock. On motion by complainants for a final decree. *Granted.*

The facts of the case necessary to an understanding of the questions raised by this motion appear in the opinion. For the history of the case and a full statement of facts see the former opinions reported in 1 New Eng. Rep. 882, and 4 New Eng. Rep. 922.

Messrs. Amasa M. Eaton, Joseph C. Ely, and Edwin Metcalf, for complainants:

No title will pass until the second decree be made; for "strict foreclosure is a severe remedy," and the party insisting upon it must show that the decree clearly gives it to him.

See 2 Jones, Mort. § 1108, 1566; *Perine v. Dunn*, 4 Johns. Ch. 140; *Smith v. Bailey*, 10 Vt. 163; *Beach v. Cooke*, 28 N. Y. 508; *Clark v. Bejburn*, 75 U. S. 8 Wall. 322 (19 L. ed. 356); *Bolles v. Duff*, 43 N. Y. 475.

When a foreclosure is opened by action on the part of the mortgagee, the right to redeem arises at that time. The matter of laches is reckoned from that date. When Attmore Robinson sued and opened the foreclosure, he was the owner of all the mortgaged stock, as conveyed by the mortgage, and of all the debt secured thereby. The mortgage was a unit, the debt was a unit, and both were held by one person. And an equity of redemption is indivisible.

1 Powell, Mort. (Coventry & Rand) 888, and note 1.

Part payment of a mortgage debt will open the foreclosure and allow redemption of the whole.

Jones, Chat. Mort. § 692; *Converse v. Cook*, 8 Vt. 164; *Deming v. Comings*, 11 N. H. 474; *Martin v. Bowker*, 19 Vt. 526; *Stump v. Henry*, 6 Md. 201; *Moore v. Beasom*, 44 N. H. 215; *Ricker v. Blanchard*, 45 N. H. 39; *Winchester v. Ball*, 54 Me. 558.

Payment of interest on part of the debt will keep alive the principal of the other part also.

1 Powell, Mort. (Coventry & Rand) 395; *Loftus v. Swift*, 2 Sch. & Lef. 642.

If a mortgagor be in possession of any part he must be admitted to redeem the whole.

Rakestraw v. Bruyer, Mosely, 189; *Burke v. Lynch*, 2 Ball & B. 426.

Attmore Robinson, standing in the position he did with reference to this stock before this litigation was begun, cannot now be allowed to set up a partition which existed only in his own imagination, to defeat the rights of those who are willing and ready to pay the whole joint debt now remaining unsatisfied.

See *Jackson v. De Lancey*, 11 Johns. 875.

In this country, with few exceptions, the doctrine of "tacking" has not been adopted.

Bridgen v. Carhartt, 1 Hopk. 234; *Townsend v. Empire*, S. D. Co. 6 Duer, 219; 1 Hill. Mort. 802; 2 Jones, Mort. 1083; *Blaph. Eq.* § 158, 159; 1 Pom. Eq. Jur. § 392, note 6; *Loring v. Cooke*, 3 Pick. 50.

Messrs. Arnold Green and Francis Nye for respondent.

Per Curiam:

Three questions are raised on this motion. They are (1) whether the complainant shall be allowed to redeem the whole of the stock which was mortgaged; (2) if not, how much shall he

be allowed to redeem?—and (3) shall he, in order to redeem, be required to pay, besides the debt to be paid under the mortgage, other debts not thereby secured?

I. We think the first question must be answered negatively. The mortgage was given to William A. Robinson and the defendant, Attmore Robinson, to secure three negotiable promissory notes, dated March 25, 1848,—one for \$636, payable to William and Attmore; one for \$1,400, to William; and the third for \$2,000, to Attmore. The \$636 note is conceded to have belonged to Attmore. The \$1,400 note was reduced before the decree entered February 8, 1864. That decree was entered in a suit to redeem, brought by the complainants' intestate, Jonathan N. Hazard, the mortgagor. It decreed that Hazard be allowed to redeem on paying \$2,841.42 to Attmore, and \$1,047.36 to William, with interest, on or before April 4, 1864, or on default that the bill stand dismissed out of court, with costs. The sums were not paid. The defendant, Attmore, in his recent action against the complainant as administrator on said Hazard's estate, took judgment for the full amount ascertained to be due to him by said decree; and we have decided that the effect was to open the foreclosure, either wholly or *pro tanto*,—the question whether wholly or *pro tanto* being left for decision. It seems clear to us that, if William had retained his interest under the decree, it would not have been possible for Attmore, by taking judgment as aforesaid, to prejudice it. The debt to William and the debt to Attmore were distinct, and, in equity at least, they did not lose their distinctness when they became merged in the foreclosure. But after the foreclosure, to wit, August 9, 1864, William released or assigned his interest to Attmore, who thus became the sole owner; and the question is whether, this being so, the foreclosure was not wholly opened by the judgment taken. We think not. The reason why such a judgment is held to open the foreclosure is because a foreclosure necessarily satisfies the mortgage debt to some extent, and, therefore, to take judgment for the debt in full amounts to a disavowal of foreclosure. Here there were two distinct debts which belonged to two distinct persons until after the foreclosure; and the judgment was taken for only one of them; and therefore it seems to us that, consistently with said reason, it should be held to have opened the mortgaged stock to redemption only *pro tanto*,—i. e., at so much of it as, apportioning it between the two debts, will correspond to the debt for which the judgment was taken. Such a measure of relief is enough to protect the mortgagor. Courts of equity do not favor the doctrine of merger; and we do not see why, as a matter of equity, Attmore, as assignee of William, should not have the right which his assignor would have had. The counsel for the complainant argue that the two debts constitute a single whole or unit. This view differs from that on which we rested our last previous opinion, and we are not convinced that it is correct.

II. The second question arises in consequence of the reduction of the indebtedness before foreclosure, the indebtedness to William having been reduced more than the indebtedness to Attmore. The counsel for the defendant contends

that under the mortgage William and Attmore took the stock conveyed as tenants in common, each taking proportionately to his debt; and that under the foreclosure they continued to be entitled in the same proportions. He cites cases in support of this conclusion; and, granting that William and Attmore originally took as tenants in common in the manner stated, we see no reason to doubt its correctness. The mortgaged stock, however, is personal property, and therefore does not fall under the law that conveyances of real estate shall create tenancies in common, unless joint tenancies are created expressly or by clear intentment. Pub. Stat. chap. 172, § 1. The mortgage deed conveys the stock to William and Attmore without any words which show that they were intended to take as tenants in common; and we have not been able to find any precedents which satisfy us that they can be held to have taken, at law, otherwise than as joint tenants. But, though at law they are joint tenants of the stock, we think they must be required in equity to hold it as trustees for each other, proportionately to their respective claims, without survivorship between them. And so are the precedents, as we understand them. *Petty v. Styward*, 1 Eq. Cas. Abr. 291; *Lake v. Gibson*, 8 P. Wms. 188; *Rigden v. Vallia*, 2 Ves. Sr. 258; 2 Story, Eq. Jur. § 1206; 1 Perry, Tr. § 186. We know of no case in which the precise question before us has arisen. But it seems to us that in case of such a trust, if one of the debts were paid, the mortgagees would hold the entire mortgaged personal estate as security for the remaining debt; and, upon the same equity, it seems to us that, if one of the debts were paid in part, they would thereafter hold as trustees for each other *pro rata*, taking the debts as they thereafter existed. It seems to us that, regarding the mortgage as security simply, as in equity we are bound to regard it until foreclosed, this is the more reasonable view. We therefore decide that William and Attmore became entitled under the decree of foreclosure in proportion to their respective claims as they were at its date and as they are ascertained in it, and, consequently, that the proportion of the estate which the complainant is entitled to redeem may be represented by the fraction following, to wit,

III. The counsel for the defendant contends that the complainant should be required, before he is permitted to redeem, to pay, not only the debt to be paid under the mortgage, but also the other debts which the intestate owed to the defendant at his decease; and he cites cases to show that the requirement is according to the practice which prevails in the English chancery courts, and which has been adopted in this country in some of the States. In other States, however, the practice has been disapproved and rejected. *Bridgen v. Carhartt*, 1 Hopk. 234; *Townsend v. Empire S. D. Co.* 6 Duer, 208, 220; *Greer v. Chester*, 7 Humph. 77; *Lamson v. Lutherland*, 13 Vt. 309; *Frye v. Illinois Bank*, 11 Ill. 367; *Beardsley v. Tuttle*, 11 Wis. 75, 79. And the American text-books say that the practice or the doctrine of tacking, as it is called, does not prevail generally in this country. 1 Hill. Mort. 801, 302; 2 Jones, Mort. §§ 1082, 1083; Bisph. Eq. §§ 158, 159; 4 Kent, Com. *178, 179. We do not think it has ever prevailed in this

State. It does not have the sanction of any reported decision, and we are strongly of the impression that the general opinion at the bar is against it. Our statute provides that, at any time within sixty days after the breach of the condition of a chattel mortgage, the mortgagor shall be entitled to redeem by paying the mortgage debt with reasonable and lawful charges for expenses arising from care, custody, or otherwise; and that, upon payment or tender thereof, he may recover the property, if not forthwith restored, in an action of replevin. Pub. Stat. chap. 176, §§ 11, 12. We do not think the rule in equity should differ from the rule at law under these provisions; and therefore, on this account, and also because we think the English practice, however proper it may be in England, is not entirely consonant with our registration laws and our laws favoring equality among creditors, we decide that the complainant shall be allowed to redeem on paying the debt to be paid, with interest, together with proper incidental charges. Of course the property, when redeemed, will remain to be administered either by the assignee or the administrator; and the defendant Attmore can come in with other creditors for his share.

Florine M. WILSON

v.

Levi WILSON.

1. **Condonation** is available as a defense to a suit for divorce on the ground of cruelty; but treatment much less cruel than would be necessary to be a good ground for divorce will suffice to avoid the defense of condonation.
2. Voluntary cohabitation, following acts of cruelty on the part of the husband, will not always operate as a condonation to defeat a wife's petition for divorce.
3. A petitioner for divorce will not be held to have condoned an offense the nature and extent of which was not known to her.

(Providence—Decided February 4, 1886.)

PETITION for divorce. *Granted.*

I. The facts are sufficiently stated in the opinion of the court.

Messrs. Charles A. Wilson, Rollis Mathewson, and Ziba O. Slocum, for petitioner:

Where the principle of condonation applies, condonation cannot take place without a full understanding on the part of the petitioner of the act or acts to be condoned.

2 Bish. Mar. & Div. § 88, and cases cited.

There is a marked distinction between the doctrine of condonation as applied in cases of adultery and in cases of cruelty.

2 Bish. Mar. & Div. 6th ed. §§ 50-53; *Snow v. Snow*, 2 W. N. C. Supp. 1, 15.

In cases of cruelty, patient endurance of ill treatment is not only no bar to a wife's suit, but raises no presumption against the truth of her complaint. The last drop makes the cup of bitterness overflow.

Macfarlan v. Macfarlan, 11 Scotch Sess. Cas. 2d sec. 583.

Almost invariably cruelty consists in a succession of acts, so that something of a condonation of earlier ill treatment must take place.

2 Bish. Mar. & Div. § 50; *Westmeath v. Westmeath*, 2 Hagg. Eccl. Supp. 1. See *Beeby v. Beeby*, 1 Hagg. Eccl. 789; *Hollister v. Hollister*, 6 Pa. 449; *Snow v. Snow*, 2 W. N. C. Supp. 1; *Popkin v. Popkin*, 2 Hagg. Eccl. Supp. 766, note.

Condonation necessarily implies an intention fully to forgive. Unless accompanied by that operation of the mind, cohabitation, even without force or fraud, is insufficient to establish condonation.

Betz v. Betz, 2 Rob. 694.

Until the wife has determined to leave her husband, she should use every means to reclaim him. Should she fail in this effort, and her sufferings become unendurable, does the doctrine hold that, by living on for a time after she has received cause for divorce, she bars her suit? Such is not the law.

2 Bish. Mar. & Div. § 52, and cases cited.

In some of the United States,—notably, Massachusetts, Pennsylvania, and Alabama,—the doctrine of condonation does not seem to have application to cases of cruelty.

2 Bish. Mar. & Div. § 51, and cases cited. See *Perkins v. Perkins*, 6 Mass. 69; *Phillips v. Phillips*, 1 Bradw. 245; *Hollister v. Hollister*, 6 Pa. 449; *Reese v. Reese*, 23 Ala. 785.

Courts at once seize slight circumstances to revive a cause condoned, going, in cases of cruelty, even so far as to revive the cause where the only subsequent conduct was the silence of the husband.

Robbins v. Robbins, 100 Mass. 150. See *Betz v. Betz*, 2 Rob. 694; *Snow v. Snow*, 2 W. N. C. Supp. 1-20; *Westmeath v. Westmeath*, 2 Hagg. Eccl. Supp. 1; *Beeby v. Beeby*, 1 Hagg. Eccl. 789; *Popkin v. Popkin*, 2 Hagg. Eccl. Supp. 766, note; 3 Eng. Eccl. Rep. 325; *Mack v. Handy* (La.) 2 South. Rep. 181.

Mears. George J. West and Walter B. Vincent, for respondent:

The principle of condonation extends to cruelty the same as to adultery.

Bish. Mar. & Div. 6th ed. § 50, and cases cited.

If the wife is living beyond the influence of her husband, as with her father or brother, the same circumstances which would show a condonation by him will show a like condonation by her.

Bish. Mar. & Div. 6th ed. § 49, and cases cited.

This is not a case for the exercise of special caution in applying the rules of condonation. According to the testimony of Mrs. Wilson herself, the offense of cruelty was fully developed, and a divorce was determined upon, previous to the period of continuous cohabitation at her father's house.

2 Bish. Mar. & Div. 6th ed. § 51, and cases cited.

Durfee, Ch. J., delivered the opinion of the court:

We think the charge of extreme cruelty is abundantly proved. The petitioner married the respondent October 2, 1882; she filed her 1 R. I.

petition for divorce January 20, 1886; and the evidence shows that, during the intervening period, she suffered from him in greater or less degree four different kinds of cruel treatment, to wit: vulgar, profane, and abusive language, often used to or concerning her in her presence, when she was in very feeble health; blows and other physical injuries inflicted upon her; the communication to her of a vile disease, and the forcing her by threats and importunities to surrender to or for him her money, her jewels, and her household furniture,—so that, making all due allowance for exaggeration and misconception, we are entirely satisfied that she is entitled to a divorce, unless she has lost her right to it by condonation.

There are cases which hold that, where the charge is extreme cruelty, the defense of condonation is unavailable; but these cases are at variance with the main current of decision, and are in our opinion erroneous. Doubtless, however, the defense is more easily avoided when set up to such a charge than when set up to the charge of adultery. It is a virtue for a wife who is maltreated by her husband to bear with him so long as any hope remains that her patience may be rewarded by his amendment; and therefore her bearing with him has as much the character of probation as of condonation; and, regarded as condonation, it is just that the condonation may be easily forfeited by the husband by conduct showing that he still continued incorrigible; for it is well settled that a condonation is always subject to the condition that the offending party shall not repeat the offense, and also settled, when the offense is cruelty, that treatment much less cruel than would be necessary to be a good ground for divorce will suffice to avoid the defense of the condonation.

The petitioner was living in her father's house when her petition was filed. She had been living there for several weeks, her husband living with her up to the morning of the day when it was filed. The acts of cruelty which she chiefly relies upon for divorce were committed while she was living with him elsewhere. The evidence shows, however, that ten days before the filing of the petition he gave way, without any real provocation, to a fit of violence towards, and intemperate abuse of, her, which, in our opinion, would have amounted to a forfeiture on his part of any previous condonation, if she had then refused any longer to cohabit with him, as, being in her father's house, she might have done. She lived with him, receiving him as her husband, ten days longer, and, so far as appears, without receiving any further maltreatment from him. Ordinarily such conduct would be regarded as a condonation, and it must be so regarded here unless she can show some excuse for it. It is ordinarily the duty of a party, after making up his or her mind to apply for a divorce, to show his or her good faith by withdrawal from cohabitation. 2 Bish. Mar. & Div. § 88; *Anon.* 6 Mass. 147.

She makes two excuses. One is that she was so much enfeebled by sickness and the sufferings which she had undergone that she dreaded to provoke her husband's anger by shutting the door upon him, and in fact was incapable of the effort which his exclusion

would cost until it was absolutely necessary for her to make it. She is apparently a person of delicate organization, one who would naturally shrink from such a trial, and she was undoubtedly much debilitated in body and mind. The evidence shows, moreover, that she married without her father's approval, and, owing to some consequent estrangement from him, was thrown, as it were, into the hands of her husband, without the moral support of her family, and so acquired a habit of almost utter subjection to his domineering will,—a habit which he had confirmed, if we can trust her testimony, by a peculiar practice which he had of mortifying her from time to time for his own gratification. Add to this that she had reason to fear for her children, lest, if he were excluded before her petition was filed, he might attempt to gain possession of them. In the fit of passion which he gave way to ten days before the petition was filed, one of his threats was that he would leave her and take her children away with him. In a matter like this a wife is much more indulgently considered by the courts than a husband, owing to her comparative helplessness, and it has been held that voluntary cohabitation following acts of cruelty on the part of the husband will not always operate as a condonation to defeat a petition for divorce. 2 Bish. Mar. & Div. §§ 49-51.

The first excuse greatly palliates, if it does not justify, the petitioner's conduct.

The second excuse is that, though the petitioner knew she had suffered cruel and injurious treatment from her husband, she did not know the extent of the injury. Her husband had syphilis, but nevertheless continued to co-

habit with her, the consequence being that she had a syphilitic sore throat. He told her the name of the trouble, but, to exculpate himself, ascribed it to a false cause, namely, drinking from a cup which had been used by a person having it, and, though his own disorder increased, did not restrain himself. It is difficult to imagine a worse or more insidious form of cruelty. The petitioner testifies that she did not know the nature of the disease, notwithstanding he had named it, and, though there were things which might have opened her eyes, we are inclined to believe that it was not until after the physicians, summoned at our request, had given their testimony, that she fully realized to what a shameful and dangerous disorder he had exposed her. It is not to be supposed that a lady, bred up in family seclusion, has the same understanding of such matters as the average man. The respondent evidently did not think the petitioner had it. "In a case of this kind," it has been said, "the court ought to see its way very clearly to the fact of condonation before it comes to that conclusion." *Ellis v. Ellis*, 4 Swab. & T. 154, 157.

When the defense is condonation, it is for the respondent to prove it; and, of course, if the petitioner did not know what the offense was, she cannot be held to have condoned it; and we may add that it is the easier to believe she did not know, because it is so difficult to believe that, if she had known, she either would or could have condoned it.

Our conclusion is that the defense cannot avail.

Petition granted.

CONNECTICUT.

SUPREME COURT OF ERRORS.

Nellie QUINN, Admr.,

NEW YORK, NEW HAVEN, & HARTFORD R. R. CO.

1. It is not proper for a trial judge to stop a witness while about to give important testimony, merely because he had formed an unfavorable opinion as to the witness's truthfulness.
2. When the interval between the time that one killed by a railroad collision became aware of the peril, and the occurrence of the collision, was too brief to be stated in minutes and seconds, a question to a companion of the deceased, who jumped from the hand car on which they were both riding, and escaped injury, as to whether the deceased had time to jump, is not objectionable as calling for an opinion.
3. Held, under the facts of the case, that such question did not call for an opinion of the witness as to the negligence of the deceased; and further, that, even if the subject-matter of the question was the one controlling element in the issue as to negligence on the part of the deceased, the question would have been proper.
4. When an officer of the defendant railroad company testified, on direct examination, that in his opinion the rules and regulations of the company in reference to giving notice to employees of the running of extra trains, at the time of the accident in suit, were reasonable and sufficient, it was proper to permit him to be asked, on cross-examination (not for the purpose of showing negligence on the part of the company, but merely to show an inconsistency with his former statement), whether an additional regulation was not made after the accident.

(New Haven—Filed February—, 1888.)

APPEAL by defendant from a judgment of the Superior Court of New Haven County, in favor of plaintiff in an action brought to recover damages for personal injuries resulting in death. *Reversed.*

The facts are sufficiently stated in the opinion of the court.

Messrs. Townsend & Watrous, for defendant, appellant:

"The mere fact that an accident occurs by which a servant is injured does not raise a presumption, even, that the master was at fault."

3 Wood, R. R. pp. 1455, 1456, 1463, 1461, § 372, and cases cited; *Devlin v. Smith*, 89 N. Y. 476; *Indianapolis, B. & W. R. Co. v. Toy*, 91 Ill. 474; *S. C. 33 Am. Rep. 57*; *Wilson v. Williamian Linen Co.* 50 Conn. 462.

The defendant, after default, does not go into the hearing in damages weighted with the admission of the default. He is in the same

position after default as upon demurrer overruled.

Lamphear v. Buckingham, 33 Conn. 250; *Nolan v. New York, N. H. & H. R. Co.* 1 New Eng. Rep. 826, 53 Conn. 475-477; *Crogran v. Schiele*, 1 New Eng. Rep. 305, 53 Conn. 208.

The court erred in excluding from consideration, in connection with the rules as found printed upon the train-sheet, the custom and usage of the employees.

Crew v. St. Louis, K. & N. W. R. Co. 20 Fed. Rep. 91, 92.

"If the court required of the defendant some act which the law did not require, it erred in a matter of law, and the question may be reviewed by this court."

Nolan v. New York, N. H. & H. R. Co. 1 New Eng. Rep. 826, 53 Conn. 471.

Negligence of the engineer of the extra engine arises, as a matter of law, from the facts stated in the finding.

Peck v. New York, N. H. & H. R. Co. 50 Conn. 383, 384, 392.

But plaintiff cannot recover for negligence of the engineer, as he was confessedly a fellow servant.

A hand car is a means of transportation supplied for the personal convenience of employees on a railroad.

An employee using a hand car does so with full notice of the character of the appliance and the risk attending its use.

The defendant, therefore, was not bound in law to notify the decedent of such an evident risk.

McGrath v. New York & N. E. R. Co. 14 R. I. 357; *S. C. 18 Am. & Eng. R. R. Cas. 5*; *Pennsylvania R. Co. v. Wachter*, 60 Md. 395; *S. C. 15 Am. & Eng. R. R. Cas. 187*; *Clifford v. Old Colony R. Co.* 2 New Eng. Rep. 175, 141 Mass. 564; *Railway Co. v. Leech*, 41 Ohio St. 388.

One who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of the employment.

Randall v. Baltimore & O. R. Co. 109 U. S. 479 (27 L. ed. 1004); *District of Columbia v. McElligott*, 117 U. S. 633 (29 L. ed. 950).

If a person, knowing the hazards of his employment as the business is conducted, voluntarily continues therein without any promise of the master to do any act to render the same less hazardous, the master will not be liable for any injury he may sustain therein, unless, indeed, it may be caused by the willful act of the master.

Hayden v. Smithville Mfg. Co. 29 Conn. 558; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 647 (29 L. ed. 758); *Wright v. N. Y. Cent. R. Co.* 25 N. Y. 569; 3 Wood, R. R. p. 1488, § 383; p. 1488, note; *Naylor v. Chicago & N. W. R. Co.* 53 Wis. 661; *S. C. 5 Am. & Eng. R. R. Cas. 460*; *O'Rourke v. Union Pac. R. Co.* 22 Fed. Rep. 189; *Leary v. Boston & A. R. Co.* 189 Mass. 590; *S. C. 52 Am. Rep. 738*.

Defendant could not be held to guarantee personal notice, to the decedent, of an extra train.

Slater v. Jewett, 85 N. Y. 61, 70 *et seq.*; *Howard v. Denver & R. G. R. Co.* 26 Fed. Rep. 838, 839; *Patterson, R. R. p. 316*; *East T. V. etc. R. Co. v. Rush*, 15 Lea, 145; *Railway Co. v. Leech*, 41 Ohio St. 388

If the injury arose from the negligence of the switchman, it was not because of the inadequacy of the means placed at his disposal by the defendant.

See *Davis v. Central Vermont R. Co.* 55 Vt. 84; *Wilson v. Willimantic Linen Co.* 50 Conn. 441, 462, 465; *Zeigler v. Danbury & N. R. Co.* 1 New Eng. Rep. 278, 52 Conn. 553; *Howard v. Denver & R. G. R. Co.* 26 Fed. Rep. 837; *Patterson, R. R.* p. 316.

The doctrine of common employment rests chiefly upon the theory that the servant assumes the risks incident to his employment.

Zeigler v. Danbury & N. R. Co. 1 New Eng. Rep. 278, 52 Conn. 556.

One important test by which we may determine whether two employees are fellow servants is the opportunity given one to observe the habits of the other in his daily employment.

Zeigler v. Danbury & N. R. Co. 1 New Eng. Rep. 278, 52 Conn. 557; *North Chicago R. M. Co. v. Johnson*, 114 Ill. 64.

The master is not liable for injuries caused by carelessness of a fellow employee, when both are engaged in common employment and no relation of subordination exists between them.

Illinois & E. I. R. Co. v. Geary, 110 Ill. 388; *Stafford v. Chicago, B. & Q. R. Co.* 114 Ill. 246; *Little Miami R. Co. v. Fitzpatrick*, 42 Ohio St. 324; *Street R. Co. v. Bolton*, 43 Ohio St. 226; *Dick v. I. C. & L. R. Co.* 38 Ohio St. 393; *Randall v. Baltimore & O. R. Co.* 109 U. S. 484 (27 L. ed. 1005); *Howard v. Denver & R. G. R. Co.* 26 Fed. Rep. 837; *Kansas P. R. Co. v. Salmon*, 14 Kan. 524.

The court erred in excluding the question as to the sufficiency of time to escape from the car. The question related to the quantity of time only. The evidence was admissible either as being that of an expert witness, or as that of an ordinary witness entitled to give an opinion from necessity.

The witness was an expert. All persons who practice a business or profession which requires them to possess a certain knowledge of the matter in hand are experts, so far as expertness is concerned.

Rapalje, Witnesses, 1887, p. 490; *Whart. Ev.* § 444; *Lawson, Exp. Ev.* p. 2.

The competency of a witness as an expert does not at all depend upon the nature of the calling (*Rapalje, Witnesses*, p. 502), nor whether the subject-matter is common or uncommon, nor whether many persons or few have some knowledge of the matter (*Taylor v. Monroe*, 48 Conn. 44).

Railroad men are experts as to questions of railroad management.

Lawson, Exp. Ev. p. 86; *Redf. R. R.* § 134.

The matters as to which the witness was asked pertained to his employment, and were not equally within the knowledge of all men of ordinary intelligence.

Cooper v. Iowa Cent. R. 44 Iowa, 134.

"The opinions of ordinary witnesses, derived from observation, are admissible in evidence when, from the nature of the subject under investigation, no better evidence can be obtained, or the facts cannot otherwise be presented to the tribunal.—e. g., questions relating to time, quantity, number, dimensions, height, speed, distance, or the like."

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Lawson, Exp. Ev. Rule 63, p. 460; *Whart. Ev.* §§ 512, 513.

As to questions of time, see—

Stewart v. State, 19 Ohio, 302; *Ward v. Charleston City R. Co.* 19 S. C. 521; *S. C.* 16 Am. & Eng. R. R. Cas. 356; *S. C.* 45 Am. Rep. 794; *Bower v. Chicago, M. & St. P. R. Co.* 19 Am. & Eng. R. R. Cas. 301.

As to other instances of the admissions of the opinions of nonexpert witnesses (or, more properly, their conclusions from facts), in similar cases, see—

Salter v. Utica & B. R. R. Co. 59 N. Y. 631; *Com. v. Sturtivant*, 117 Mass. 122, and cases cited; *Sydeleman v. Beckwith*, 43 Conn. 9, and cases cited.

Evidence of what was done after an accident, for the purpose of showing negligence on the part of the defendant, should have been rejected.

Nalley v. Hartford Carpet Co. 51 Conn. 524, and cases cited; *Ely v. St. Louis, K. C. & N. R. Co.* 77 Mo. 34; *S. C.* 16 Am. & Eng. R. R. Cas. 342; *Hudson v. Chicago & N. W. R. Co.* 59 Iowa, 581; *S. C.* 8 Am. & Eng. R. R. Cas. 464; *Patterson, R. R.* p. 422.

Messrs. James P. Pigott and William S. Pardee, for plaintiff, appellee:

The master is liable if he fails to provide proper instrumentalities for his employees.

Wilson v. Willimantic Linen Co. 50 Conn. 483, 457; *Darrigan v. New York & N. E. R. Co.* 53 Conn. 285; *Pierce, R. R.* 370; *Fuller v. Jewett*, 80 N. Y. 46; *Sheehan v. N. Cent. & H. R. R. Co.* 91 N. Y. 332, 334; *Ellis v. New York, L. E. & W. R. Co.* 95 N. Y. 546, 552; *Abel v. Delaware & H. C. Co.* 5 Cent. Rep. 615, 108 N. Y. 581; *Hough v. Texas & P. R. Co.* 100 U. S. 213, 217 (25 L. ed. 612); *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377 (28 L. ed. 787).

"A railroad corporation must devise some suitable and safe method by which to run special and irregular trains."

Darrigan v. New York & N. E. R. Co. 53 Conn. 305, 306.

"The law is so that the master is responsible for an injury produced by the combined negligence of himself and a fellow servant of the injured employee."

Wilson v. Willimantic Linen Co. 50 Conn. 486, and cases quoted.

It is a question of fact whether Quinn negligently ran risk of extra engines that morning.

Clarke v. Holmes, 7 Hurlst. & N. 944; *Hudleston v. Lowell Machine Co.* 106 Mass. 382; *Laning v. N. Y. Cent. R. Co.* 49 N. Y. 531.

As to decedent's coemployee, so far as he was negligent, it was in a relation of friendship to his boss. He owed no duty to the road to make these inquiries; he owed no duty to decedent to make them. He was not even ordered by his boss to make them, but simply told to ask. So far from its being a duty he owed the road or decedent, it does not even appear that either of them ever knew of it.

Sprong v. Boston & A. R. Co. 58 N. Y. 56; *Baird v. Pettit*, 70 Pa. 477.

If the company wishes to escape from liability for the night switchman's neglect, it must show that he was a competent man for his place.

Darrigan v. New York & N. E. R. Co. 53 Conn. 289.

1 CONT.

The night switchman was not a fellow servant with deceased, under—

Darrigan v. New York & N. E. R. Co. supra; *Wilson v. Willimantic Linen Co.* 50 Conn. 488; *Wheeler v. Wason Mfg. Co.* 135 Mass. 294; *R. R. v. Gildersleeve*, 80 Gratt. 805.

The rule as to the admissibility of nonexperts' opinions is stated in *Sydeleman v. Beckwith*, 48 Conn. 12.

"These exceptions to the general rule are allowed on the ground of necessity, where the subject of inquiry is so indefinite and general as not to be susceptible of direct proof, or where the facts on which the witness bases his opinion are so numerous or so evanescent that they cannot be held in the memory and detailed to the jury precisely as they appeared to the witness at the time."

In this case the witness stated at length and in detail the facts.

See also *Keller v. N. Y. Cent. R. Co.* 2 Abb. N. Y. App. 480; *Buxton v. Somerset Pottery Works*, 121 Mass. 446.

In a hearing in damages on a default, the defendant is limited to such defenses as are admissible under a general denial.

Brown v. Southbury, 1 New Eng. Rep. 422, 53 Conn. 212, 213; *Croghan v. Schiele*, 1 New Eng. Rep. 305, 53 Conn. 198, 207, 208; *Nolan v. New York, N. H. & H. R. Co.* 1 New Eng. Rep. 826, Id. 474, 477; *Crane v. Eastern Transp. Line*, 48 Conn. 843, 863; *Shepard v. New Haven & N. Co.* 45 Conn. 55, 58; *Batchelder v. Bartholomew*, 44 Conn. 494, 501; *Carey v. Day*, 36 Conn. 153, 156; *Daniels v. Saybrook*, 34 Conn. 381.

Loomis, J., delivered the opinion of the court:

This is a suit to recover damages for causing the death of Michael Quinn, a track repairer in the employ of the defendant on the Air Line Railroad. The court found that the death of Quinn was caused by the neglect of the defendant to provide a reasonable system of rules and regulations, and the execution of the same, relative to giving notice to its employees of the running of extra trains. It was also found that there was no contributory negligence on the part of the deceased or of any coemployee, unless it arises, as matter of law, on the facts.

At the time of the injury the deceased and three other track repairers were in a hand car, going to their work, when an extra train suddenly appeared, coming towards them. All the men on the hand car, except the defendant, jumped off before the collision, and were saved; but the defendant remained, and was killed in the collision.

One prominent ground of contention on the trial was whether the deceased was guilty of contributory negligence. Upon this issue the defendant introduced Timothy Hayes, another of the gang of track repairers, who was on the hand car,—who testified that he saw the engine about nine hundred feet away; that he called out to have brakes on the hand car; that the car stopped, and that all got off except the deceased. The witness stated, at length and in detail, all the facts relating to the matter in controversy, and was finally asked, upon direct examination: "Was there, or was there not, time for Quinn to jump off?"—and again: "State

whether or not there was time for Quinn to jump off between the time when the order to brake was given and the time of collision." The defendant claimed these questions to show negligence on the part of the deceased.

The court states its ruling as follows: "If the testimony of the witness was true, it was manifest that the deceased had ample time to get off the car before the collision, and there was no occasion for the opinion of the witness." The court thereupon excluded the questions for the reason aforesaid, and also upon the ground that the questions called substantially for the opinion of the witness as to the negligence of the deceased.

We cannot accept either the ruling or the reasons given as sound. The fact that Quinn had time to get off the car was material, if not absolutely controlling, upon the question of contributory negligence. The court, directly in the face of the proposed evidence, found that he "was unable to jump off the car in season to save himself," and thereupon negatived the existence of any contributory negligence as matter of fact.

The court gives two reasons for excluding the evidence. The first justifies the exclusion upon the assumption that the witnesses' evidence, as far as received, was true; the implied argument being that, if true, it proved, beyond a doubt, the fact which the excluded evidence was designed to prove, and hence no harm was done if the ruling was erroneous. It is, however, obvious that the reason as given was not operative. The court did not in reality assume or find the statement true; for, in repudiating a conclusion stated as the manifest one upon the assumption referred to, the court in effect repudiated the evidence already given, and found it untrue.

The controlling reason, therefore, was not expressed, but was an implied alternative; that is, the evidence as given was not true, and therefore any further evidence would not be believed, and hence, again, no harm was done. The counsel for the plaintiff, both in their brief and in argument, state the point in these words: "The witness was not telling the truth, and the court knew he was not, and his opinion would not have had the slightest effect on the court."

It seems to us that this reasoning is not only illegitimate, but unsafe and pernicious in its consequences. We may perhaps test the principle by applying it to the trial of the cause itself. How can a case be properly decided until it has been heard? And how can it be heard, where matters of fact are in issue, without a hearing of the witnesses? A partial trial is no trial, it is not having "a day in court." The whole case may depend on one witness, and such, for aught we know, was the case here. It will not do, therefore, to stop a witness while he is about to give important testimony, merely because the trial judge had imbibed an unfavorable opinion as to his truthfulness. Such early impressions, with the very best of judges, cannot always be avoided; but we think the experience of triers generally will confirm the statement that such impressions are often dissipated after further patient hearing.

This brings us to the second reason,—which is the important one,—Was the evidence admissible?

No claim is made that it was irrelevant to the issue, but the objection involved in this reason is twofold: (1) Whether the circumstances would allow the witness to give his opinion at all; and (2) whether, if given, it would have amounted to an opinion as to the negligence of the deceased,—which the court, and not the witness, was to decide.

Assuming that the answer involved an opinion, it was yet clearly admissible; for the time required for such sudden movements as are referred to, it would be impossible to estimate in minutes or seconds with any approximation to accuracy; but every observer familiar with the running of trains and hand cars, as this witness was, would carry in his mind, though unconsciously, the measure of time required for jumping from the car, as compared with the time it took the train, after it was discovered, to reach the place of collision. We doubt whether, in strictness, such evidence should be considered matter of opinion. It would seem to be rather matter of fact to be determined by judgment or estimate. If the mental process be analyzed, it would seem to involve just as much a matter of opinion had the question been how long it would have taken to jump from the hand car, and how long it took for the train, after its discovery, to reach the place of the accident.

The remaining ground of objection is that the question called substantially for the opinion of the witness as to the negligence of the deceased.

This objection is not well taken, for the question does not call for such an opinion. It calls simply for a fact which constitutes only one element of the question of negligence, although confessedly a very important one; but other facts must be considered in connection, namely, whether the deceased could see and hear as quickly as others, and whether or not he was lame; also his position in the car might have been such that he could not jump as soon as others, or, on the contrary, it might have been the best position for the purpose. But if it had been, as the court assumed, the one controlling element in the question of negligence, even then the question would have been proper; for where the point is a proper subject of opinion, and the question is properly framed, it is admissible though it may be decisive of the question to be decided by the court or jury. *Eastern Transp. Line v. Hope*, 95 U. S. 297 (24 L. ed. 477); *Del-*

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aware, do. Steam Tugboat Co. v. Starrs, 69 Pa. 36; *Walsh v. Washington M. Ins. Co.* 82 N. Y. 443; *Moore v. Westercelt*, 9 Bosw. 558; *Jamson v. Drinkald*, 12 Moore, 157.

Another question of evidence, of minor importance, was raised on the trial. The defendant called one Waterbury, the superintendent of its road, "to prove that the rules and regulations in question were reasonable, sufficient, and the best that could be framed to meet the exigencies of the case;" and he stated in substance that such was his opinion.

Upon his cross-examination he was asked: "Does the foreman of the track section gang now have to report personally to the switch-house, to see if there are any trains out?" This question, against the objection of the defendant, was admitted by the court simply as cross-examination, to affect the value of his opinion as expressed in the direct examination. The witness answered: "I might have said something of the kind to the section boss, and I believed he did give such an order after the accident." As the evidence was not received to show negligence, but was restricted by the court to the single purpose of showing that, as the act of the witness was inconsistent with his expressed opinion, it tended to impair its value, we do not think it conflicts with the principles adopted in *Nalley v. Hartford Carpet Co.* 51 Conn. 524.

Of course, if the new rule or order was not the act of the witness, but of the railroad company, it could not affect him with the inconsistency; but no such point was suggested, and the witness spoke of the order as one which he gave. As the question is presented in the finding, we cannot say there was error.

The other questions in the case, which are very numerous, call upon this court to review the rulings of the court below relative to the negligence of the defendant, and its duties and obligations to its employees under the facts and circumstances detailed in the finding.

As there must be a new trial, which will result in a new finding of facts, we do not deem it necessary to discuss or decide the other questions presented in the record.

There was error in the ruling complained of, and a new trial is ordered.

In this opinion the other Judges concurred.

1 CONN.

MAINE.

SUPREME JUDICIAL COURT.

Samuel S. JORDAN *et al.*,

v.

Leonard H. SOULE.

A tenant in common may recover in an action at law, from his cotenant, his proportional part of the expense of improvements made by agreement of all the tenants; and that, too, though the improvements were used by a co-partnership composed of all the tenants, when it appeared that the realty was individual property, and not firm property.

(Sagadahoc—Decided December 30, 1887.)

ON report. Judgment for plaintiffs.

The facts are stated in the opinion of the court.

Mr. Joseph M. Trott, for plaintiffs:

"When a plain, convenient, and adequate remedy may be had at law, a party ought not to be turned over to a suit in equity.

Fanning v. Chadwick, 3 Pick. 424.

The relationship of the tenants in common was not that of partners at all, nor did the account sued on involve partnership transactions. But even if their relationship were that of partners, this action would lie. Under the agreement to cut ice, money with which to operate was required. The promise of defendant to contribute one quarter of the necessary funds was at most a promise to pay in capital toward the initiation of a new enterprise or transaction. An action of assumpsit will lie even between partners upon such a promise.

Marshall v. Winslow, 11 Me. 58; *Wright v. Eastman*, 44 Me. 232; *Williams v. Henshaw*, 11 Pick. 84; *Chitty*, Cont. §41. See also *Venning v. Leckie*, 13 East, 7; *French v. Styring*, 2 C. B. N. S. 354; 3 Jur. N. S. 670; 20 L. J. C. P. 181; *Coll. Partn.* 6th ed. §§ 256-258, and notes; *Add. Cont.* § 1805.

There can be no reasonable doubt—weighing the whole evidence carefully—that defendant, upon receipt of the bill of expense, did virtually promise to repay to these plaintiffs the balance of his proportion thereof. An action will lie upon such a promise even between partners, and even although the rest of the partnership affairs remain unadjusted.

Williams v. Henshaw, *supra*; 1 Pars. Cont. p. 140, note; *Pars. Laws Bus.* pp. 224, 225; *Holyoke v. Mayo*, 50 Me. 390, citing *Gibson v. Moore*, 6 N. H. 547.

Mr. C. W. Larrabee, for defendant:

In *Holmes v. Higgins*, 1 Barn. & C. 76, Abbott, Ch. J., says: "Now it is perfectly clear that one partner cannot maintain an action against his copartner for work and labor performed or money expended on account of the partnership."

When money is due from one partner to another by simple contract on the partnership account, payment, except in a few special cases, can only be enforced in a court of equity.

Coll. Partn. 4th Am. ed. chap. 111, § 11; 1 Story, Eq. Jur. § 664.

Danforth, J., delivered the opinion of the court:

The evidence in this case shows that plaintiffs and defendant were tenants in common of a lot of land with an ice privilege attached, purchased for the purpose of harvesting and selling ice; that, for the purpose of carrying on that business, it was agreed that certain repairs and improvements were to be made, each one agreeing to pay his share of the expenses, and one of the plaintiffs was appointed the agent of all to accomplish this purpose. There is also testimony tending to show that a similar agreement was made in relation to gathering in and disposing of the ice. But in regard to this we have no occasion at this time to inquire; for the specification attached to the declaration in the writ confines the claim sought to be recovered "to the defendant's share of the expense of certain improvements and outlay in and upon the property and ice privilege owned in common by said plaintiffs and defendant."

The defense is that these parties were partners in the transactions out of which this suit grew; that the action will not settle all matters between them as such; and therefore the remedy is in equity alone.

If this defense were sustained by the evidence, in the absence of an agreement to the contrary it would prevail. But the ownership of the land is one thing; carrying on the ice business upon that land is another, and may be a very different thing. There may be a partnership, with all its incidents, in the latter, when none exists as to the former. In this case there is not only an entire absence of all testimony tending to show that the land and privilege were partnership property, but the contrary appears. The proof is plenary that the land was purchased by the parties as individuals, each paying for his share out of his private funds. The ownership of the improvements must follow that of the land, not only from general principles, but as the result of the agreement, clearly shown by the case, that each was to pay his share of the expense. By virtue of this contract the parties were jointly liable for the whole amount, and, as the plaintiffs have paid the whole, the defendant is liable for his share, which is one fourth. For this result the case of *Soule v. Frost*, 76 Me. 119, is, in principle, an authority.

As to the damages, the proof is not so satisfactory. But the preponderance of evidence shows that the bill of particulars is a reliable statement of the amount expended. A few of the items were evidently expended in the business of ice harvesting,—such as the amount paid Trask for cutting and housing ice, \$1,767.80; two years' fowage, \$32; swamp hay, \$12; and sawdust, \$2.50. These must be deducted from the sum total. Then as to the credits. The \$150 and the \$90 paid Packard were evidently paid by the defendant, and upon this bill. These sums should therefore be deducted from his share. The \$50, though paid by the defendant, was for expenses upon the ice, and the remaining credits appear to have come from the proceeds of the ice. These items will therefore more properly be considered in the settlement of the ice account. Making up the claim pending in this suit upon these principles, it leaves a balance due from the defend-

ant of \$453.14, for which the plaintiffs are entitled to judgment, with interest from date of writ.

Judgment for the plaintiffs for \$453.14, and interest from date of writ.

Peters, Ch. J., Walton, Virgin, Emery, and Foster, JJ., concurred.

Mary A. LEWIS

v.

George W. BECKLER.

The fact that a person took a cow, upon which he held a claim under a Holmes note, *from the premises of a married woman, considering that the husband had the right of redemption, is not evidence of such possession or right of possession in the wife as will enable her to maintain trover for the value of the cow.

(Oxford—Decided January 3, 1888.)

ON exceptions by plaintiff. *Overruled.*

Action of trover for the value of a cow.

The exceptions were to the ruling of the presiding justice directing that judgment be entered for defendant upon the following agreed statement:

One Osgood Drew bargained the cow which is the subject of this suit to one Charles S. Lewis, December 19, 1885, taking a Holmes note, so called, for the balance unpaid for the cow, at date of said note, which note, assignment, and certificate of record thereon are made a part of this case.

Said note was duly recorded in Albany town records, where both parties resided, on December 21, 1885.

Nothing was ever paid said Drew on said note, who, on the 21st day of April, 1886, assigned the same, for a valuable consideration, to the defendant.

Said assignment was duly recorded in the town records of Albany, June 18, 1886.

Nothing was paid said defendant on said note, and on the 21st day of said June said defendant took said cow on said note from the premises of the plaintiff.

After the defendant had reached the highway with said cow, plaintiff's husband, said Charles S. Lewis, acting, as he said, in behalf of said plaintiff, tendered said defendant, on the same day, \$10.50 in satisfaction of said claim, and demanded a return of the cow, which was refused by the defendant.

Upon the foregoing statement the parties agree to submit the above-entitled cause to the presiding justice, reserving the right of exception. It is agreed that the value of the cow in controversy is the sum of \$25.

Mr. S. F. Gibson, for plaintiff:

Possession is *prima facie* evidence of title to personal property. The plaintiff, being in possession, may maintain trover against all persons

*The term "Holmes note" (derived from the name of an extensive user of such instruments) is applied in Maine to a note given by a vendee to a vendor, which recites that it was given for property the title to which remains in the vendor until the note is paid.

wrongfully interfering with his or her possession.

58 Me. 544.

In 35 Me. 150, the court says: "No principle is more fully settled by the uniform weight of authority than that possession is *prima facie* evidence of title, and that, upon proof of that fact, the party proving it is entitled to vindicate any violation of his rights thus established."

34 Me. 545; 60 Me. 244; 3 N. H. 448; 22 N. H. 548; 26 N. H. 847; 28 N. H. 453; 29 N. H. 321; 30 N. H. 567; 43 N. H. 245.

The court says in *Union State Co. v. Tilton*, 69 Me. 245, "that possession of personal property is *prima facie* evidence of title, and sufficient to enable a possessor to maintain an action against a wrongdoer,"—citing 35 Me. 150, and 3 N. H. 484.

Defendant became a wrongdoer when he refused to take the tender on June 21, 1886.

"When goods have been taken from the actual possession of the plaintiff, and the defendant fails in establishing any title in himself to the property so as to justify his acts, he will not be allowed to set up a *jus tertii*, and deny plaintiff's title to the goods: for, as against a "wrongdoer," possession is title, and the possession and ownership of chattels go together."

Add. Torts, 452, 454, 455; 53 Me. 544; 34 Me. 545; 35 Me. 150.

Mr. A. S. Kimball for defendant.

Per Curiam:

The court is of opinion that the exceptions must be overruled.

From the agreed statement of facts upon which the case was tried, it does not appear that the plaintiff had in any way acquired her husband's interest in the cow. He still had the right to redeem, if not too late. Nor does it appear that the plaintiff had such possession of the cow as will give her the right to maintain the action. An agreement that the defendant took the cow from the plaintiff's premises, considering that her husband had the right of redemption, is not equivalent to an agreement that the defendant took it from her possession. As it does not appear that the plaintiff had either title or possession, she has no right of action.

Exceptions overruled.

Inhabitants of CAPE ELIZABETH

v.

Albert W. SKILLIN.

A discharge in insolvency does not release one from paying the arrearages of his just taxes for the support of the government.

(Cumberland—Decided December 21, 1887.)

ON report on agreed statement of facts. *Defendant defaulted.*

This was an action of debt brought under the statute for the collection of State, county, and town taxes in the town of Cape Elizabeth for the year 1879. No question was raised as to the form of the action or the legality of the

assessment of the tax. It was admitted that, subsequent to the assessment of the tax, said Skillin was, in the Insolvent Court for Cumberland County, duly adjudged to be an insolvent debtor on his own petition, and was, before this action was brought, granted his discharge in due form. This discharge was pleaded in bar of the action, and was the only defense. The tax sued on was not proved against the estate of Skillin when in insolvency, and his estate paid nothing to creditors. On the above acts it was agreed that the court might order default or nonsuit, according to the legal rights of parties.

Messrs. N. & H. B. Cleaves and W. R. Anthoine, for plaintiffs:

The insolvent law of this State and the United States Bankrupt Act of 1867 were substantially the same in their provisions. In the case of *United States v. Herron*, 87 U. S. 20 Wall. 251 (22 L. ed. 275), the question at issue is fully discussed by *Mr. Justice Clifford*, and the court held that the words "creditor" and "creditors," as used in the several provisions of said Bankrupt Act, do not include the United States. He says: "Perhaps the earliest decision in this country was that given in the case *United States v. King*, Wall. C. Ct. 18, which was made almost at the beginning of the present century. In that case the question was directly presented, and was as directly adjudicated, the court holding that debts due to the United States are not within the provisions of the Bankrupt Act."

In the case of *People v. Herkimer*, 4 Cow. 318, *Chief Justice Savage* further says that "the people of the State, being the sovereign, have succeeded to the rights of the king." They are not, therefore, bound by general words in a statute restrictive of prerogative, without being expressly named, *e. g.*, the insolvent law. In the case of *People v. Gilbert*, 18 Johns. 227, the court held that the people were not bound by any statute which affects any right, title, or interest belonging to them, unless it is made to extend to them by express words.

In a case, *Anonymous*, 1 Atk. 262, the Lord Chancellor says: "The crown is not within the statutes of bankrupts, and therefore he cannot be discharged from a commitment on behalf of the crown."

The plaintiffs in this case were under no obligations to prove their claim, for it would not be discharged by the defendant's discharge in bankruptcy. The estate paid nothing to creditors.

Richmond v. Brown, 66 Me. 875.

The Act does not discharge debts due the State or the United States.

Saunders v. Com. 10 Gratt. 494; *Com. v. Hutchinson*, 10 Pa. 466.

Poll taxes are assessed for town, county, and State purposes.

Rev. Stat. chap. 6, § 88.

Mr. A. F. Moulton, for defendant:

The only question at issue is whether an action brought to collect a tax is barred by a discharge in insolvency.

The Insolvent Law, § 45 (Rev. Stat. chap. 70, § 49), provides that, "a discharge in insolvency duly granted shall * * * release the insolvent from all debts, claims, liabilities, and demands which were or might have been proved against

his estate in insolvency,"—and such discharge, duly pleaded, shall bar all suits brought on any such debts, claims, or liabilities which were or might have been proved as aforesaid.

The Insolvent Law, § 36 (Rev. Stat. chap. 70, § 40), specifically names a tax as a "claim," saying: "In making a dividend under the preceding section, the following claims shall first be paid in full, in their order. * * * All debts and taxes due to the State or to any county, city, or town therein," etc.

No language can be more plain and direct than that which makes a tax a claim which is or may be proved, and to which a discharge in insolvency operates as a full and complete bar.

Emery, J., delivered the opinion of the court:

The question is whether, in enacting the insolvency statute and providing for the release of the honest insolvent "from all debts, claims, liabilities, and demands which were or might have been proved against the estate in insolvency," the Legislature intended to release him from paying the arrearages of his just taxes for the support of the government.

We think the Legislature did not so intend. It is a settled rule of statute construction that the government is not bound by the words of a statute, tending to restrain or diminish its powers, rights, or interests, unless it is named therein as to be also bound. It is old English law that the crown is not bound by a restraining statute unless specifically named.

The assessment and collection of taxes is a function of government. It is essential that each person under its protection should promptly pay his share of tax. That the tax is assessed and collected by town officers makes no difference. The prompt payment is a duty from the individual, to the State.

The insolvency statute contains no words declaratory of an intention to restrain or diminish the right of the State or its political subdivisions to recover arrearages of taxes from insolvents. The inference is that the Legislature did not so intend, and that the right to recover unpaid taxes is not thereby abridged.

United States v. Herron, 87 U. S. 20 Wall. 251 (22 L. ed. 275).

Defendant defaulted.

Peters, Ch. J., Walton, Virgin, Libbey, and Haskell, JJ., concurred.

VIRAM B. PAUL

v.

JESSE H. FRYE *et al.*

1. The report of a master has substantially the weight of a verdict, and his conclusions are not to be set aside or modified without clear proof of error.
2. The decision of a single justice upon matters of fact in an equity hearing shall not be reversed unless it clearly appears that the decision is erroneous.

(Waldo—Decided December 22, 1887.)

ON appeal by the plaintiff. Decree affirmed. The opinion states the point.

Mr. Joseph Williamson, for plaintiff:

The report of a master is not conclusive, although every reasonable presumption is to be made in its favor; and if the evidence clearly shows that he is mistaken in his conclusions, the court will set them aside upon exceptions.

Drew v. Beard, 107 Mass. 64.

Mr. William H. Fogler, for defendants.

Per Curiam:

This is an equity appeal. The bill is to enforce specific performance of an agreement to convey lands. The question was as to the amount the complainant was to pay for such conveyance. The case was referred to a master, who heard the parties and their witnesses, and examined their papers, and made his report, stating the amount he found due. He also reported the evidence taken before him. The complainant objected to the master's findings, and was heard thereon by the presiding justice, who reviewed the reported evidence and found the master's findings to be correct, and decreed accordingly. The complainant thereupon appealed. Questions of fact only are presented by the appeal.

While the master's report upon questions of fact is not conclusive, yet it has substantially the weight of a verdict of a jury; and his conclusions are not to be set aside or modified without clear proof of error on his part. *Dean v. Emerson*, 102 Mass. 480; *Trow v. Berry*, 118 Mass. 146; *Richards v. Todd*, 127 Mass. 172; *Cary v. Herrin*, 62 Me. 16.

Again, we have before held that the decision of a single justice upon matters of fact in an equity hearing should not be reversed unless it clearly appears that such decision is erroneous. *Young v. Witham*, 75 Me. 586.

The appellant must show the decree appealed from to be clearly wrong, otherwise it will be affirmed.

Applying these rules, we cannot say that the finding of the master, and that of the single justice, are clearly wrong. The evidence was conflicting, but some of it fully sustains the findings.

Decree affirmed.

Joseph MAYBERRY

v.

James C. MEAD.

1. A corporation of the pew-owners, by a majority vote, may control the meeting-house, make repairs thereon, etc., at a meeting of the corporation duly called therefor. It can not be done at a meeting called by a justice of the peace, on application to him therefor, for the purpose of organizing the corporation.
2. Proceedings which were held to be for the organization of pew-owners.
3. It must appear that a majority of the members voted to repair, raise the money, and assess the pews, in order to make a valid assessment.
4. An assessment is void where the assessors added an overlay to the sum raised, and assessed it upon the pews.

(Cumberland—Decided January 2, 1888.)

ON report. Judgment for the plaintiff.

This was an action for the recovery of pew No. 16 in the Congregational Meeting-house in North Bridgton.

It was admitted that the title to the pew was conveyed by deed in 1875. But the defendant claimed title under a deed from the treasurer of a corporation of the pew-owners, given in 1834. This deed was sufficient in form, and it was admitted conveyed a good title if the following proceedings were valid:

Records.

To Edward Kimball, Esq., one of the Justices of the Peace in and for the County of Cumberland and State of Maine.

The undersigned proprietors and pew-owners in the house known as the Congregational Meeting-house in North Bridgton Village, in said county, hereby make application to you to issue your warrant to one of them to notify the proprietors and pew-owners of said house to meet in said house on Saturday the 6th day of October, A. D. 1883, at 2 o'clock P. M., to act on the following articles, viz.:

1. To choose a moderator to govern said meeting.
2. To choose a clerk.
3. To see if said proprietors and pew-owners will incorporate themselves into a legal body.
4. To determine the mode of calling future meetings.
5. To determine whether they will repair said house.
6. To determine in what manner money shall be raised for repairs.
7. To choose treasurer, appraisers, assessors, and any other officers, committees, or agents as they may think proper for executing such purposes as they may direct.
8. To transact any other business that may legally come before them.

Dated this the 5th day of September, A. D. 1883. Luke Brown,
G. E. Chadbourne,
Asa Gould.

State of Maine, }
Cumberland, } ss.

[L. s.]

To Luke Brown, Esq., of Bridgton:

In compliance with the foregoing application to me directed, you are hereby required to notify and warn the pew-owners therein named to meet and assemble at the time and place and for the purposes specified in said application, by posting an attested copy of the same on the principal outer door of said meeting-house, and one at the North Bridgton postoffice, also to be printed in the Bridgton News at least twenty-one days before the time of said meeting.

Given under my hand and seal this 10th day of September, A. D. 1883.

Edward Kimball,
Justice of the Peace.

I hereby certify this is a true copy of the above warrant directing me to notify the said meeting.
Luke Brown.

In compliance with the within warrant I have notified the proprietors and pew-owners by posting a true copy of the within warrant on the principal outer door of said meeting-house,

and one at the postoffice at North Bridgton, and causing the same to be printed in the Bridgton News.

Notice posted Sept. 12, 1888, and published Sept. 18, 20, 27,—it being more than three weeks before the time of said meeting.

A true copy. Luke Brown.

Attest: Geo. E. Chadbourne,

Clerk.

Afterward said Brown made a supplemental return as follows:

To the Clerk of the Association of Pew-owners and Proprietors of the North Bridgton Meeting-house:

I herewith make a supplemental amendatory return of my proceedings returned by me upon a warrant issued by Edward Kimball, justice of the peace, dated September 10, A. D. 1888, to Geo. E. Chadbourne, Asa Gould, and me.

The record of my proceedings is made by you upon the book of records of said association, upon page 5 thereof. The supplement and amendment hereby made is as follows: To be added thereto, after the sentence of my return ending in the words "the Bridgton News." The words of addition are the following: "Said postoffice is a public place in said Bridgton."

Luke Brown.

North Bridgton, April 1, A. D. 1886.

A true record.

Attest: Geo. E. Chadbourne,

Clerk.

North Bridgton, Oct. 6, 1888.

Met in accordance with the foregoing request and warrant at the time and place and for the purpose therein named, and called to order by Mr. Brown, to whom said warrant was directed.

Chose by ballot Jacob Hazen, Moderator.

" " Geo. E. Chadbourne, Clerk, —who was sworn to the faithful and impartial discharge of the duties incumbent to that office, by the moderator. A majority in interest of the owners, being present, voted, on motion of the clerk, that we now declare this a body corporate, and that a committee of three be appointed by the chair to draft a code of by-laws for the use and the government of said corporation. G. E. Chadbourne, Luke Brown, and C. H. Gould were appointed the committee.

Voted, on motion of A. A. Libby, that the report presented by the committee be accepted.

Voted, on motion of Mr. Gould, that each item of said report be voted on for adoption, amendment, or rejection; and the following preamble and code was unanimously adopted:

This association now being a body corporate in accordance with chapter 12 of the Statutes of the State of Maine, the same to be known for all legal transactions as the Pew-owners and Proprietors of North Bridgton Meeting-house, the same to be governed by the following by-laws:

Chose by ballot C. H. Gould, Treasurer	} Sworn by Moderator.
Chose by ballot Austin B. Frisbee, Collector	
Chose by ballot Jacob Hazen, Luke Brown, and G. E. Chadbourne, Assessors.	

Mr. Hazen was sworn by Edward Kimball,

1 Mr.

justice of the peace; Brown and Chadbourne by the moderator.

Voted that the meeting-house be reshingled, and the plastering be repainted in distemper.

Voted, on motion of Mr. Brown, that said repairs be done by assessment on the pews.

Voted, on motion of the clerk, that the procuring of materials and putting on be left with the executive committee, with power.

Voted, that whenever we do adjourn, it shall be to meet at this place one week from to-day at 2 o'clock P. M., to hear the report of committee, etc.

Adjourned.

A true record.

Attest: George E. Chadbourne,

Clerk.

North Bridgton, Me., Oct. 18, 1888.

Met according to adjournment.

Report of executive committee on the purchase of shingles, etc., made verbally and accepted.

Voted to raise \$150 for the purpose of shingling the roof and repairs on plastering.

Voted that when we adjourn, it shall be at this place two weeks from to-day at 8 o'clock P. M.

Adjourned.

A true record.

Attest: Geo. E. Chadbourne,

Clerk.

Tax of \$150, with overlay of \$5.40 assessed on the pews in the meeting-house at North Bridgton, Oct. 20, 1888, committed to collector for collection Oct. 20, A. D. 1888.

Mr. Caleb A. Chaplin, for plaintiff:

The statement in the petition that there had been no meeting of the organization within three years was indispensably necessary, and for want of it the magistrate had no jurisdiction, and his warrant was a nullity.

Sudbury Parish v. Stearns, 21 Pick. 156; Rev. Stat. 1871, chap. 12, § 34.

"The jurisdictional facts must be set out. They must not be left to inference."

Goodwin v. Sagadahoc County, 60 Me. 380.

"It must appear affirmatively, and nothing is to be inferred."

Bethel v. Oxford County, 42 Me. 478.

There is no presumption in favor of the warrant of a magistrate.

State v. Hartwell, 35 Me. 129.

A magistrate's warrant must show his jurisdiction to issue it.

Virgin, Dig. citing *Gurney v. Tufts*, 37 Me. 180; *Vinton v. Weaver*, 41 Me. 430.

Jurisdiction of magistrates cannot be conferred by consent of parties; it is merely a statute regulation.

Call v. Mitchell, 39 Me. 465.

That the jurisdictional facts must appear of record or be proved, see—

Starbird v. Falmouth School Dist. No. 7, 51 Me. 102; *Powers v. Sanford*, 39 Me. 188.

No indication anywhere in the chapter relating to meeting-houses, that a less number than a majority of the pew-owners or proprietors could constitute a legal meeting; but these are the expressions of the statute:

"The majority in interest of the owners of a meeting-house."

Stat. 1871, chap. 12, § 27.

"A majority of the pew-owners or proprietors of a meeting-house present at a legal meeting."

Stat. 1871, chap. 12, § 28.

"Such corporation by a majority vote of its members."

Stat. 1871, chap. 12, § 38.

These statutes seem to make it entirely clear that there must be a majority present to constitute a legal meeting of these religious or charitable associations or corporations, and to take it out of their power to make any less number a quorum.

Mr. A. H. Walker for defendant.

Per Curiam:

We think the defendant fails to show title to the pew in suit, for the following reasons:

I. The proceedings put in evidence by the defendant, and relied on by him, must be treated as an organization of the pew-owners of the meeting-house as a corporation under Rev. Stat. 1871, chap. 12, §§ 31, 32.

II. By § 33 of said chapter, such corporation, by a majority vote of its members, may control the meeting-house, etc. It must be done at a meeting of the corporation duly called therefor. It cannot be done at a meeting called by a justice of the peace, on an application to him therefor, for the purpose of organizing the corporation. The meeting so called is not a meeting of the corporation, but one called before there was a corporation.

III. It does not appear by the record that a majority of the members of the corporation were present or voted to repair, raise the money, or assess it on the pews.

IV. The assessors had no authority to add, to the sum raised, an overlay at their pleasure, and assess it on the pews. We find no statute authority for it, and in the absence of such authority they had power to assess the sum raised only. In adding the overlay they exceeded their power, and for this reason the assessment was void.

Judgment for the plaintiff.

Francis H. PEABODY *et al.*

v.

James MAGUIRE *et al.*; Chase, Leavitt, & Co., *Trustees*, and J. O. Lafreniere and Desrosiers & Paille, *Claimants*.

1. A State officer can not make a valid attachment of property in a United States bonded warehouse, or while in the possession of a customs officer.
2. Property in a United States bonded warehouse is constructively in the possession of the person who placed it in bond, and he may be charged as trustee of the real owner in trustee process.
3. When a sale is made for cash, the payment of the money is a condition precedent to the passing of the title.
4. That condition may be waived by vendor. Facts stated upon which the court held that the condition of a sale was waived by an unconditional delivery.
5. The law of the country where a con-

tract is made governs its interpretation and construction, although performance is demanded in a foreign jurisdiction.

6. Where no foreign law is proved, which shows that the rights of the parties are to be affected in any manner different from the law of the country where the remedy is sought, the court will assume that the law of the place of contract is the same as that where the remedy is sought.
7. Where a writ is sued out against one member of a firm and served upon a creditor of the firm as alleged trustee, no valid attachment is made.
8. Such attachment becomes valid when the writ is amended, by leave of court, by making all the members of the firm parties, before any change of possession of the property on the part of the alleged trustee, and before any rights of third parties have intervened.
9. As against a claimant who appears and claims the property in the hands of the trustee, the plaintiff, if he prevails in holding the property, is entitled to costs.

(Cumberland—Decided December 27, 1887.)

ON report from the Superior Court of Cumberland County of the question (between the plaintiffs and claimants) upon charging of the alleged trustees. *Trustees charged.*

The action was assumpsit by Messrs. Kidder, Peabody, & Co., of New York, on a dishonored bill of exchange drawn by Messrs. D. & J. Maguire, of Quebec, on Messrs. Gordon & Co., of London.

The essential facts are stated in the opinion.

The following are the laws and decisions of Canada which were introduced in evidence and referred to in the opinion:

Article 1998 of the Civil Code of Lower Canada, in force since the 1st of August, 1866: "The unpaid vendor of a thing has two privileged rights: (1) a right to revendicate it; (2) a right of preference upon its price.

"In the case of insolvent traders, these rights must be exercised within fifteen days after the sale."

It was held in the Superior Court at Montreal, by Justice Rainville, in the case of *Thibodeau v. Mills*, on the 28th day of February, 1883, as follows:

Considering that, under the terms of the Civil Code of Lower Canada, art. 1998, the vendor of a thing unpaid may exercise two privileges: (1) that of its revendication; (2) that of preference on its price. Considering that, under the terms of art. 2000, the unpaid vendor, if he has lost his right to revendicate, or if he has sold with a term, keeps his privilege on the product of a thing against all creditors except the lessor and the bailee. Considering that it is proved that the goods in question, at the time of their return to the vendor by the vendee, were in the same state as at the time of their delivery, separated from all the other goods of the said Chaput and Masse, untied and bound with ropes, and that there is no doubt as to their identity. Considering that

under the terms of art. 1543, Civil Code, the vendor of a movable property has a right to the canceling of the sale, for default of payment of the price, so long as the thing sold remains in the hands of the buyer. Considering that the parties have, without fraud, canceled the said agreement of sale, by mutual consent, and that the said Chaput and Masse have executed beforehand what the law would have obliged them to do, and that the plaintiffs did not suffer any prejudice from that transaction in so far as the effect of the exercise of the privilege of said Mills and Hutchinson, by one way or another, would have been the same. Considering that, under the terms of art. 1998, the vendor, in cases of insolvency under an insolvent law, *faillite*, can only exercise his privileges within fifteen days after the sale; that such provision applies only to cases of insolvency under an insolvent law, *faillite*, and not in cases of insolvency under common law, *insolvabilité*,—the said Chaput and Masse are not insolvent traders, in so far as there is no longer a law permitting to put a person in insolvency, and that in consequence the unpaid vendor is always in time to exercise his right of preference.

Maintains the said pleas, etc.

It was held by *Mr. Justice Rainville*, sitting in the Superior Court at Montreal, on September 7, 1877, in *Re Thompson*, 9 R. L. 879, as follows:

The petitioner, merchant of Leeds, England, presented a petition in order to recover possession of goods sold to the insolvents, and sent by the petitioner to the buyers' agent at Liverpool and expedited by such agent to Montreal, where they were stored in the custom-house; in the mean time the buyers had become insolvent.

The assignee opposed the petition on the ground that the conveyance of the goods had ceased by their delivery to the buyers' agent at Liverpool and by their arrival at Montreal.

Many authorities were cited on both sides, among others the Insolvent Act of 1875, § 82, which enacts that "in the preparation of the dividend sheet, due regard shall be had of the rank and privilege of every creditor; which rank and privilege, upon whatever they may legally be founded, shall not be disturbed by the provisions of this Act, except in the province of Quebec, where the privilege of the unpaid vendor shall cease from the delivery of the goods sold."

His honor granted the petition on the principle that the delivery of goods, according to art. 1543 of the Civil Code, means their delivery in the store and in the hands of the insolvents, and not their deposit at the custom-house, and that the vendor of movable effects has a right to revendicate goods unpaid.

Article 1543 is in the following terms: "In the sale of movable things, the right of dissolution by reason of the nonpayment of the price can only be exercised while the thing sold remains in the possession of the buyer, without prejudice to the seller's right of revendication, as provided in the title of *Privileges and Hypothecs*."

It was held in the Superior Court at Montreal (*Haworth v. Elliott*, 10 L. C. Jur. 197), "that the delivery contemplated by the Insolvent 1 Me.

Act of 1864, § 12, is an actual, complete, and final one, and consequently the delivery of goods to a purchaser's shipping agent in England, for transmission to purchaser in Canada, and the entering of the goods in bond here, by the purchaser's custom-house broker, is not such a delivery as will defeat the vendor's remedy, under the Custom of Paris, art. 176, 177."

It was held in the Superior Court at Montreal (*Bank of Toronto v. Kingston*, 12 L. C. Jur. 216), "that the expression 'fifteen days after the sale' in the Civil Code of Lower Canada, art. 1998, means after the sale and delivery. The delivery of goods sold in England to a shipping agent there, employed by the vendees, who forwards them to the vendees carrying on business in Montreal, is not such a delivery as is contemplated by the Insolvent Act of 1864, § 12, and such goods may be legally revendicated by the unpaid vendors in the hands of the Grand Trunk Railway here, although more than fifteen days elapsed since each delivery to the shipping agent."

We, Prothonotary of the Superior Court of the District of Montreal, hereby certify that the preceding pages contain faithful transcript of the Civil Code in force in this province, and a faithful translation of judgments and reports in the way above indicated.

[Stamp. Seal.] Geo. H. Kernick,
Deputy Proth'y Superior Court,
District of Montreal.

Mr. J. W. Spaulding, with **Mr. Isaac W. Dyer**, for plaintiffs:

If it were a fact that the cause of action in this suit was embraced in a former suit in which an attachment was made, that defense would be by abatement, by the principal defendants, and could not be raised by the trustees.

The trustees cannot do for the defendants what the defendants themselves could not do. The defendants could not now file plea in abatement.

Steward v. Walker, 58 Me. 299.

The alleged attachment of the lumber in the former suits was void, as property in the hands of a custom-house officer cannot be attached by a State officer.

Harris v. Dennie, 28 U. S. 3 Pet. 292 (7 L. ed. 683); *Conard v. Pacific Ins. Co.* 31 U. S. 6 Pet. 262 (8 L. ed. 392).

Mr. Usher, in his work on Sales of Personal Property, § 204, says: "The performance of the condition may be waived by an express understanding, or by implication from the facts of the parties; as where the goods are delivered without any objection on the part of the seller that the condition has not been complied with, and under circumstances indicating an intent and purpose not to insist upon the condition," citing—

Carleton v. Sumner, 4 Pick. 516; *Smith v. Dennie*, 6 Pick. 262; *Fairbank v. Phelps*, 22 Pick. 539; *Dresser Mfg. Co. v. Waterston*, 8 Met. 17; *Whitney v. Eaton*, 15 Gray, 227; *Farlow v. Ellis*, Id. 231; *Scudder v. Bradbury*, 106 Mass. 427; *Upton v. Sturbridge Cotton Mills*, 111 Mass. 446; *Goodwin v. Boston & L. R. Co.* Id. 489; *Haskins v. Warren*, 115 Mass. 533; *Freeman v. Nichols*, 116 Mass. 309.

A waiver is the result of a voluntary, unequivocal act of delivery. To say a party does

not intend a waiver is to say that he does not intend the legal effect of his voluntary act.

Upton v. Sturbridge Cotton Mills, supra.

If he (the seller) voluntarily delivers the goods, this is presumptively a waiver of the condition which attaches to a sale, and the title passes to the purchaser, unless it is shown that the delivery was upon a condition which has not been complied with.

Scudder v. Bradbury, 106 Mass. 422.

A waiver may be proved by express declaration, or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage; or by a course of acts and conduct, or by so neglecting and failing to act, as to induce a belief that it was his intention and purpose to waive. It may be proved by various species of proofs and evidence, by declarations, by acts, and by nonfeasance or forbearing to claim or act.

Farlow v. Ellis, 15 Gray, 292.

An unqualified delivery of possession is a release or waiver of the seller's right, whether it be in the nature of a condition affecting the title, or only a lien for the price.

Benj. Sales, §§ 677, note *f*, 566; *Haskins v. Warren*, 115 Mass. 538. See *Heller v. Elliott*, 16 Reporter, 276; 45 N. J. L. 564; *Chapman v. Lathrop*, 6 Cow. 110, 8 N. Y. C. L. Rep. (L. ed.) 849, see note; *Lupin v. Marie*, 6 Wend. 77, 10 N. Y. C. L. Rep. (L. ed.) 1025.

Mr. Enoch Knight, also for plaintiffs:

The State must consult the policy and interests of its own people; and to enforce the laws of another country against its interests would be treacherous to its own duties.

1 Dan. Neg. Inst. § 866; 1 Burge, Col. L. p. 5; *Bartley v. Hodges*, 1 B. & S. 376.

Laws limiting the time of bringing suits constituted the *lex fori* of every country,—one of the most sacred of sovereign rights.

Hawkins v. Barney, 30 U. S. 5 Pet. 457 (8 L. ed. 190).

In this connection Story says (§§ 575, 576): "As to all liens, hypothecations, statutes of prescription or limitation, there is no doubt that they are only questions affecting the remedy. Every set-off and incidental right to a contract is governed entirely by the *lex fori*. The object is to fix certain periods and limitations within which all suits shall be brought and rights demanded, whether by or against foreigners. This is founded in the noblest policy. Such statutes hold that claims shall be litigated in the proper form. They rest on the negligence or laches of the party himself. They quicken diligence by making it equivalent to right. They discourage litigation by burying all men's rights in a common receptacle, lest men's rights might otherwise become immortal, while men themselves are only mortal."

And so, in § 578, he says: "If this question were new, it would be difficult to conceive of a different rule. Little right have foreigners to insist that the laws of their country shall supersede those of the nation where they have chosen to litigate their controversies."

Also, in § 581: "The common law has fixed its own doctrine that the *lex fori* must prevail in all cases as the universal rule." Also quoting *Bulger v. Roche*, 11 Pick. 36; *Bryne v. Crowninshield*, 17 Mass. 58.

In § 571 Judge Story quotes *Lord Tenter-*

den: "A person who comes into a court in this country must take the law as he finds it. He cannot, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here." Also citing 83 U. S. 8 Pet. 361 (8 L. ed. 974).

The attention of the court is especially called to an opinion of Lord Brougham, quoted by Judge Story under § 557,—*Down v. Lippman*,—and the great array of cases therein cited: "The law on this point is well settled, that whatever relates to the remedy to be enforced must be determined by the laws of the country to the tribunal of which the appeal is made. If there is a conflict between our laws and foreign laws, as to the rights of our own citizens, and one of them must give way, our own must prevail."

Story, Conf. L. § 414.

In *Potter v. Brown*, 5 East, 124, is an interesting discussion of this conflict between the citizen and foreigner; and the language of Lord Ellenborough, who also adopted the view of Huberus, is incorporated into the decree of the court: "In any conflict of laws, the court which decides will prefer the law of its own country to that of the stranger."

Chancellor Kent, vol. 2. p. 461, lays it down as a fixed rule that when the *lex loci* and the *lex fori* come in collision the amity of nations must yield to the law of the land.

Mr. Burge, in his Commentaries, adopts the text above quoted, and adds: "The law of a foreign country is admitted that the contract may have the interpretation which the parties intended; but no State is bound to admit such a foreign law when it would prejudice the rights of its own subjects."

Burge, Col. L. pt. 2. chap. 20, p. 778.

The only question as to the scope of this doctrine ever entertained by our court is expressed in *Fox v. Adams*, 5 Me. 245, in 11 Me. 41, and in 71 Me. 514, in which latter case is also discussed the opinion in *South Boston I. Co. v. Boston Locomotive Works*, 51 Me. 585; and in this connection the attention of the court is respectfully called to a recent decision rendered by Chief Justice Scott of the Supreme Court of Illinois—

May v. First Nat. Bank, 7 West. Rep. 661. See also *Heyer v. Alexander*, 108 Ill. 385; *Howe v. Pearce*, 110 Ill. 350; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367; *Brown v. Knox*, 6 Mo. 306; *Upton v. Hubbard*, 28 Conn. 275; *Paine v. Lester*, 44 Conn. 196, confirming 28 Conn. 275; *Warner v. Jaffray*, 96 N. Y. 248; *Kidd v. Tufts*, 48 N. H. 121; *Davis v. Pierce*, 7 Minn. 18; *McFarland v. Butler*, 8 Minn. 116; *Jackson v. Butler*, Id. 117.

Messrs. Holmes & Payson, for claimants: "Where goods are to be paid for on delivery, which is made, but payment is evaded; where payment and delivery are agreed to be simultaneous, and the payment is omitted, evaded, or refused by the purchaser on getting possession of the goods,—the seller may at once reclaim them. No title passes till the terms of the sale have been complied with. Where nothing is said about payment, at the time of the purchase, the law presumes that the sale is for cash, and in such case payment and delivery are concurrent acts. When goods are sold on time, and delivered under an agreement

that they are to be paid for in a promissory note of the purchaser, such payment is a condition precedent, and the title will not pass till it is made."

Usher, Sales, §§ 202, 208; 1 Benj. Sales, § 334.

As early as 1808 this question came before the Massachusetts court. It was held that the title still remained in the vendors, upon the simple ground that the plaintiffs had not received the security before the delivery of the goods, as appears by the ruling at nisi prius, and the overruling of the exceptions.

Hussey v. Thornton, 4 Mass. 405.

In a case decided by the same court in 1827 there was a purchase of some property partly for cash and partly on credit. It was held by the court that the title never passed.

Marston v. Baldwin, 17 Mass. 606.

Whenever there is any question in a conditional sale whether the vendor has made such delivery as has waived the condition, the proof is upon the party claiming the sale, as against the one maintaining that any waiver existed. It is the intention of the parties which governs in such cases.

Riddle v. Varnum, 20 Pick. 280.

This is to "be ascertained only from the terms of the agreement as expressed in the language and conduct of the parties, and as applied to known usage and the subject-matter. It must be manifested at the time the bargain is made."

Foster v. Ropes, 111 Mass. 10, 16.

When a sale has been made upon any particular terms or conditions, and the delivery made pursuant to that agreement,—that is, in consequence of and by reason of it,—the delivery thereby becomes conditional in like manner as the sale.

Smith v. Dennie, 6 Pick. 262-266.

A distinction between a delivery which is unconditional after a conditional sale, and one where the condition still exists, is well taken in *Burbank v. Crooker*, 7 Gray, 158.

Sundry cases are found in the Massachusetts Reports where a special agreement was proved that the property should remain the title of the vendor until paid for in cash.

Sargent v. Metcalf, 5 Gray, 806; *Blanchard v. Child*, 7 Gray, 155.

In another case, decided in 1849, a sale of teas was made. The court, in that case, found that the title did not pass.

Hill v. Freeman, 3 Cush. 257. See also *Coggill v. Hartford & N. H. R. Co.* 3 Gray, 545; *Deaton v. Bigelow*, 8 Gray, 159; *Whitney v. Eaton*, 15 Gray, 225; *Farlow v. Ellis*, Id. 229; *Hirschorn v. Canney*, 98 Mass. 149; *Adams v. O'Connor*, 100 Mass. 515; *Nelson v. Dodge*, 116 Mass. 367; *Armour v. Pecker*, 123 Mass. 143; *Solomon v. Hathaway*, 126 Mass. 482.

The case of *Wigton v. Bowley*, 180 Mass. 262, is in conflict with many other cases in Massachusetts and elsewhere, because it contains the element of a draft attached to a bill of lading, upon the acceptance of which draft the bill of lading was to be delivered, and not without.

See also *Blanchard v. Cooke*, 4 New Eng. Rep. 68, 144 Mass. 207.

In such cases it has been held, over and over again, that the parties holding the bill of lading

and draft retain the title to the property until the draft is either accepted or paid.

Fifth Nat. Bank v. Bayley, 115 Mass. 228; *Newcomb v. Boston & L. R. Co.* Id. 230; *Alberman v. Eastern R. Co.* Id. 233; *Seymour v. Newton*, 105 Mass. 272; *Marine Bank v. Wright*, 48 N. Y. 1; *First Nat. Bank v. Dearborn*, 115 Mass. 219; *Exchange Bank v. Rice*, 107 Mass. 37.

The authorities in Maine are not numerous, but they are to the point:

Hotchkiss v. Hunt, 49 Me. 213-219, *et seq.*; *Bauendahl v. Horr*, 7 Blatchf. 148; *Stone v. Perry*, 60 Me. 48; *Seed v. Lord*, 66 Me. 580.

When a contract is made, the laws of the jurisdiction within which it is made enter into it so far as they appertain thereto; and the terms of the contract are modified accordingly.

See *Hackett v. Potter*, 135 Mass. 349; *Shoe & Leather Nat. Bank v. Wood*, 8 New Eng. Rep. 118, 142 Mass. 563; *Marvin Safe Co. v. Norton*, 5 Cent. Rep. 341, 48 N. J. L. 410, and cases cited.

So far as any laws of Canada are pertinent, they are by the terms of the report to be proved by certificates. It will be seen by the Civil Code of Lower Canada, art. 1998, which includes the residence and place of business of the claimants, the residence and place of business of the vendees, and the residence and the place of business of the agent of the vendees, that the unpaid vendor of a thing has two privileged rights: (1) the right to revendicate it; (2) right of preference upon its price.

Re Thompson, 9 R. L. 379, and *Hawesworth v. Elliott*, 10 L. C. Jur. 197, are to the effect that delivery to the buyer's agent does not deprive the creditor of his rights.

In *Re Thompson*, *supra*, the provisions of § 1543 of the Code are cited. This contains certain provisions, and carefully provides that they shall not affect the chapter containing § 1998.

The same court at Montreal, following the authorities, and reciting art. 1998, in a case where the goods were sold in England and delivered to the purchaser's shipping agent there, held that such a delivery was not a delivery such as was contemplated by the statute, and that the goods might be legally revendicated by the unpaid vendor in the hands of the Grand Trunk Railway in Lower Canada, although more than fifteen days had elapsed since such delivery.

Bank of Toronto v. Kingston, 12 L. C. Jur. 216.

Rights and property in goods obtained in Canada, by contracts made there, and the laws existing there, including the laws and rights to revendicate the same, follow the property, although it has gone into another jurisdiction, so long as such rights or property have not in any way been abandoned by the voluntary act of the party who possessed them in the original jurisdiction.

See Story, Conf. L. § 272; Jones, Com. & Trade Cont. § 28; *Bulkeley v. Honold*, 60 U. S. 19 How. 390-392 (15 L. ed. 663); *Walker v. Whitehead*, 88 U. S. 16 Wall. 314-317 (21 L. ed. 357); *Scudder v. Union Nat. Bank*, 91 U. S. 406 (23 L. ed. 245); *Pritchard v. Norton*, 106 U. S. 124, 180 (27 L. ed. 104); *Morgan v. New Orleans, M. & T. R. Co.* 2 Woods, 244-254; 8 Myer, Fed. Dec. § 1200; *Green v. Sarmiento*, Pet. C. Ct. 74; *S. C. 1 Abb. Nat.*

Dig. p. 796; *Rhode Island Cent. Bank v. Danforth*, 14 Gray, 128; *Williams v. Wade*, 1 Met. 32; *Judd v. Porter*, 7 Me. 837, 839; *South Boston I. Co. v. Boston Locomotive Works*, 51 Me. 585; *Lindsay v. Hill*, 66 Me. 212-217; *Smith v. Eaton*, 36 Me. 298-306.

On the other hand, it is true that what pertains to the remedy is governed by the *lex fori*. This doctrine and the reasons for it are fully set forth in Story, Conf. L. §§ 572, 575, 576, note a.

Leroux v. Brown, 12 C. B. 801.

No attachment was ever made in this case of the goods of D. & J. Maguire, but only of James Maguire. The addition of Charles Maguire's name cannot relate back so as to make the attachment good as against him, the amendment having been made after the entry of the writ in court. It was only the defendant James Maguire's property which was attached.

The property of an individual in firm assets consists only of his share of the assets remaining after the payment of all the debts of the firm; and, in this case, it appearing that the firm was wholly insolvent, the attachment held nothing whatsoever in the hands of the alleged trustees. Whether a trustee is chargeable depends upon the state of things existing at the time of service upon him.

Mace v. Heald, 36 Me. 135; *Williams v. Androscoggin & K. R. Co.* Id. 201; *Capen v. Duggan*, 136 Mass. 501.

Adding a new defendant, though he be another partner in the same firm, vacates an attachment of firm property.

Denny v. Ward, 8 Pick. 199.

Foster, J., delivered the opinion of the court:

The plaintiffs bring this action of assumpsit against the defendants, lumber merchants residing at Quebec, and there doing business under the firm name of D. & J. Maguire. Chase, Leavitt, & Co., of Portland, are joined as trustees by reason of their having in their possession certain lumber shipped to them by the defendants.

The real contest is in reference to the title to the lumber in the possession of the trustees. The contention lies between the plaintiffs and the parties of whom the defendants purchased the lumber, who appear as claimants, and assert that, under the circumstances, no title passed so as to prevent their claiming the lumber as their own.

These claimants, at the time of the transactions out of which this suit arose, were lumber merchants, residents of Canada, and carrying on business independent of each other at Louisierville, on the St. Lawrence. The firm of D. & J. Maguire—the principal defendants—was also in the same business at Quebec. They had an agent, Arthur D. Ritchie, for the purchase of lumber in Canada, and Chase, Leavitt, & Co. were their consignees of the lumber in Portland, who acted for said firm, received the lumber, entered it in the custom-house, and gave a warehouse bond; subsequently an export bond was substituted, and the lumber shipped abroad as ordered by the consignors. Such was the general course of business.

At the time of the service of the writ in this

case upon the trustees, the property in dispute, although in bond for storage, was constructively in their possession. While there could be no actual attachment of the property itself by a State officer undertaking to take the property out of the custom-house, either by paying the duties or giving an export bond (*Harris v. Dennie*, 28 U. S. 3 Pet. 304, 7 L. ed. 687; *Conard v. Pacific Ins. Co.* 31 U. S. 6 Pet. 262, 8 L. ed. 392); and therefore could not be come at to be attached, there is no reason why it might not be subject to trustee process while thus in the constructive control and possession of the trustees. They could take it out of bond, either by giving an export bond or by paying duties.

The lumber in question was purchased by the Maguires, through their agent, about the 1st of November, 1886, at Louisierville, and was to be delivered at Doucet's Landing, a place about thirty miles from there, down the St. Lawrence,—a terminus of the Grand Trunk Railway.

The contention on the part of the claimants is that the terms of sale were cash less 2½ per cent discount, or note on three months from date of shipment, and that the terms have never been complied with; in other words, that the sales were conditional, and, the conditions never having been performed, no title vested in the defendants.

The plaintiffs, on the other hand, controvert the position of the claimants, asserting that the sales were unconditional; or, if conditional, that there has been such a waiver of any conditions by the claimants as would render the title to the lumber complete in the defendants, and therefore subject to this process.

These questions ordinarily are for the jury, as questions of fact. But this case is before the court on report, and we must therefore determine them upon such evidence, and by such means of judging, as the parties have seen fit to furnish us, applying the law to the facts as we find them.

There is no doubt that it is a well-settled rule of law in this State that a sale and delivery of goods, on condition that the property is not to vest until the purchase money is paid or secured, does not pass the title to the vendee till performance of the condition, and that in case the condition is not fulfilled the vendor has a right to repossess himself of the goods, not only as against the vendee, but also as against his creditors, claiming to hold them under attachments. *Everett v. Hall*, 67 Me. 498; *Brown v. Haynes*, 52 Me. 580.

It is equally well settled that, in the sale of personal property to be paid for by cash or by note on delivery, the payment of the money or the giving of the note is a condition precedent; and until that is done, or waived, the title does not pass from the vendor. *Seed v. Lord*, 66 Me. 580; *Stone v. Perry*, 60 Me. 50; *Whitney v. Eaton*, 15 Gray, 225.

If the delivery and payment were to be simultaneous, and the goods were delivered in the expectation that the price would be immediately paid, a refusal to make such payment would be such a failure on the part of the purchaser to perform his part of the contract as would entitle the seller to put an end to it and reclaim his goods. In such case the delivery

may be regarded as conditional; and, upon the purchaser's refusal to pay, the seller may at once reclaim the goods. The sale is not consummated, and the title does not vest in the purchaser.

No citation of authorities is necessary in support of the principle, equally familiar and well founded, that the vendor may waive the condition of the sale, and by so doing pass the title, although the sale was originally a conditional one. He may waive the payment of the price, or agree to postpone it to a future day, and proceed to complete the delivery. In that case it would be absolute, and the title would vest in the purchaser. A waiver is the voluntary relinquishment of some known right, benefit, or advantage, and which, except for such waiver, the party otherwise would have enjoyed. And therefore, in order for the title to vest in the purchaser when the sale has been conditional, it must in some way appear that the goods were put into his possession with the intention of vesting the title in him, or that there were such acts and conduct on the part of the seller that such intention might be legitimately inferred therefrom. *Farlow v. Ellis*, 15 Gray, 232; *Paul v. Reed*, 52 N. H. 138.

Even in the case of a conditional sale of goods for cash, there are authorities which hold that a delivery apparently unrestricted is a waiver of the condition that payment is to be made before the title passes, although the seller has an undisclosed intent not to waive the condition. *Upton v. Sturbridge Cotton Mills*, 111 Mass. 446; *Haskins v. Warren*, 115 Mass. 533; *West v. Platt*, 127 Mass. 373.

But the doctrine which has the support of our own court upon this question, and which seems to be the correct and rational one, is that even in a conditional sale the mere fact of delivery, without a performance by the purchaser of the terms and conditions of sale, and without anything being said about the condition, although it may afford presumptive evidence of an absolute delivery, and of a waiver of the condition, yet it may be controlled and explained; and it is not necessarily an absolute delivery or a waiver of the condition; but whether so or not is a question of fact to be ascertained from the testimony. *Seed v. Lord*, 66 Me. 580; *Stone v. Perry*, 60 Me. 51; *Farlow v. Ellis*, 15 Gray, 229; *Hammelt v. Linneman*, 48 N. Y. 399; *Smith v. Lynes*, 5 N. Y. 43. This, doubtless, would be good evidence of its waiver. *Dresser Mfg. Co. v. Waterston*, 3 Met. 18; *Furniss v. Hone*, 8 Wend. 247; *Carlton v. Sumner*, 4 Pick. 516; *Smith v. Dennie*, 6 Pick. 262.

Such waiver may be proved, either directly or inferentially, from the circumstances, like any other fact. It may be proved "by express declaration; or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage; or by a course of acts and conduct, or by so neglecting and failing to act, as to induce a belief that it was his intention and purpose to waive." *Farlow v. Ellis*, *supra*.

Let us apply these rules to the present case. The evidence of these contracts of sale comes entirely from the purchaser's agent, Ritchie. Neither claimant has testified. They were the parties with whom the contracts were made,—

the parties who afterwards delivered the lumber. We are therefore without the light which their testimony might possibly shed upon the facts in this case. Although, taking the testimony before us, we may be satisfied that the contracts were originally conditional, nevertheless the evidence satisfies us of the fact that the vendors, by their acts and conduct in reference to the property, have waived any such conditions as may have originally attached to their contracts. This they had a right to do; and the evidence submitted fully warrants such conclusion. Nor are there any circumstances disclosed by the evidence which would modify the presumption of waiver by the unqualified and unconditional delivery which was made. There had been dealings of large amounts and of a similar character between the parties during the previous season. No custom or usage is shown that would delay for any number of days a cash payment. The lumber was sold to be delivered at Doucet's Landing. At the time of the delivery, which was some days after the trade was made, each claimant was present, and knew that his lumber was being shipped out of the country on the cars for Portland, and made no objections of any kind. Neither claimant, at the time and place of delivery, mentioned any conditions, or asked for cash or note; nor was anything said as to the length of time the lumber should remain at the place of delivery. The delivery in each case was made directly to the purchaser's agent who made the contract of purchase. The purchasers, not only at the time of making the contract, but also at the time of delivery, were doing a large business, and the evidence fails to show that they were known or even suspected to be in failing circumstances. Not more than three days were required from the time of the delivery for the certificate or bill of lading to be forwarded by the agent to the purchasers (the defendants), and the cash or notes to be returned. In this case the agent forwarded certificates of the amount of lumber of one of the claimants on the 17th of November, and of the other on the 25th or 26th of the same month. The failure of the defendants occurred on the 7th of December, and on the 10th an assignment of their property was made to trustees under the laws of the Province of Quebec. Up to that time neither of these claimants had taken any steps or made any movement in reference to the pay for their lumber. Nearly a month had elapsed between the delivery and the first intimation that the title to the lumber had not vested in the defendants. Other purchases had been made by the defendants from one of these claimants about the 5th of December, or just prior to the failure, and consigned to the same parties,—the trustees in this suit. But that consignment was stopped in Montreal by the vendor.

With these facts before us, notwithstanding the law of the place of the contract introduced and forming a part of the report in this case, we are irresistibly drawn to the conclusion reached in the case of *Smith v. Dennie*, 6 Pick. 262.—a case very frequently cited by the courts,—and the language of that opinion, drawn by Chief Justice Parker, might be appropriately applied here. "We are apprehensive," he says, "that to establish the right to reclaim under

such circumstances would widen the door for fraudulent contrivances, and that afterthoughts respecting conditions will spring up to intercept attaching creditors, when the sale was really unconditional, or, at least, when the vendor has thought his condition of so little importance as to be willing to abandon it and trust to the credit of the purchaser."

The case last cited was where a chattel was sold upon condition that the vendee should give an indorsed note, but was delivered without any express reference to the condition, and remained in the possession of the vendee eight days, when it was attached by his creditors, the vendor having made no claim during that period, either for the note or the chattel, and no reason was assigned for omitting such a claim; and it was held that there was a waiver of the condition, so far as to warrant the attachment; and a verdict having been rendered to the contrary, was set aside as against evidence.

But it is contended, on the part of the claimants, that the law of the country where the contract is made is the law of the contract, no matter where performance is demanded. And the learned counsel, upon this branch of the case, strenuously invokes the attention of the court to the Civil Code of Lower Canada, art. 1998, an abstract of which, with certain decisions of the court, has been introduced and forms a part of the report.

By virtue of that law it is claimed that the unpaid vendor of personal property has the right, upon the insolvency of the vendee, to revendicate or reclaim it. We do not understand, however, that this right attaches, according to any foreign law proved in this case, if the sale is made upon credit. Nor is there anything by which we are to be governed, showing that the vendor may not waive his rights, to which he might otherwise be entitled, even under a conditional sale. No law or statute to the contrary being proved, we must assume that his rights in this respect would be the same as those existing by virtue of the laws of the country where the remedy is sought. *Carpenter v. Grand Trunk R. Co.* 72 Me. 390; *Lloyd v. Gilbert*, L. R. 1 Q. B. 129.

It is unnecessary, therefore, to protract the consideration of any foreign law or statute in reference to the rights of these parties.

But the further objection is urged, by the counsel for the claimants and trustees, that there was no valid attachment of the partnership property of the defendants in the hands and possession of the trustees.

The writ bears date on the 17th day of December, 1886. It was sued out against James Maguire, alone, as principal defendant, instead of being against each of the partners. The direction to the officer was to attach the goods and estate of James Maguire, of Quebec, in the Province of Quebec, surviving partner of the firm of D. & J. Maguire, and doing business under said name of D. & J. Maguire, etc.; and, while the writ was in that condition, service was made upon the trustees. On the first day of the term of court to which the writ was returnable, leave was obtained to amend the same by adding the name of Charles Maguire as a party defendant, thus making the defendants James Maguire and Charles Maguire, copart-

ners under the firm name of D. & J. Maguire.

The service upon the trustees of the writ, as it was at first made, in which James Maguire, but no partner of his, was then a principal defendant, did not create a valid attachment of the partnership property. As soon, however, as the writ was amended by joining Charles Maguire as a defendant,—the trustees still continuing to hold the property, then all the necessary parties being before the court, no rights of third parties having intervened,—the previous attachment became valid as to the property in the hands and possession of the trustees. *Sullivan v. Langley*, 128 Mass. 237.

The conclusion of the court, therefore, is that the title to the thirteen carloads of lumber for which the claimants contend, at the time this suit was commenced, was not in the claimants, but that it had passed to and become vested in the principal defendants, and was subject to trustee process by the plaintiffs in this suit, as also the lumber of the other nine carloads, about which no contention is raised. As against the claimants, the plaintiffs are entitled to costs from such time as they appeared as claimants of the property in dispute.

From the terms of the stipulation submitting this case to the law court, it is provided that if the trustees are chargeable for any of the lumber mentioned in their disclosures, they are to be charged in accordance with the terms of a written agreement entered into between the parties, dated May 6, 1887. The agreement is not found in the report, nor is it before us. The amount, therefore, for which the trustees are to be chargeable must be determined by the court below. They are entitled to their disbursements and services as a lien upon the property in their possession, and which has been put in bond in the custom-house by them. They should be entitled to retain the sum of \$246.95,—the amount advanced by one of the claimants, and which they are to repay to him,—it being advanced toward the expenses upon the lumber in dispute, and which the trustees agreed should be refunded.

Judgment accordingly.

Peters, Ch. J., Walton, Virgin, Libbey, and Haskell, J.J., concurred.

Henry LADD

v.

John PUTNAM.

1. In a suit upon a mortgage, the defendant may show any fraud on the part of the mortgagee affecting the consideration for the mortgage debt.
2. If the defense goes to the entire consideration of the mortgage notes, it may be tried upon the main issue.
3. If it is partial only, then it must necessarily be heard by the court upon the motion for conditional judgment.

(Kennebec—Decided December 24, 1887.)

ON exceptions by defendant. *Sustained.*
The opinion states the facts.
Mr. L. T. Carlton, for defendant.
Mr. J. H. Potter, for plaintiff:

The plaintiff is entitled to judgment if there is anything due on the mortgage, and unless the entire conditions of the mortgage have been performed.

Mason v. Mason, 67 Me. 546.

The partial failure in the consideration of a note is no defense when the damages sought to be set off against the note are unliquidated.

Day v. Niz, 9 Moore, 159; *Greenleaf v. Cook*, 15 U. S. 2 Wheat. 18 (4 L. ed. 172).

The partial failure of the title to the land is no defense to an action on the notes given for the purchase money, or to an action on the mortgage given to secure the same. The defendant must resort to the covenants of warranty in his deed.

Lloyd v. Jewell, 1 Me. 352; *Wrinkle v. Tyler*, 3 Martin, N. S. (La.) 111.

The defendant cannot take advantage of the alleged fraud at this stage of the case. He should have offered to rescind within a reasonable time.

Latamson v. Marwin, 8 Barb. 9; *McAllister v. Reab*, 4 Wend. 483; 3 Wend. 109; *Curtis v. Hannay*, 3 Esp. 82; *Burton v. Stewart*, 3 Wend. 236.

When failure or want of consideration may be set up in bar of recovery on a sealed instrument, the purchaser of land is not allowed to allege failure in whole or in part while he is in the undisturbed possession of the land.

7 Martin (La.), 228; 15 Martin (La.), 111; 11 Martin (La.), 235; 1 Bailey (S. C.), 217.

Foster, J., delivered the opinion of the court:

Plaintiff conveyed a farm to defendant, the consideration therefor being \$2,000. Four hundred dollars were paid down. The defendant gave his notes for the balance, secured by mortgage upon the same premises.

This action was brought to foreclose the mortgage, and was referred to the presiding justice with the right of exception.

At the hearing the defendant offered to prove that the plaintiff, when showing the defendant the premises, pointed out to him as the north line a line more than 15 rods north of the true line, making a difference of some 15 acres, which the defendant would have got if the line had been where the plaintiff pointed it out; and that during the negotiations for the purchase the plaintiff took the defendant into his barn and showed him the hay, representing that all the hay then in the barn was cut from the premises the previous year, whereas, in fact, it had been accumulating there for years, and only ten or fifteen tons of the hay then in the barn were cut from the premises, as represented; and that the defendant was damaged by means of these representations; and asked to be allowed to go into these matters, and have the damages suffered by him allowed in reduction of whatever might be found due on the mortgage.

The court excluded the evidence offered, ordered judgment for the plaintiff, and, on motion, conditional judgment as of mortgage.

From the case, as presented, it may properly be inferred that the defendant did not understand or intend his defense to strike deep enough to defeat the plaintiff's action. Taking the whole case as presented by the pleadings 1 Me.

and the evidence offered, and viewing it in the light of the alleged fraud and the claim of the defendant that the damages should be allowed on whatever might be found due on the mortgage, it is evident that he understood that there was something due upon the mortgage, and that the plaintiff was entitled to judgment. The contract had never been rescinded; nor did the defendant claim that the land was not worth more than the sum paid down at the time of the purchase.

The evidence was not offered for the purpose of defeating the action by showing that, even with the damage allowed, nothing would be due under the mortgage, and was not admissible upon that branch of the case; yet, in adjudging the amount due under the motion for the conditional judgment, we think the evidence should have been received, and therein the court erred in excluding it.

The statute contemplates that, in proceedings like this, there may be two separate and distinct judgments,—the one as based upon the title put in issue by the pleadings, and the other as to the amount. The former may be the result of a verdict, or, if referred to the court, as in the present case, the judgment of the court in the place of the jury; the latter, under our statutes (Rev. Stat. chap. 90, §§ 8, 9), the work of the court. These provisions involve the necessity, when raised by the pleadings, of inquiring not only into the title, but also the existence and amount of the debt claimed to be due, in order to a proper entry of the conditional judgment. It may appear that the debt has been wholly paid, and that nothing is due, in which case no conditional judgment can be entered. Or it may appear that something is due, or that the conditions have not been fully performed; and in that case the plaintiff is entitled to judgment, and, upon motion of either party, to the conditional judgment for such amount as the court might adjudge to be due. These judgments being separate and distinct, testimony may be admissible as pertinent to the one which might not be as to the other.

It may now be regarded as settled law that, in an action of this kind, to foreclose a mortgage, the same defenses may be made, except the Statute of Limitations, which might be made in an action upon the note or other evidence of debt secured by the mortgage. *Vinton v. King*, 4 Allen, 562; *Davis v. Bean*, 114 Mass. 361; *Northy v. Northy*, 45 N. H. 141; 2 Jones, Mort. § 1296.

In *Wearse v. Peirce*, 24 Pick. 141, which was a writ of entry upon a mortgage, the defense set up was want of consideration for the notes secured by the mortgage, and the issue was tried by the jury, and the defense prevailed. In that case the court held that, inasmuch as the jury found that the notes were given without consideration, there was nothing due on the mortgage upon which to found a conditional judgment, and that this amounted to a complete defense, thereby defeating the action.

In *Freeland v. Freeland*, 102 Mass. 475, the defense of a partial failure only was held appropriate upon a hearing on a motion for conditional judgment.

So in *Minot v. Sawyer*, 8 Allen, 78, it was held that an action of this kind opened any proper matter of defense, in whole or in part,

to the validity of the note secured by the mortgage.

"We see no more reason," says the court in *Davis v. Bean*, 114 Mass. 361, "why any defense which relates to the validity of the debt, or to the consideration of the notes secured by mortgage, should not be admitted to defeat or limit the right of the mortgagee to enforce his claim against the land of the mortgagor, as well as when he seeks to enforce it against the mortgagor personally. If the defense goes to the whole debt, it may be tried upon the main issue. If it is partial only, then it must necessarily be heard with the motion for conditional judgment."

In the case at bar the action is upon a mortgage made to secure notes given for the purchase of the very land covered by the mortgage. The sale of the land, and mortgage back, were one transaction; so that, if the suit had been brought upon the notes, the evidence offered would have been admissible in mitigation of damages. Had action been brought by the plaintiff upon the notes, instead of this suit upon the mortgage, the defendant might defend against the notes to the extent of the damages sustained by the plaintiff's fraud. *Rand v. Webber*, 64 Me. 198; *Herbert v. Ford*, 29 Me. 546; *Perley v. Balch*, 23 Pick. 283; *Dorr v. Fisher*, 1 Cush. 275.

It was upon this principle that in *Hammatt v. Emerson*, 27 Me. 308, the court held that a partial failure of consideration for a note given in payment for land sold, not arising out of a failure of title, but out of fraudulent representations respecting the quantity of timber trees then upon it, might be given in evidence in defense in a suit upon such note, while it remained in the hands of a seller or of one having no superior rights.

Although the case is somewhat imperfectly made up, and does not show in express terms the amount for which the order for conditional judgment was made, yet it may fairly be understood to embrace the amount of the mortgage debt unaffected by anything offered in defense. The testimony which was offered seems to have been understood by counsel as excluded for all purposes, although admissible under the motion for conditional judgment. Lest an injustice be done to the party offering it, the court is of opinion that the entry should be—

Exceptions sustained.

Peters, Ch. J., Walton, Danforth, Virgin, and Emery, JJ., concurred.

Hattie J. SMITH

v.

Joshua B. ALLEN.

1. A statute which requires a plaintiff who becomes nonsuit to pay the costs of the first action before he should be allowed to proceed in a subsequent action for the same cause should be liberally construed in behalf of defendants.
2. Under that statute (Rev. Stat. chap. 82, § 124), in order to entitle defendant to a stay of proceedings in the second suit until the costs in the first are paid, it is

enough that the plaintiff has so brought his second suit that the cause of action relied upon in the first suit may be relied upon in the second.

(Knox—Decided December 6, 1887.)

ON plaintiff's exceptions. Overruled.

This is a writ of entry for the recovery of certain real estate situate in Cushing, entered at the March Term, 1886. The defendant at the next September Term moved that the action be dismissed unless the costs be paid of another suit which he alleged to be for the same cause of action, previously brought, and entered in this court. The two writs are of identical form except as to date and term of court.

The previous suit was a writ of entry by the same plaintiff against the same defendant to recover the same premises, entered at the March Term, 1885, and continued to the December Term, 1885, at which term the plaintiff became nonsuit.

At the hearing upon defendant's motion, the plaintiff alleged, and the defendant admitted, that at the bringing of the first suit, and during its pendency, the plaintiff's sole claim to recover was by reason of the alleged insanity of defendant's alleged grantor, whose sole heir the plaintiff was. After the first suit was dismissed, and before the commencement of this action, the plaintiff became the owner of a certain mortgage given by the grantor to one Samuel B. Flint, covering the demanded premises, and brought her present suit to recover possession of the premises; and the plaintiff offered to be confined, in her proof, to the mortgage, and not the insanity proposition.

The presiding judge ruled that the two suits were for the same cause of action; and fixed a time when the previous costs must be paid; to all of which rulings the plaintiff duly excepted. And the costs not being paid at the time fixed by the court, the presiding judge ordered the second suit to be dismissed; to which order and ruling the plaintiff duly excepted.

Mr. A. P. Gould, for plaintiff:

The present suit is not for the same identical cause, and Rev. Stat. chap. 82, § 124, does not apply.

The form of writ in this case is not the test in determining whether the cause of action in both suits was the same. The true test is the character of the judgments sought to be recovered. This form of writ is expressly authorized by our statutes in two different causes of action, where the purpose of the suits and the results sought are very different.

Rev. Stat. chap. 104, § 1, provides that "any estate of freehold in fee simple, fee tail, for life, or any term of years, may be recovered by writ of entry.

Section 2 provides that the defendant shall declare on his own seisin. The purpose and effect of such action is to test the plaintiff's title to the premises. He declares for an unconditional fee.

Rev. Stat. chap. 90, § 8, provides that "the mortgagee, in an action for possession, may declare on his own seisin, in a writ of entry, without naming the mortgage or assignment; and if it appears, on default, demurrer, verdict, or otherwise, that the plaintiff is entitled to

possession, and that the condition had been broken when the action was commenced, the court shall award the conditional judgment."

By § 9 [the conditional judgment shall be that, "if the mortgagor * * * pays the sum that the court adjudges to be due and payable, with interest, within two months from the time of judgment, * * * no writ of possession shall issue, and the mortgage shall be void."

In *Howard v. Kimball*, 65 Me. 308, motion was made, as is in this case, to stay proceedings until judgment for costs in a former suit was paid.

To determine whether the motion should be granted, the court made the question to depend on whether the former action would be a bar to the second, and says, on page 380: "To ascertain whether a former judgment is a bar to present litigation, the true criterion is found in the answer to the question, Was the same vital point put directly in issue, and determined?"—and on page 381 it holds that the motion was rightfully overruled, because the first suit was not identical with the second.

Mr. C. E. Littlefield, for defendant:

In *Warren v. Homestead*, 82 Me. 87, an assignee sought to maintain a suit on a claim where his assignor had previously brought a suit and had become nonsuit; and the court held that he could not do so without first paying costs of the former suit, saying: "On any other construction, after nonsuits on negotiable notes or in land actions, new purchasers might come in with new suits in their own names, and the statute be wholly evaded."

Again, in *Morse v. Mayberry*, 48 Me. 162, the court seems to appreciate the purpose of this statute, when it says: "The object of the statute is to prevent a party from being harassed by successive suits, by an irresponsible plaintiff, or by one who will not, if he is able, pay the costs awarded against him. This object," they say, "would be in a great measure defeated if the plaintiff could avoid the effect of nonpayment by bringing a second or third or fourth suit, and in each adding some new item of claim, which might be a just or unjust claim. When the second suit contains the 'same cause of action' as the first, it cannot be prosecuted until the costs of the first suit are paid, although the second may contain additional claim."

Peters, Ch. J., delivered the opinion of the court:

Rev. Stat. chap. 82, § 124, provides that, "when costs have been allowed against a plaintiff on nonsuit or discontinuance, and a second suit has been brought for the same cause before the costs of the former suit are paid, further proceedings shall be stayed until such costs are paid." We think this statute should be interpreted liberally in behalf of defendant. It imposes no unreasonable burden on a plaintiff, to require him to pay costs which he has put upon a defendant without cause, before he can proceed again.

The question here is whether the defendant has been twice sued for the same cause. If we are governed by the record, he certainly has been. The declarations are precisely alike. It matters not that the plaintiff may have in the second suit more or better evidence of her claim

than she had in the first, or that she could not maintain her first suit, but can maintain the second. The statutory requirement is not founded on the theory that the plaintiff has as good grounds for sustaining one suit as the other. The presumption is that she discontinues her suit for the reason that she may improve her chances of success by a later proceeding. But the defendant should not be perplexed by the plaintiff's experiments without some amends for the annoyance which is thereby inflicted on him.

The result must be the same, in the present case, if we look beyond the literal record and consider the admissions and evidence accompanying the papers.

It appears that, during the pendency of the first suit, the plaintiff's sole claim to recover the land was by reason of the alleged insanity of the defendant's grantor, the plaintiff being the sole heir of such grantor, and that, since the first suit was discontinued and before the second was commenced, she purchased a mortgage subsisting on the premises, under which she now claims to recover, the mortgage being a better title than the deed under which the defendant claims. But there is no notice in the writ or declaration that the plaintiff's claim will be limited to the mortgage right, or be based upon it in any way. The plaintiff merely offers, at the hearing of defendant's motion to dismiss the second suit, that she would be "confined in her proof to the mortgage, and not the insanity proposition."

The offer came too late. The defendant should not be required to wait until a trial be had, to ascertain what proof or cause of action the plaintiff will rely on. It is enough that the plaintiff has so brought her suit that the cause of action first relied on may be relied on again,—that the declaration just as much embraces it in the second as in the first suit. The plaintiff does not necessarily abandon one ground for recovery because she has another. Her claim is for possession of the premises in dispute, and she is not precluded from relying upon any legal evidence which will show that she is entitled to possession. The statutory requirement which we are discussing applies although a new and additional cause of action is embraced in the second writ. *Morse v. Mayberry*, 48 Me. 161.

In the present instance, the test is to be found in the writ and declaration, and not in the evidence to be offered to sustain the action.

Exceptions overruled.

Walton, Virgin, Libbey, Foster, and Haskell, JJ., concurred.

Fannie E. ROGERS

v.

Olive M. PERCY.

When it is claimed that a deed was obtained by fraud founded upon misrepresentations, and that is the question presented by the case, and from the testimony there is no ground for inference that untrue representations were in fact made, there is nothing for the jury to pass upon.

(Sagadahoc—December 30, 1887.)

ON exceptions by plaintiff. *Overruled.*
Writ of entry to recover an undivided half of certain lands situate in Phippsburg, of which plaintiff's mother, Frances A. Percy, died seised January 22, 1867, leaving plaintiff and a younger sister her sole heirs.

Defendant, who is the widow of plaintiff's father, having married him subsequent to the death of plaintiff's mother, claims title under a deed from her late husband, who took a conveyance from plaintiff, both of which deeds plaintiff contended were invalid.

The finding of the court from the testimony reported is stated in the opinion.

The presiding justice instructed the jury that the deed from the plaintiff to her father was valid, and to this instruction exceptions were taken.

Mr. Franklin P. Sprague, for plaintiff:
Whether or not said deed was valid was an issue for the jury, and the justice erred in withdrawing it from them.

Noyes v. Shepherd, 30 Me. 173; *Freeman v. Rankins*, 21 Me. 446; *Baylies v. Davis*, 1 Pick. 206; *Linscott v. Trask*, 35 Me. 150, and cases cited; *Whipple v. Wing*, 39 Me. 424; Rev. Stat. chap. 82, § 83.

"It should appear to be morally certain that erroneous instructions have not been injurious, before the party aggrieved can be deprived of a new trial."

Thacher v. Jones, 31 Me. 534; *Croucher v. Oakman*, 1 Allen, 404; *Pond v. Williams*, 1 Gray, 630; *Priest v. Wheeler*, 101 Mass. 479; *Clough v. Whitcomb*, 105 Mass. 482.

Fraud may be committed by the artful concealment of facts exclusively within the knowledge of the one party and known by him to be material, where the other party had not equal means of information.

Prentiss v. Russ, 16 Me. 30; 2 Kent, Com. 490, note c 1; *Baker v. Corey*, 19 Pick. 496; *Rice v. Dwight Mfg. Co.* 2 Cush. 80.

"Where a misrepresentation of a material fact not within the observation of the opposite party is made, the person making the misrepresentation knowing at the time that his statements are untrue,—under such circumstances an action may be maintained at law for the purpose of recovering compensation in damages for the injury the party has sustained."

Brown v. Castles, 11 Cush. 850; *Lobdell v. Baker*, 8 Met. 472; *Harding v. Randall*, 15 Me. 332; *Kerr*, Fr. 48, 413, 414.

"When a conveyance of land was obtained by fraud and imposition, and the same was acknowledged and recorded, it did not operate such a disseisin as disabled the grantor afterwards to demise the estate to be conveyed."

Smithwick v. Jordan, 15 Mass. 112; *Chase v. Walker*, 26 Me. 555; *Ellsworth v. Starbird*, 32 Me. 176; *Larrabee v. Larrabee*, 34 Me. 477.

Mr. William E. Hogan, for defendant.

Per Curiam:

So far as appears, the only objection to plaintiff's deed to her father is that it was obtained by fraud founded upon misrepresentations. From so much of the testimony as is reported, there is no ground for an inference that any untrue representations were made. Therefore,

in that respect there was nothing for the jury to pass upon, and the instruction was correct. *Exceptions overruled.*

Henry A. DEXTER

CANTON TOLLBRIDGE CO.

1. The statute providing the weight which a loaded team may be permitted to haul across a bridge, "exclusive of the team and carriage," does not exclude the weight of the driver; that is included with the weight of the load.
2. When the load, including driver, exceeds the weight thus permitted, and thereby the bridge is broken down and injuries sustained, the owners of the bridge are not liable therefor.

(Kennebec—Decided December 27, 1887.)

ON exceptions and motion to set aside the verdict by the defendant. *Sustained.*
The opinion states the facts.

Mr. John P. Swasey, for defendant:
Since the revision of the statutes in 1883, the liability of tollbridge companies in this State is only that of the common law,—that the proprietors of turnpikes and tollbridges are only bound to use ordinary care and diligence in the construction of their roads and bridges and keeping them in proper order.

Shearm. & Redf. Neg. §§ 251, 389; *Orcutt v. Kittery Point Bridge Co.* 53 Me. 500.

The burden of proof is on the plaintiff to show that he was acting with due care at the time of his injury, and that the injury was caused solely by fault or culpable negligence of the defendants.

Bigelow v. Reed, 51 Me. 325, 53 Me. 500; *Murphy v. Deane*, 101 Mass. 455; *Hinckley v. Cape Cod R. Co.* 120 Mass. 262.

If the bridge was unsafe, defendant is not liable; for if, with knowledge on his part of the unsafe condition of the bridge, plaintiff chose to take the risk, it was such a want of ordinary care, or such contributory negligence, as would defeat his right to recover against defendant.

Hubbard v. Concord, 35 N. H. 52.

It being admitted that this bridge was more than fifty feet from one pier or abutment to another, the burden of proof is upon plaintiff to show that his load, exclusive of team and carriage, did not exceed 4,500 pounds, before he is entitled to recover in this suit.

Rev. Stat. chap. 50, § 8.

The plaintiff must prove affirmatively that he was rightfully and lawfully on the bridge.

Shearm. & Redf. Neg. § 39.

Where the statute prescribes a wagon-load shall not exceed a certain weight, if the load exceeds that weight, however insufficient the highway may be, or whatever may be the degree of care and prudence exercised, and however directly the injury may result from the insufficiency of the road, no action whatever can be sustained against the town whose duty it is to maintain the road.

Id. § 418; *Howe v. Castleton*, 25 Vt. 162.

We are unable to find any authority that a

"team" means the animal or animals that draw the load, and that "carriage" means the vehicle upon which the load is drawn, whether wheels or runners, or on "horseback."

46 N. H. 521.

Mr. L. T. Carlton, for plaintiff:

The verdict will not be set aside.

22 Me. 133; 28 Me. 477; 40 Me. 28; 36 Me. 252.

In 43 Me. 484, the court says, without citing any authorities: "We think the jury must have misapprehended the evidence or disregarded their duty." In another case, 50 Me. 222, for injuries on a road, \$5,525 was awarded, where no limbs were broken. The court, without citing authorities, says: "We are forced to the conviction that the weight of evidence is clearly against the plaintiff, and for this cause a new trial should be granted."

Again, in 62 Me. 20, *Judge Walton*, in drawing the opinion, said: "When a verdict is so clearly wrong as to satisfy the court that the jury must have acted corruptly or mistakenly, it will be set aside. But the court will not infer corruption or mistake simply because the verdict is contrary to what the court deems a mere preponderance of evidence."

Again, in 62 Me. 93, *Judge Walton*, in drawing the opinion, said: "A verdict which has no other support than the testimony of a deeply interested party to the suit, in opposition to the positive testimony of five intelligent, unimpeached, and disinterested witnesses, must be regarded as clearly, manifestly, against the weight of evidence."

Again, in 69 Me. 208, the court says: "It is evident that the verdict is so manifestly against the weight of evidence * * * that it ought to be set aside."

See 49 Me. 427; 47 Me. 9; 62 Me. 128, 473; 59 Me. 418; 58 Me. 454; 36 Me. 252; 37 Me. 221; 40 Me. 217; 53 Me. 171; 42 Me. 362; 65 Me. 285; 69 Me. 159.

In 75 Me. 477, the court says: "One jury might arrive at one result, and another jury at another result, and yet both act honestly. The court has no right to set aside the verdict and put the parties to the trouble and expense of another trial."

See, further, 78 Me. 569; 76 Me. 282; *State v. Madison*, 59 Me. 538.

It must be conceded that the Legislature contemplated that a driver should accompany the team. The language of the statute in chap. 50, § 3, is, "or drives or transports over it any loaded cart * * * the weight whereof exceeds 4,500 pounds exclusive of the team and carriage, and thereby breaks it down," etc. And it would make no difference whether the driver was on the load or walking on the bridge; indeed, in the latter case, the danger would be increased.

Forster, J., delivered the opinion of the court:

The plaintiff brought suit against the defendant corporation to recover damages for injuries to his person and property, sustained by the reason of the breaking down of the centre span of the defendant's tollbridge, located across the Androscoggin River, in the town of Canton.

At the time of this accident the plaintiff was driving across the bridge with a load of cordwood, upon which he was seated, drawn by

two horses. The bridge gave way, precipitating the plaintiff, together with the load and horses, upon the ice below, and inflicting severe injuries to the person and property of the plaintiff. He has brought this suit to recover the damages sustained, basing his action upon the alleged negligence of the corporation in the construction and repair of the bridge.

The case was tried in the Superior Court for Kennebec County, and the jury rendered a verdict for the plaintiff for \$2,745.38 damages, and the defendant brings the case to this court on motion and exceptions.

1. One of the grounds of defense insisted upon at the trial, and now urged upon the attention of the court under the motion, is in reference to the weight of the load which was being transported over the bridge at the time it broke down.

By Rev. Stat. chap. 50, § 3, it is provided, in reference to tollbridges more than fifty feet in length from one abutment, pier, or trestle part to another, that if any person, without the consent of the toll-gatherer or agent of the corporation owning it, "drives or transports over it any loaded cart, wagon, or other carriage, the weight whereof exceeds 4,500 pounds, exclusive of the team and carriage, and thereby breaks it down or injures it, neither he nor the owner of any property under his charge shall recover any damages against such corporation for his loss or injury."

The bridge in question is one to which the foregoing provisions apply, and no claim is made that any consent was asked or obtained to transport over it any load exceeding in weight that specified by statute.

It therefore became material in the trial of the case to determine whether the plaintiff, at the time the injuries were received, was violating the provisions of statute in relation to the weight of the load which was being transported across the bridge. The statute having prescribed the weight which might lawfully be transported across it, if the plaintiff's load exceeded that, he is prohibited from recovering, however severe the injuries which he may have received, or however great the damages he may have sustained.

The testimony from both sides shows that the plaintiff's load was composed of poplar, hemlock, white birch, beech, and white maple. For the plaintiff it is claimed that the load contained one and seven eighths cords, and that its weight could not have exceeded 4,380 pounds. On the other hand, the defense maintains that there were more than two cords upon the sled, and that its weight greatly exceeded 4,500 pounds.

We are aware of the well-established rule that it is the province of the jury to weigh conflicting testimony, and that the court will be slow in disturbing a verdict unless there is sufficient to make it appear that the verdict was the result of improper bias or prejudice, or clearly against the weight of evidence. *Polard v. Grand Trunk R. Co.* 62 Me. 93. Whenever it clearly appears that a verdict has thus been improperly rendered, it is the duty of the court, in the furtherance of justice, to set such verdict aside and grant a new trial.

It becomes unnecessary in this opinion to enter upon a detail of the evidence, or to refer

particularly to the testimony of witnesses bearing upon the question of the weight of the plaintiff's load. We have given the case a thorough and careful examination, and from all the evidence upon this point,—and one which appears to have been material in the decision of the case,—we are forced to the conviction that the weight of evidence so strongly preponderates against the plaintiff as to justify the court in setting the verdict aside. For this cause the motion must be sustained.

2. The result would be the same were we to consider the case upon the exceptions alone.

The jury were instructed, in effect, that the weight of the driver or person in charge of the team was not to be taken into account in ascertaining the weight of the load. This, we think, was error, and by which the excepting party may properly claim to have been aggrieved.

In actions like this the statute prohibition applies to "any loaded cart, wagon, or other carriage the weight whereof exceeds 4,500 pounds exclusive of the team and carriage." It is an established rule in the construction and exposition of statutes that their language is to be understood in its plain, obvious, and ordinary signification, particularly if the words are of common use.

Applying this rule to the statute before us, we see no reason why we should seek to ascertain the intention of the lawgiver by going outside of the language used, or by engrafting any additional exception upon what expressly and plainly appears.

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The very words of the exception afford the strongest light by which we are enabled to read the legislative intent. No other words are embraced in this exception than "team and carriage." The driver or person in charge is not a part of either. Webster, Dict. *Team, Carriage*. See Rev. Stat. chap. 19, §§ 1-10, inclusive. The maxim, that the express mention of one thing implies the exclusion of another, may be appropriately applied here. If it had been intended that the driver as well as the "team and carriage" was to be excluded in ascertaining the weight of the load that might lawfully be transported across such bridge, it would have been an easy matter for the Legislature to have expressed such intention in language as clear as it has already done with reference to that which is excluded in express terms. Not having done so, we think we shall not be straining the construction by coming to the conclusion that it intended just what it said.

In the case of *Howe v. Castleton*, 25 Vt. 163, the court, from the peculiar phraseology of the statute under consideration in that case, held that the weight of the carriage, as also of the driver or the person in charge of the load, should not be taken into account in ascertaining its weight. That decision was based upon a statute the phraseology of which differed essentially from the one now before us.

The entry must therefore be, motion and exceptions sustained. New trial granted.

Peters, Ch. J., Walton, Danforth, Virgin, and Emery, JJ., concurred.

1 ME

MASSACHUSETTS.
SUPREME JUDICIAL COURT.

City of NEWBURYPORT

v.

Daniel CREEDON.

Defendant had a legal settlement in plaintiff city. Plaintiff paid for his support in the **Essex County Receptacle for Insane**, and brings this action under Stat. 1882, chap. 113, to recover for the same. **Pub. Stat. chap. 87, § 49**, in general terms makes the town where the inmate has a settlement liable for his support. It was claimed in defense, under § 47 of the same chapter, that Essex County had not fixed liability for support upon the town, by reason of failure to have the cost of support certified in the manner specially referred to in that section. *Held:*

(a) That § 49 must be read as intended not only to place it beyond doubt that the counties had remedy against the towns of settlement, but also to include all counties.

(b) That, as § 49 does not in terms require that the price of support should be certified by the county commissioners, such condition can not be attached by implication.

(Essex—Filed February 15, 1888.)

ON plaintiff's exceptions. *Sustained.*

Defendant, who had a settlement in the plaintiff city, was committed to the Essex County Receptacle for the Insane at Ipswich, in April, 1885. The plaintiff paid for his support in said receptacle the sums set forth in the declaration, and after his release brought this action to recover the same.

On proof of these facts, the court ruled, at defendant's request, that the action could not be maintained, on the ground that plaintiff was not bound to pay for such support under Pub. Stat. chap. 87, § 49, and that plaintiff was so liable under § 47 only, the terms of which had not been complied with.

The plaintiff alleged exceptions.

Mr. Frank W. Hale, for plaintiff:

The ruling of the court was erroneous in that it implies that Pub. Stat. chap. 87, § 47, contains conditions or terms which are to be complied with in order that Essex County may recover for the support of those confined in the receptacles for the insane, which are not found in § 49.

Stat. 1886, chap. 223, established the county receptacles for the insane within the precincts of the houses of correction, and gave a right of action to the masters and keepers against the cities and towns, for the support of those there confined.

Watson v. Charlestown, 5 Met. 54.

This statute, of course, was as applicable to Essex County as to the other counties in the Commonwealth.

Stat. 1846, chap. 154, § 2 (Pub. Stat. chap. 87, § 47) made the receptacle for the insane in Essex County a separate institution. The stat-

ute also took away all rights of action from the master and keeper. In case of the criminals the county was given the same remedies given heretofore to the city of Boston in Suffolk County, and for the support of the insane the remedies which the masters and keepers had for the support of those confined in the houses of correction. These remedies would seem to be the same.

Rev. Stat. chap. 143, § 16.

By the revision and enactment of the General Statutes, the rights of action vested in the masters and keepers of the houses of correction were transferred to the county.

Gen. Stat. chap. 178, § 59.

A right of action was also given against the person, which did not exist before.

Gen. Stat. chap. 74, § 6; Pub. Stat. chap. 87, § 49.

The inference is that this section was intended to apply to all the counties of the State: (1) because Essex County is not excepted by name; (2) because otherwise Essex County would have no remedy against the person.

Stat. 1886, chap. 223, and 1846, chap. 154, were expressly repealed by Gen. Stat. chap. 182.

This interpretation would be perfectly clear, if the Legislature had not retained the terms of the Statute of 1846, in Pub. Stat. chap. 87, § 47; but if the remedy given by § 47 is exactly that given by § 49, the fact that it is expressed differently is not material.

However, the plaintiff city is not bound to show why § 47 remains as it is, but it is sufficient if § 49 is applicable to Essex County.

The fact that Essex County has a remedy under § 47 is not inconsistent with the right to recover under § 49; no reason having been shown for the exception of Essex County from the operation of the latter section.

Mr. Nathaniel N. Jones, for defendant:

The defendant contends that his liability depends upon the construction of Pub. Stat. chap. 87, § 47, and the provisions of chap. 230, §§ 60, and 61, as in said § 47 referred to; while the plaintiff contends defendant is liable under Pub. Stat. chap. 87, § 49.

Previous to April 13, 1886, there were no such receptacles or asylums within each county, but Laws 1886, chap. 223, authorizes the establishment of such asylums in each county of the Commonwealth.

Chapter 223, § 2, aforesaid, provides that, if "there shall be no parent, kindred, master, guardian, town, or city obliged by law to maintain the person so confined, the sum allowed," etc., shall be paid by the Commonwealth. This law of 1886 appertained to all the counties until the passage of the Law of 1846, chap. 154, entitled "An Act in Relation to the House of Correction and Asylum for Insane Persons in the County of Essex," and providing in §1 for the pay of the master of the house of correction, and that "said county of Essex shall have the same remedies for maintaining prisoners committed to said house (of correction) as are provided by law for the city of Boston in like cases."

Section 2 of the same chapter provides that the county commissioners of Essex County "shall appoint a superintendent and matron of the receptacle, or asylum, for idiots and insane

persons not furiously mad, * * * and said county shall have the same remedies for the care and support of persons confined in said asylum as are provided in the preceding section for maintaining prisoners in the house of correction."

As the county of Essex under the Law of 1846, chap. 154, is given the same remedy as the city of Boston, the inquiry is, What was the remedy of the city of Boston? Rev. Stat. chap. 143, §§ 15 and 16, give to the keeper and the master of the house of correction in each county, and to the city of Boston, certain remedies for the recovery of the maintenance of prisoners committed to the houses of correction; and Pub. Stat. chap. 220, §§ 60 and 61, is a substantial re-enactment of Rev. Stat. chap. 143, §§ 15 and 16, *supra*.

Pub. Stat. chap. 87, § 49, is a substantial re-enactment of the Law of 1836, chap. 223, §§ 1 and 2. But Pub. Stat. chap. 87, § 47, is a re-enactment of the Law of 1846, chap. 154, §§ 1 and 2, and provides that "said county (of Essex) shall have the same remedies for the expense of the care and support of such persons (insane persons not furiously mad) as are provided for keepers and masters of houses of correction in relation to the maintenance of prisoners committed to houses of correction;" therefore, to recover in this action, plaintiff must bring its case within the terms of Pub. Stat. chap. 220, §§ 60 and 61, wherein are the provisions for the recovery of the support of persons committed to said houses of correction, and show that all of said provisions have been complied with. As none of the said provisions have been complied with, plaintiff cannot recover.

Boston v. Amesbury, 4 Met. 281.

Conceding, for the argument, plaintiff's contention that defendant's liability is under Pub. Stat. chap. 87, § 49, the defendant claims that he is not liable, because, as *Chief Justice Shaw* says, in the case of *Watson v. Charlestown*, 5 Met. 54, in commenting on the Law of 1836, chap. 223 (of which law Pub. Stat. chap. 87, § 49, is a re-enactment): "The Act itself recognizes the previous existence of the house of correction and laws and regulations to govern it. It was not the creation of a new establishment, * * * but it was designed to appropriate a department of a county-house already established, for purposes in some measure analogous. It therefore necessarily referred to those existing laws and regulations, so far as they were applicable, without repeating them in detail."

"A contemporaneous is generally the best construction of a statute."

Packard v. Richardson, 17 Mass. 143.

Holmes, J., delivered the opinion of the court:

This is an action under Stat. 1882, chap. 113, to recover money paid by the plaintiff for defendant's support in the Essex County Receptacle for the Insane, at Ipswich. As the statute would not apply to a purely officious payment, the plaintiff seeks to show that it was bound to pay for the defendant's support there. It appears that the defendant had a settlement in the plaintiff city, and we assume that the defendant was a pauper at the time when the support was furnished and paid for. It was found that the terms of Pub. Stat. chap. 87, § 47, had not been

complied with. The court ruled that the plaintiff was liable under that section only, and not under § 49 of the same chapter.

There can be no doubt that the plaintiff falls within the words of § 49, or that it must prevail, unless the county of Essex is excepted by implication from the general words used, and is confined to such rights, if any, against towns where lunatics are settled, as are given by § 47. There is no obvious reason for making such a distinction, but the defendant contends that § 49 is merely a substantial re-enactment of a part of Stat. 1836, chap. 223, § 2, an Act providing for lunatic asylums throughout the State; while § 47 represents a part of the later Act of 1846, chap. 154, §§ 1, 2, which made special provisions for the county of Essex; that this later Act by reference attached certain conditions to the remedies given that county, and therefore overrode the earlier statute; and that the sections in the Public Statutes must be construed in the same way as the Acts which they represent.

Stat. 1846, chap. 154, § 2, gives the county the same remedies for the support of persons confined in the Essex Lunatic Asylum "as are provided in the preceding section for maintaining prisoners in the house of correction." By § 1 the "said county of Essex shall have the same remedies for maintaining prisoners committed to said house as are provided by law for the city of Boston in like cases." The counsel on both sides agree that § 2 thus gives the county the same remedies for the support of lunatics confined in the asylum as are provided by law for the city of Boston for maintaining prisoners in the house of correction, and that these are to be found in Rev. Stat. chap. 143, §§ 15, 16, re-enacted with important modifications in Pub. Stat. chap. 220, §§ 60-63; but then, as now, subjecting the remedy to the condition that the amount due should be certified as then required (*Boston v. Amesbury*, 4 Met. 278), whereas on such condition was expressed, at least, in the Act of 1836. Pub. Stat. chap. 220, limits the remedy against towns much more, as we shall show.

The compilers of the General Statutes adopted the same construction in terms, and were followed by the Public Statutes,—Gen. Stat. chap. 74, § 2; Pub. Stat. chap. 87, § 47.

It is at least doubtful, however, whether Stat. 1846, chap. 154, § 2, meant anything more than that the county of Essex should have the same remedies as were provided by law for the city of Boston in like cases,—that is, for the support of lunatics confined in the Boston Lunatic Asylum. By this interpretation the reference would be not to Rev. Stat. chap. 143, but to Stat. 1839, chap. 131, § 5, which corresponds almost word for word with Stat. 1836, chap. 223, § 2, so far as it bears upon the present question. The statute of 1836 was held to give a remedy against the town of settlement in certain cases, by necessary implication. *Watson v. Charlestown*, 5 Met. 54.

The same would be true of the statute of 1839 by the same reasoning, and thus, by the interpretation suggested, we should avoid the anomaly of a different rule for Essex County from that which governs the other counties of the State. At the same time the argument for the defendant would be answered, so far as it de-

pend on the order of the Acts in point of time, which it mainly does. For, if the original purport of the Act of 1846 was not to put Essex County on a different footing from the others, the subsequent misunderstanding by the General Statutes and Public Statutes as to the Acts to which it referred could not be held to set Essex apart for the first time, and to take it out of the broad provisions of Pub. Stat. chap. 87, § 49; Gen. Stat. chap. 74, § 6. In other words, if the Public Statutes should be read as a Code, all composed at the same time, we should have no doubt that § 49 applied to Essex County, for reasons which we shall state in a moment.

But, supposing the defendant's interpretation of the Act of 1846 to be the true one, the liability of towns for the support of persons committed to the house of correction was done away with, except in a limited class of cases, by Stat. 1848, chap. 66, § 2; and it will be seen that Pub. Stat. chap. 220, § 61 (Gen. Stat. chap. 178, § 58, amended by Stat. 1876, chap. 148), does not give counties the general remedy against towns of settlement provided by Rev. Stat. chap. 148, § 16. So that, if the remedies of the county of Essex are limited to those given by Pub. Stat. chap. 220, § 61, referred to in Pub. Stat. chap. 87, § 47, they have now been cut down unwittingly, by changes made with a different intent, upon a different subject-matter, to much narrower limits than were imposed by the statute of 1848, however construed.

Such a result ought not to be, and we think that it is prevented by the changes which have been made in Pub. Stat. chap. 87, § 49, from the language of the original Act of 1886. That Act, as we have said, gave a remedy against towns, not in express terms, but by implication only. Then came the Act of 1846, determining the remedies of Essex County by reference to other Acts; then came modifications of the other Acts supposed to be referred to; and then the Acts of 1846 and 1886 were taken up into Gen. Stat. chap. 74, §§ 2, 6. The latter section gives a remedy in express terms, which, on their face, and construed by their surroundings, apply to all the counties. We are of opinion that these words, inserted as they were, for the first time, after the uncertainties introduced by the Act of 1846, and the vicissitudes of the legislation upon which the section representing it has been made to depend, must be read as intended not only to place it beyond doubt that the counties had a remedy, but also to include all counties in a clear provision. The rest of the section, as to the comfortable support, government, and employment of "persons confined in said receptacles," undoubtedly refers to Essex, the receptacle in which is mentioned first above, as well as to other counties, as does also the provision that "such sum a week shall be allowed and paid for the support of persons so confined as the commissioners shall direct." We must give an equal scope to the following words: "And the same may be recovered of such persons, or of any parent, kindred, master, guardian, city, or town, obligated by law to maintain him." Pub. Stat. chap. 87, § 49, is the same, except that it says "bound" instead of "obligated." We may note, as a further reason for our construction, that this section gives a remedy against the person for the first time, unless it is

given by implication by Rev. Stat. chap. 148, § 16.

But if Pub. Stat. chap. 87, § 49, does apply to Essex County, then it is argued by the defendant that, as the Act of 1886 only gave a remedy to the county against the town by implication, it was subject by implication to the conditions in other cases,—that is, the conditions expressed in Rev. Stat. chap. 148, §§ 15, 16,—and therefore that the remedy expressly given by Pub. Stat. chap. 87, § 49, must be subject to the much more stringent terms and conditions in Pub. Stat. chap. 220, § 61. It is enough to say that, as the statute expresses no such terms or conditions, we cannot make it almost nugatory by implying them. The provision in Pub. Stat. chap. 220, § 60, for the county commissioners certifying the amount due, is made less necessary by the requirement that the sum to be paid in this case shall be directed by them in the first instance.

We may remark that, if the defendant's construction of the Act of 1886 were the true one, then the Act of 1846 did not put Essex County on a different footing from the other counties, and the defendant's main argument would be met in that way.

Exceptions sustained.

COMMONWEALTH of Massachusetts

v.

Joseph UHRIG.

Stat. 1887, chap. 414, making the fact that defendant kept **posted** in his premises a **United States tax receipt**, running to him as a dealer in spirituous or **intoxicating liquors**, competent **evidence** that he kept the premises for the **sale of liquors**, is valid.

(Suffolk—Filed February 6, 1888.)

ON defendant's exceptions. *Overruled.*

Complaint for keeping a tenement in Cambridge then and there used for the illegal keeping and illegal sale of intoxicating liquors. At the trial in the Superior Court before Aldrich, J., it was admitted that the defendant was the proprietor and had control of the Prospect House, a public hotel in Cambridge. The district attorney called a witness, and asked him the following question: "During the time covered by the complaint, did you see posted in the defendant's premises a United States tax receipt as a dealer in spirituous or intoxicating liquors other than malt liquors?" The defendant objected to the question upon the ground that the Act of 1887, chap. 414, so far as it authorizes the introduction of such evidence, is unconstitutional and void. The court overruled the objection; the jury returned a verdict of guilty, and the defendant alleged exceptions.

Mr. H. E. Fales for defendant.

Mr. Andrew J. Waterman, Atty-Gen., for the Commonwealth:

The effect of the statute in question is only to give a certain artificial force to a designated fact. This does not substantially change the burden of proof or conclude the defendant. It is similar to the law making the delivery of

liquor from any building other than a dwelling-house *prima facie* evidence of sale,—a law which has been repeatedly sustained.

Com. v. Williams, 6 Gray, 1.

The forms of proceeding and the rules of evidence are within the control of the Legislature, and it is the same in criminal and civil cases.

Jones v. Robbins, 8 Gray, 329, 341, 342; *Hapgood v. Doherty*, Id. 373; *Hunt v. Lucas*, 99 Mass. 404; *Biddle v. Com.* 13 Serg. & R. 405; *Kendall v. Kingston*, 5 Mass. 524, 534; *Ogden v. Saunders*, 25 U. S. 12 Wheat. 213, 262, 349 (6 L. ed. 606); *Holmes v. Hunt*, 122 Mass. 505, 516, 517, and cases cited.

Some of these instances are: Making the deed of the tax collector *prima facie* evidence that the land has been sold for nonpayment of taxes at a time and manner authorized by law.

Pillon v. Roberts, 54 U. S. 18 How. 472 (14 L. ed. 228); *Callanan v. Hurley*, 93 U. S. 387 (23 L. ed. 931); *Webb v. Den*, 58 U. S. 17 How. 576 (15 L. ed. 35); *Fales v. Wadsworth*, 23 Me. 558.

So, the record of a deed shall be evidence that it has been duly acknowledged and proved, without record of the certificate of proof of acknowledgment.

Webb v. Den, *supra*.

So the law providing that a notary's protest shall be evidence of the facts stated therein.

Fales v. Wadsworth, 23 Me. 558.

So, by Massachusetts statute, the record certificate of two witnesses is made sufficient evidence of an entry to foreclose a mortgage.

Pub. Stat. chap. 181, § 2; *Hawkes v. Brigham*, 16 Gray, 561; *Field v. Gooding*, 106 Mass. 310.

So, under Act of Congress, the certificate of a vice-consul that a master has refused to take destitute seamen on board was made *prima facie* evidence in a suit against the master for the penalty.

Matthews v. Offley, 3 Sumn. 115.

So, the law of this State which imposes the burden of proving any license under which the defendant testifies.

Com. v. Carpenter, 100 Mass. 204.

That rules of evidence are not an exception to the doctrine that all rules and regulations affecting remedies are at all times subject to modification, and controlled by the Legislature, was held in *Howard v. Moot*, 64 N. Y. 262.

The statute that provides that, in all prosecutions for selling adulterated milk, if it appear that the milk contained more than 87 per cent watery fluid, it shall be deemed adulterated, was held constitutional in *Com. v. Evans*, 132 Mass. 11.

Per Curiam:

The fact that the defendant kept posted in his premises a United States tax receipt, running to him as a dealer in spirituous or intoxicating liquor, is competent evidence that he kept the premises for the sale of liquor, irrespective of the provisions of the Statute of 1887, chap. 414. So far as that statute authorizes the introduction of such evidence, it is merely declaratory of the common law, and is valid. In the case at bar, the only ruling was that the evidence was admissible; no ruling was asked or given as to the weight or effect of the evidence.

The ruling given was clearly right, and we cannot properly consider any question not raised by the bill of exceptions.

Exceptions overruled.

COMMONWEALTH of Massachusetts

v.

Henry PURDY.

When a complaint for unlawfully keeping for sale intoxicating liquors charges the offense with a *continuando* between certain dates, the time alleged is material, and the charge can be sustained only by proof of acts at times specified in the complaint.

(Norfolk—Filed February 23, 1886.)

ON defendant's exceptions. *Sustained.*

The complaint, dated August 23, 1887, was made to a trial justice, and alleged that defendant "on the 1st day of April, 1887, at Medway, in the county of Norfolk, and on divers days and times between said 1st day of April and the 1st day of November, 1886, did keep intoxicating liquors with intent to sell the same in this Commonwealth,—the said Henry Purdy not being authorized to sell the same in this Commonwealth, by any legal authority whatever,—against the peace of the said Commonwealth, and the form of the statute in such cases made and provided." At the trial before the trial justice, no objection was made to the complaint, but in the superior court the defendant asked the court to quash the complaint because it set forth no offense whatever, and because it was bad for duplicity; but the court overruled the motion, and defendant excepted.

The evidence tended to show that defendant for two years last past, and until recently, had occupied the same dwelling-house in Medway, and in one of the front rooms had kept a store in which he had sold fruit, candy, soda, and other similar articles.

A witness called by the government testified that on July 8, 1886, he made a seizure of liquors in said dwelling-house, but not in the part occupied as a store; that Purdy was present. To this testimony defendant objected; but it was admitted by the court, and defendant excepted.

One Vedetto, a witness called by the government, testified that he had seen persons during two years last past going to and from said store, both day and evening, but not intoxicated persons; that he had seen intoxicated persons in the street near said store. Defendant objected to this testimony; but it was admitted by the court, and defendant excepted.

Another witness called by the government testified to a conversation which he had with defendant in July, 1886, in which the defendant admitted that he had previously sold intoxicating liquors. Defendant objected to this testimony; but it was admitted by the court, and defendant excepted.

The court instructed the jury that if the evidence proved, beyond a reasonable doubt, that defendant kept at Medway intoxicating liquors

with intent to sell the same, at any time within two years before the making of the complaint, the jury would be authorized to find the defendant guilty, to which defendant excepted.

The jury found the defendant guilty, and he alleged exceptions.

Messrs. Ely, Gates, & Keyes, for defendant:

The complaint properly charged the offense of keeping intoxicating liquor for sale with a *continuando*.

Com. v. Chisholm, 103 Mass. 213; *Com. v. Canada*, 107 Mass. 405; *Wells v. Com.* 12 Gray, 326.

In such cases time enters into the essence of the offense, and fixes its identity.

Com. v. Pray, 13 Pick. 359; *Com. v. Wood*, 4 Gray, 11; *Wells v. Com.* 12 Gray, 326.

In such cases a conviction is a bar to another complaint for the same offense between the days named, but not to a complaint for such offense before or after said days.

Com. v. Connors, 116 Mass. 35.

In such cases the evidence must be confined to acts done within the time charged.

Com. v. Briggs, 11 Met. 573; *Com. v. Elwell*, 1 Gray, 463; *Com. v. Adams*, 4 Gray, 27; *Com. v. Keefe*, 7 Gray, 332; *Com. v. Gardner*, Id. 494; *Com. v. Langley*, 14 Gray, 21; *Com. v. Shea*, Id. 336; *Com. v. Traversæ*, 11 Allen, 260.

In such cases, if the complaint did not allege the offense in proper form, except on a single day, then the evidence must be confined to acts done on that day.

Com. v. Gardner, 7 Gray, 494; *Com. v. Foley*, 90 Mass. 499.

The evidence of Vedetto was incompetent. The witness does not connect intoxicated persons with the defendant or his store, nor does it appear that he had frequently seen intoxicated persons in the street near said store.

The cases relating to this kind of evidence do not support the admission of this testimony.

Com. v. Taylor, 14 Gray, 26; *Com. v. Higgins*, 16 Gray, 19; *Com. v. Berry*, 109 Mass. 366; *Com. v. Maloney*, 16 Gray, 20; *Com. v. Leighton*, 7 Allen, 528; *Com. v. Kennedy*, 97 Mass. 224; *Com. v. Van Stone*, Id. 548; *Com. v. Dowdican*, 114 Mass. 257; *Com. v. Shaw*, 116 Mass. 8; *Com. v. Leighton*, 1 New Eng. Rep. 502, 140 Mass. 306; *Com. v. Wallace*, 3 New Eng. Rep. 296, 143 Mass. 88.

Mr. Andrew J. Waterman, Atty-Gen., for the Commonwealth:

The objections to complaint were not seasonably made.

Pub. Stat. chap. 214, § 25; *Com. v. Donahue*, 130 Mass. 280; *Com. v. Goulding*, 135 Mass. 552.

It was competent to show that the place was one of common resort.

Com. v. Wallace, 123 Mass. 400.

The presence of intoxicated persons in the street near defendant's house was an item of evidence proper to be considered in connection with other evidence.

Com. v. Kennedy, 97 Mass. 224.

The testimony as to statements respecting sales within two years next prior to making of complaint was admissible.

Com. v. Dillane, 11 Gray, 67.

Morton, Ch. J., delivered the opinion of the court:

The offense of keeping intoxicating liquor

with intent to sell the same unlawfully may extend over many successive days, and may properly be charged with a *continuando*. *Com. v. Chisholm*, 103 Mass. 213.

When a continuing offense is charged, the time alleged is material. It is descriptive of the offense, and fixes its identity; and the evidence generally must be confined to acts done within the time specified, and the defendant can be convicted only for such acts. *Com. v. Briggs*, 11 Met. 573; *Com. v. Elwell*, 1 Gray, 463; *Com. v. Dunster*, 5 New Eng. Rep. 115, 145 Mass. 101.

In the case at bar, the offense is charged with a *continuando*; and the superior court erred in admitting proof of acts of the defendant at times not specified in the complaint, and in ruling that he might be convicted if he kept intoxicating liquor with intent to sell the same at any time within two years before the making of the complaint.

Exceptions sustained.

COMMONWEALTH of Massachusetts

v.

Simon GEARY.

1. On the trial of a complaint for selling intoxicating liquor, evidence on the part of the defendant, tending to show that the liquor which the government witnesses testified had been sold to them by defendant did not belong to him, but to a club of which he was a member; that the liquor was on the premises merely for the use of the members, and not for sale; and that no member had a right or was permitted to sell any,—is competent in rebuttal.
2. In such a case it is proper to refuse a request to charge that, if the person to whom the sale was alleged to have been made paid for only a part of the liquor in a bottle, and the bottle was passed to him for that purpose, and he retained possession of the entire contents, and simply used a glass to taste from and determine what the liquor was, and took it all away, there was not a complete sale.

(Suffolk—Filed February 28, 1888.)

ON defendant's exceptions. *Sustained.*

The complaint charged defendant with the unlawful sale of intoxicating liquor to one Drew.

After the government had introduced evidence tending to show that defendant was guilty as charged, he testified that he was a member of an association that occupied the premises, and the liquor was owned by the association; he had no control over it, and none of it was for sale; that at the time in question he had on his hat and coat; had been in the premises about twenty minutes with a friend whom he was talking with; that Drew and his companion came in; the bottle was on the counter, and they took it, and paid no money; he called to have them bring it back; went after them towards the door, and was then arrested.

One Duffy, who was then present, testified substantially as the defendant as to the transaction with Drew and his companion.

Defendant offered to show, by several witnesses who, with him, were members of an association called the Albany Associates, that the liquor on the premises in question was owned by the association, each member having contributed towards its purchase; that defendant was simply a member, and had contributed the same amount as other members for the purchase of the liquor, as it was their custom; that it was there only for the use of members; that none of it was for sale, and no member had a right, or was permitted, to sell any; also the evidence of the party who purchased the liquor for the association, the party who sold it to them, and the party who let the premises to them,—all of which was excluded by the court, and defendant excepted.

Defendant requested the court to rule that if Drew and his companion paid only for a portion of the whiskey, and the bottle was passed them for that purpose, and they retained possession of the entire contents, and simply used the glasses to taste from, to determine what it was, and took all away, there was not a complete sale. This the court declined to do, and defendant excepted.

A verdict having been rendered against him, defendant brought the case to this court, alleging exceptions.

Mr. Henry F. Naphen, for defendant:

Any evidence having a tendency to influence the jury in the determination of any material question of fact which is controverted should be received; it can never be deemed to be redundant or superfluous.

Blackwell v. Hamilton, 47 Ala. 475. See 2 Whart. Ev. 1102.

Though the question of sale was the one in direct conflict, yet the jury were first required to pass on the credibility of witnesses and to determine on whom they could place the greatest reliance. The evidence offered, if admitted, would tend to aid them in this respect, and would corroborate the evidence of the defendant.

Com. v. Jeffries, 7 Allen, 565; *Bronner v. Frauenthal*, 37 N. Y. 166; *Com. v. Austin*, 97 Mass. 595; *Blackwell v. Hamilton*, 47 Ala. 475.

Evidence, however slight, which tends to corroborate or deny the testimony as to the *res geste*, should not be considered incompetent.

Com. v. Cummings, 121 Mass. 63; *Boston & W. R. Co. v. Dana*, 1 Gray, 102; *Com. v. O'Connor*, 11 Gray, 94; *Mayor v. Com.* (Pa.) Leg. Int. April, 1882, p. 160.

Having testified for himself, and having evidence to corroborate his testimony, his failure to produce it could be taken into consideration by the jury. The evidence excluded should have been admitted for that purpose. Its exclusion raised the presumption that it would be of no benefit to the defendant, and therefore misled the jury.

Com. v. Costello, 119 Mass. 214; *Com. v. Cummings*, and *Boston & W. R. Co. v. Dana*, *supra*.

This evidence, of course, would not deny his guilt, but should be left to the jury with the other facts in the case.

Hamilton v. State, 36 Ind. 281; *Bronner v.*

Frauenthal, 37 N. Y. 166; *State v. Howard*, 32 Vt. 380; *Simmons v. Rust*, 39 Iowa, 241; *Mobile & M. R. Co. v. Ashcroft*, 48 Ala. 15; *State v. Daley*, 53 Vt. 442.

Mr. Andrew J. Waterman, *Atty-Gen.*, for the Commonwealth.

C. Allen, J., delivered the opinion of the court:

For the prosecution evidence was introduced tending to establish certain criminal facts, namely: that the defendant was behind the counter with his coat off, and in possession of whiskey in a bottle, with glasses, thus being apparently prepared for making sales. This evidence tended to confirm the direct testimony of the government witness that a sale was made by him. The direct testimony of a sale being contradicted by two witnesses, it was obviously important for the defendant to show, if he could, that the circumstances which bore against him were consistent with his innocence. In this aspect, testimony was competent to show that the whiskey did not belong to him, but to a club of which he was a member; that the whiskey was there merely for the use of the members, and was not for sale; and that no member had a right or was permitted to sell any. No doubt all these things might be true, and yet the defendant be guilty; but their tendency was in favor of his innocence. The jury might properly find them sufficient to explain the suspicious circumstances against him, and thus to rebut the presumption of fact which might otherwise arise from them. *Com. v. Cotton*, 138 Mass. 500; *Com. v. Pomphret*, 137 Mass. 564.

The final instruction asked for was properly refused.

Exceptions sustained.

COMMONWEALTH of Massachusetts

Charles O. TAY and Frank J. DALEY.

1. A complaint for unlawfully exposing and keeping for sale **intoxicating liquors** is sustained by proof of keeping for sale, without proof of exposing for sale.
2. When the trial judge has correctly instructed the jury upon the true interpretation of the **statutes** and upon the **law relating to the case**, it is proper to refuse a request to charge that the jury may consider the statutes and the law in the case.

(Middlesex—Filed February 23, 1888.)

ON defendants' exceptions. *Overruled.*
Complaint for unlawful exposing and keeping for sale intoxicating liquors in Stoneham, on January 15, 1887.

The evidence for the government tended to show that defendant Daley kept a shop on Central Street; that the shop was searched on January 15, 1887, and also a barn 50 feet away, to which one could pass from the shop through open passageways; that in the barn was a barrel two thirds full of whiskey, having a lock fast-

cet and marked C. O. Tay. The faucet was locked, and the barrel concealed from sight by a sailcloth.

This barrel was claimed by Tay, who claimed that he was an invalid and had the liquor for his personal use. It appears that Daley alone kept and owned the saloon or shop on Central Street, while Tay kept and owned one on Main Street.

The government then asked a witness what Tay kept in his saloon on Main Street; whether he had liquors there, or a bar; what was in the saloon: to which the defendants objected; but the court admitted it, and the defendants excepted.

It appeared that the defendants were formerly in business together in the building occupied by Daley, but not within a year of the date of the complaint, and that there was a private path leading from the back door of Daley's saloon to the window in said barn, through which was an opening.

The defendants asked for the following instructions:

1. That finding intoxicating liquors in the shop or barn is not *prima facie* evidence of keeping with intent to sell or expose for sale.
2. That the government must show that such liquor was kept with the intent to expose for sale or to sell in this Commonwealth.
3. That there must be an offer of the liquor by exposing it to those who might become purchasers. If the liquor is covered up, concealed, or deposited where its presence could not be seen or known to the public, it is not exposed for sale within the meaning of the statute. The words are to be taken together, to get at the sense of the statute.
4. That the jury may consider the statutes of the Commonwealth relating to intoxicating liquors, and the law in the case.

The court refused to give them, and the defendants excepted.

The court instructed as follows: "The burden is upon the government to satisfy you that the whiskey found in the barn was illegally kept for sale, or illegally exposed for sale, and that it was so kept or exposed by the defendants; that, as the defendants did not claim to have a license to sell spirituous or intoxicating liquor, if the whiskey was kept for sale and to be sold by defendants, or either of them, in this Commonwealth, or if any part of it was so kept, then the part so kept was illegally kept; that, upon the question of whether it was so kept, the jury may take into consideration all the circumstances disclosed in the evidence; that the mere fact that the whiskey was in the barn is not *prima facie* evidence one way or the other, but is simply one of the circumstances to be considered.

"If the whiskey, or any part of it, was illegally kept for sale, and the defendants, or either of them, so kept it, then the one who so kept it should be convicted."

"The complaint is sustained if the jury are satisfied that the defendants kept the whiskey, or any part of it, for sale as above stated, although there was no exposure for sale; and that in this case there is no evidence to warrant a conviction upon the ground of exposure for sale."

3 Mass.

Defendants, having been found guilty, alleged exceptions.

Mr. A. V. Lynde, for defendants:

The instructions given by the court did not cover the requests of the defendants; they were entitled, upon the evidence, at least to the third request.

Com. v. McCue, 121 Mass. 358.

As to the fourth request, the court declined to instruct the jury as to their duty in considering the statute and the law relating to the case.

Com. v. Anthes, 12 Gray, 29.

Mr. Andrew J. Waterman, *Atty-Gen.*, for the Commonwealth.

C. Allen, J., delivered the opinion of the court:

The defendants merely presented a brief, which is very short, and does not show in detail the grounds on which they rely in support of their exceptions. The judge ruled that there was no evidence to warrant a conviction upon the ground of exposure for sale. But the complaint was well supported by proof of keeping for sale. *Com. v. Atkins*, 186 Mass. 160; *Com. v. Welch*, 2 New Eng. Rep. 162, 140 Mass. 372.

The averment of exposure might have been omitted. *Com. v. Sprague*, 128 Mass. 75; *Com. v. Peto*, 186 Mass. 155.

The judge having correctly instructed the jury upon the true interpretation of the statutes and upon the law relating to the case, there was no occasion to give the fourth instruction which was asked for. *Com. v. Anthes*, 5 Gray, 185; *Com. v. Thorniley*, 6 Allen, 445, 448.

We see no error in the trial.

Exceptions overruled.

COMMONWEALTH of Massachusetts

v.

John SULLIVAN.

1. An indictment under Pub. Stat. chap. 209, § 1, for setting up and promoting a lottery, which follows the words of the statute, is sufficient.
2. A game in which a price is paid for a chance of a prize, and in which it purports to be determined by chance whether the one who has paid the money should have the prize or nothing, is a lottery, and the opinion of the jury need not be taken thereon.
3. Whether or not a definitely described game falls within the prohibition of the statute is a question of law.
4. When the tendency of the evidence on the trial of such indictment is to the effect that all the transactions testified to as having occurred on a certain day were parts of one continuous setting up and promoting a lottery, the government is not required to elect some transaction complete in itself, on which to go to the jury.

(Suffolk—Filed February 28, 1888.)

ON defendant's exceptions. *Overruled.*

This was an indictment against defendant.

in six counts, for setting up and promoting a certain lottery for money, under Pub. Stat. chap. 209. The first count was as follows:

"The jurors for the Commonwealth of Massachusetts on their oath present that John Sullivan, of Boston aforesaid, on the 9th day of April, in the year of our Lord one thousand eight hundred and eighty-six, at Boston aforesaid, with force and arms did set up and promote a certain lottery, the name and a more particular description of which said lottery being to said jurors unknown, which said lottery was then and there for money,—said lottery not being then and there authorized by law in said Commonwealth,—against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided."

Defendant, before the jury was impaneled, filed a motion to quash; and, upon argument, the court overruled the motion as to the first and third counts, but sustained it as to the others. Defendant excepted. After the evidence had all been presented, the court was asked to rule that, as a matter of law, there was not sufficient evidence for the jury to convict the defendant on either the first or the third count. The court ordered the jury to acquit on the third count, but refused the request of the defendant as to the first count, and ruled that, as a matter of law, if the jury should believe the evidence of one Walker, which was the only evidence as to the first count, it was a lottery, and a setting up and promoting a lottery, and they would be warranted in finding that the defendant was guilty of setting up and promoting a lottery. Defendant excepted.

One Walker testified that he knew the defendant; that on April 1, 1886, he went to a room in building No. 1156, Washington Street, Boston; that the room had a long counter, and behind it were some men writing; that thirty minutes after witness got there the defendant came in, took off his coat and hat, and said to one Graham, who was one of the writers, "I am ready to go to work;" that witness asked him if he was a writer there. Defendant said he was, and, on being asked if he was the proprietor, replied that he was only hired there, and did it for money; that witness asked defendant to whom he should look for his money if he won any, and defendant said he would settle all as soon as the drawings were made; that witness gave him four numbers,—what is called a "horse;" that is, a combination of four numbers from a column of 78,—that if witness had given three numbers it would be a "gig;" that witness paid ten cents to defendant; that he saw several other persons give defendant numbers and give and take money; that defendant gave him a ticket or piece of paper with 479 on it.

Q. What does 479 stand for?

A. The number for the drawing; each drawing is numbered a class number. The drawings are put in envelopes.

The witness testified that he stayed there ten or fifteen minutes, and saw others receive from defendant similar papers with numbers, and give money to him; that defendant stood up and asked if there were any other parties that wanted to take part in the game, and took an envelope from the wall, took out therefrom a slip of paper with twelve numbers in each

column, numbers being below 78, turned around, and copied with chalk the numbers on a blackboard and also the class number; then a man made a claim of \$5, and defendant paid him with money from the counter drawer; then defendant continued to write again, and witness remained and saw another drawing made in the same way.

Q. You say you saw another drawing after the one in which you had numbers. Describe it.

A. The numbers that the persons wanted to give defendant or call out, defendant would write on slips of paper in place of the money he took from them; when the audience ceased to take part they made another drawing,—that is, defendant took another envelope and took out a drawing just as he did in the other case.

Q. Describe this game in full,—in detail.

This question was excluded by the court.

On cross-examination:

Q. Did one Washington go with you to this room, March 31 or April 3, 1886?

A. Yes.

Q. Didn't Washington charge you with picking up this paper you have produced, and other papers with numbers on them, from the room floor, and proposing to him to go into court and swear that they were bought of defendant and Graham; and didn't Washington say that he wouldn't have anything to do with you on that account?

This question was excluded on objection by the district attorney, and defendant excepted.

After all the evidence was in, the defendant also asked the court to require the government to elect some transaction, complete by itself, on which it would go to the jury on the first count; but the court refused so to rule, and ruled that the government might rely on all the transactions of said April 1; and defendant excepted.

Defendant, having been found guilty, alleged exceptions.

Messrs. John L. Eldridge and D. F. Fitz, for defendant:

There was no evidence that the alleged lottery was held out to the public. Yet it was necessary to prove that fact.

Wattingford v. Mutual Society, L. R. 5 App. Cas. 685; *Smith v. Anderson*, L. R. 15 Ch. Div. 269.

Mr. Andrew J. Waterman, for the Commonwealth:

The question respecting what Washington said, charging the government witness with picking up from the floor certain papers, was properly excluded, in the exercise of the broad discretion in the presiding judge, and hence the matter is not a subject of exception.

Com. v. Sacket, 22 Pick. 394.

The defendant is charged with setting up and promoting a lottery for money. The evidence, so far as the record shows, was all directed to one occasion, on April 1; there was no propriety in asking for an election, and the refusal was not subject to an exception.

Com. v. Pratt, 137 Mass. 98.

Holmes, J., delivered the opinion of the court:

1. This is an indictment, under Pub. Stat. chap. 209, § 1, for setting up and promoting a lottery. The indictment follows the words of the statute and is well enough.

2. The testimony described a game substantially similar to that described in *Com. v. Wright*, 187 Mass. 250, which the jury found to be a lottery. The defendant asked the court to rule that there was no sufficient evidence to warrant a conviction. The court refused so to rule, but ruled that, if the evidence was believed, "it was a lottery, and a setting up and promoting a lottery," and that the jury would be warranted in finding the defendant guilty. If the statement that "it was a lottery," etc., was anything more than a preliminary explanation of why the court refused the defendant's request,—the substance of the ruling made being that there was evidence for the jury,—we cannot say that it went too far.

The testimony was not very clear, it is true, and further description seems to have been excluded on the defendant's objection. But if the evidence meant anything, it described a game in which a prize was paid for a chance of a prize, and in which it purported to be determined by chance; that is, by means making the result independent of the will of the manager of the game, according to a scheme held out to the public, whether he who paid the money should have the prize or nothing. This having been determined to be a lottery in *Com. v. Wright*, it is not necessary to go on forever taking the opinion of the jury in each new case that comes up. Whether or not a definitely described game falls within the prohibition of the statute is a question of law. The defendant was bound to know at his peril. Whatever practical uncertainty courts may have felt upon a subject with which they are less well acquainted than some others of the community, in theory of law there is no uncertainty, and the sooner the question is relieved from doubt the better.

3. The court excluded a question by the defendant, on cross-examination, whether one Washington, who on another occasion accompanied the witness to the same place, did not charge him with having picked up a paper produced, and with having proposed to Washington to swear that it was bought of the defendant, etc. The exclusion was proper in the discretion of the court. There was no offer to prove that the witness acquiesced in the charge. The means of Washington's knowledge was not suggested. The witness might have been asked about the fact with which he was supposed to have been charged, and Washington might have been produced to contradict him if he could do so.

4. It did not appear with certainty that all the transactions of April 1 were not parts of one continuous setting up and promoting a lottery. The tendency of the evidence was the other way. The motion that the government should be required to elect some transaction complete in itself was rightly overruled.

Exceptions overruled.

Clarence A. HADDOCK, *Esr.*,

v.

BOSTON & MAINE R. R. *Appt.*

1. There is no limit to the time after the death of a testator in which a will dis-
3 MASS.

posing of real estate can be admitted to probate.

2. The fact that a woman actually executed a paper purporting to be a will, at a time when a married woman was incompetent to make such will, may be considered, in connection with other evidence, as tending to show that such woman was a widow, and therefore competent to make such will.

(Essex—Filed February 29, 1888.)

ON report. *Case to stand for further proceedings.*

This was an appeal from a decree of the Probate Court of Essex County, admitting to probate the will of Sarah Pendergast, formerly of Haverhill. The Boston & Maine Railroad Company owned land in Haverhill, the title to which it had obtained through the heirs of said Sarah Pendergast. The will, if established, devised the lands to persons other than those who, as heirs, had conveyed title to the railroad company. The rights of the railroad company might therefore be affected by the establishment of the will, and it claimed the right to appeal, which right was recognized by Morton, *Ch. J.*, before whom the case was tried. Issues were submitted to a jury, and exceptions were taken to rulings made and refusals to rule, and the case was reported to the full court. If the rulings and refusals to rule were incorrect, a new trial of the issue was to be had, otherwise the case was to stand for further proceedings in the supreme judicial court.

Further facts appear in the opinion of the court.

Mr. Solomon Lincoln, for appellant:

To the opinion of the court in *Shumway v. Holbrook*, 1 Pick. 117, the reporter has appended the following note:

"*Mr. Justice Jackson*, at the argument, said that there was a case in the county of Essex, perhaps thirty years ago, where it was found that the widow of the testator must hold land under the will, which had not been proved. The will was therefore carried to the probate office, but more than twenty years being elapsed since the death of the testator, the judge of probate refused to allow it; but upon an appeal the decision was reversed, as a will must be proved and allowed in order to convey land."

The case was that of *Bourne v. Greenleaf*. See *Waters v. Stickney*, 12 Allen, 13.

The papers on file in Essex County, in *Bourne v. Greenleaf*, show that a paper purporting to be the will of Thomas Beck, bearing date August 1, 1765, was offered for probate to the Court of Probate for Essex County on December 7, 1801, by Joseph Buckley, attorney to Deborah Bourne, who recites in her petition that she is a sister and one of the heirs of Frances Beck, deceased, who was named in the will of Thomas Beck as his widow and executrix. Her petition does not state the date of the death of Thomas Beck, nor of the death of Frances Beck. It prays the court "to proceed to hear and examine the witnesses whose names are subscribed to said will, and to prove and allow the same in due form of law."

Upon the same day the court decides as fol-

lows: "I do not consider myself authorized by law to make any order or decree on the instrument above mentioned, and therefore do not grant the above request."

Deborah Bourne claimed an appeal, which was duly entered in the supreme judicial court; one of her reasons of appeal being—

"Third. That the said judge was fully authorized by law to proceed to hear and examine the said subscribing witnesses, and upon such examination to prove, approve, and allow the said instrument as the last will and testament of the said Thomas Beck."

The appeal was duly heard by the supreme judicial court, and the court admitted the will to probate.

Certain papers on file in the probate office, alleging objections to the probate of the will, do not appear to have been presented to the appellate court.

In *Shumway v. Holbrook*, 1 Pick. 117, the court says: "If a will can be found, it may be proved in the probate office at any time, in order to establish a title to real estate." The case does not decide this point, however, but merely that a will of which there has been no probate cannot be admitted in evidence; and the words quoted are *obiter dicta*.

In *Waters v. Stickney*, 12 Allen, 18, Judge Gray says: "It has been directly adjudged by this court that a will may be proved even thirty years after the death of the testator," etc., and cites as authority *Bourne v. Greenleaf* and *Shumway v. Holbrook*. In this case, again, the only point decided material to the present discussion is that a codicil may be admitted to probate fourteen years after the maker's death, and the words quoted are again *obiter dicta*.

The cases of *Bourne v. Greenleaf*, *Shumway v. Holbrook*, and *Waters v. Stickney* are all the cases decided in Massachusetts which touch the question under consideration, and they all rest upon the narrow foundation of *Bourne v. Greenleaf*. That case cannot be regarded as one of controlling authority.

The question is therefore practically a new one, to be settled upon just principles.

There must be a limit beyond which a court would not admit a will to probate. What is that limit? It should be set at less than sixty-three years.

In determining what limit is reasonable, reference must be had not merely to the rights of the testator and his representative and successors, but also to the interest of the community in which his property lay.

Statutes in effect declaratory of the principle of law for which the appellant contends have been enacted in certain States. In Maine, after twenty years from the death of a person, no probate of his last will can be originally granted (Rev. Stat. chap. 64, § 1). In Connecticut a limit of ten years is imposed (Gen. Stat. Rev. 1875, chap. 11, § 11).

Messrs. Benjamin F. Butler and Prentiss Webster, for appellee:

The fact that the will in question is so old is not in itself a bar to the right of the parties interested in it to prove it in probate, so far as it affects real estate.

If a will can be found, it may be proved in the probate court at any time, in order to establish a title to real estate.

Shumway v. Holbrook, 1 Pick. 117; *Waters v. Stickney*, 12 Allen, 18.

The law recognizes a conclusive presumption in favor of due execution of ancient wills and deeds. When these instruments are thirty years old, and are unblemished by any alterations, they are said to prove themselves. Their bare production is sufficient, the subscribing witnesses being presumed to be dead.

Wynne v. Tyrchitt, 4 Barn. & Ald. 377, and cases there cited; *Ely v. Stewart*, 2 Atk. 44, and cases there cited; Taylor, Ev. §§ 87, 88; *Winn v. Patterson*, 34 U. S. 9 Pet. 674, 675 (9 L. ed. 270); *U. S. Bank v. Dandridge*, 25 U. S. 12 Wheat. 70, 71 (6 L. ed. 554, 555); *Northrop v. Wright*, 24 Wend. 221, 228; *King v. Little*, 1 Cush. 486.

But it must appear that the instrument comes from such custody as to afford a reasonable presumption in favor of its genuineness.

Doe v. Samples, 8 Ad. & El. 151; *Roe v. Bawlings*, 7 East, 291; *Doe v. Pearce*, 2 Moody & R. 240.

The jury were authorized to find that Sarah Pendergast was a widow, taking the recitals in the deed from Mary Ayer as matters of reputation. The deed, which was put in evidence, was an original deed.

Taylor, Ev. § 651; *Doe v. Skinner*, 8 Exch. 84; *Doe v. Witcomb*, 6 Exch. 605.

The jury having found her to be in a condition of widowhood at the date of receiving the deed as a widow, and under which she acted as a widow, had the right to presume that the condition of widowhood continued, in accordance with experience in human affairs, unless evidence was submitted by the appellant to control the presumption. This is founded on the experienced continuance or immutability, for a longer or shorter period, of human affairs.

Greenl. Ev. § 41; Taylor, Ev. § 196; 6 C. B. 680 *Price v. Price*, 16 Mees. & W. 283, 240-242; *Scales v. Key*, 11 Ad. & El. 819; *Reg. v. Lillshall*, 7 Q. B. 158; *Rex v. Tanner*, 1 Esp. 306; *Rex v. Budd*, 5 Esp. 280; *Pickett v. Puckham*, 4 L. R. Ch. App. 190.

The fact that she allowed herself to be styled a widow in the deed is conclusive on that point, when uncontradicted.

Greenl. Ev. § 211; Taylor, Ev. §§ 97, 98; *Doe v. Stone*, 3 C. B. 176.

The jury was authorized to presume that the death of Pendergast was some time prior to the date of the deed received and acted upon by her as a widow in 1801, and sufficient to admit of the presumption that seven years' continuous absence had elapsed prior to the execution of the will in 1807.

Loring v. Steineman, 1 Met. 204; *Newman v. Jenkins*, 10 Pick. 515.

For the purpose of determining the legal rights of persons, the courts conclusively presume that every sane person above the age of fourteen is acquainted with the common as well as the statute law of the land.

1 Russ. Cr. 25; 1 Hale, 42; Taylor, Ev. § 90; *Haven v. Foster*, 9 Pick. 112.

Devens, J., delivered the opinion of the court:

The first question discussed by the appellant is whether the probate court has authority, as matter of law, to admit a will to probate sixty-

three years after the death of the testator, and, incidentally, whether there is any limit of time after the death of the testator subsequent to which the court has no such authority. In *Shumway v. Holbrook*, 1 Pick. 117, the question was whether a will not admitted to probate was admissible in evidence. It was held that it was not, but it is said: "If a will can be found, it may be proved in the probate court at any time, in order to establish a title to real estate. It differs from an administration of personal property, which cannot be originally granted upon the estate of any person after twenty years from his decease." In the course of the argument, *Mr. Justice Jackson* alluded to a case in Essex County, perhaps thirty years before, where it was found that a widow must hold land under a will which had not been proved. The will having been offered for probate, the judge of probate declined to allow it, as more than twenty years had elapsed since the death of the testator; and on appeal his decision was reversed and the will admitted to probate.

The research of counsel for the appellant has established that the case thus alluded to was that of *Bourne v. Greenleaf* (Essex), and has supplied us with as satisfactory an account of it, drawn from the papers on file, as they will afford. It is a case to which some weight must be attached, as it brought into question, directly, the authority of the court of probate, and the appeal was to the full bench of the supreme court, which reversed the original decree. While no opinion appears to have been written, it could not but have been a carefully considered case, as it reversed the opinion of the judge of probate as to the extent of his jurisdiction. The will thus admitted to probate was so admitted thirty-six or thirty-seven years after its date. How long after the death of the testator does not clearly appear, although some of the papers found indicate that it was more than thirty years after.

In *Marcy v. Marcy*, 6 Met. 360, the question was whether there was sufficient evidence that a will which became operative forty-three years before had been admitted to probate, so that it could be read in evidence. The court held that there was such evidence, adding: "And, on evidence like the present, it would be the duty of the probate court to establish the will if, for want of form, the probate should have been considered so defective that the will had been rejected, as evidence, in its present form."

In *Waters v. Stickney*, 12 Allen, 1, where it was held that the probate court, fourteen years after admitting a will to probate, might admit to probate a codicil written upon the same leaf, which had escaped attention, and was not passed upon at the time of the probate of the original will, it is said by *Mr. Justice Gray*, citing the above cases: "It has been directly adjudged by this court that a will may be proved even thirty years after the death of the testator, although original administration could not by statute be granted after twenty years;" and again, "if no will had been proved, the lapse of time would not prevent both will and codicil from being proved now."

While it is true that in neither of these cases has it been decided that a will disposing of lands can be admitted to probate after sixty years,

yet there is no suggestion in any of them that there is any limitation of time to such proof; and the language used is quite explicit to the contrary. In view of the decisions made, and the repeated expressions, directly relevant to the cases considered, used in argument by judges of this court, we cannot treat this inquiry as the defendant desires we should, as practically a new question. We must deem it as one that has been fairly passed upon and decided. It may be that the inconveniences which might arise from the probate of a will many years after the death of the testator were such that a statute limiting the period might be properly enacted. That course has in some States been adopted. Conn. Rev. Stat. 1875, chap. 11, § 11; Me. Rev. Stat. chap. 64, § 1. But statutes of limitation are arbitrary, and the considerations which apply to positive laws of this character are legislative rather than judicial. In many instances, where a great length of time has elapsed after the death of a testator, possessory titles will have been acquired which will prevail against the record. What is due to the just rights of the devisees is to be considered with reference to other rights of property or to the repose of the community; but such considerations belong to the domain of legislation. So long as one can produce the evidence necessary to obtain the probate of a will, we can see no legal reason why one who relies upon it should not be allowed to prove it as he would be permitted to prove a deed, however ancient, under which he claimed title. The fact that he could not offer in evidence a will not admitted to probate, as he might an ancient deed, would certainly afford no reason why its authenticity should not be established in the probate court by its regular course of procedure.

The appellant further contended that the jury ought not to have been allowed (in determining the question whether the testatrix was a widow, and thus competent to make a will as the law stood in 1807) to consider the fact that she actually executed a paper purporting to be a will devising land, as any evidence that she had legal capacity so to do. This fact, in connection with the other facts proved, was competent to be considered. There was no ruling that alone it would have been sufficient to establish her legal capacity,—that is, that she was at the time a widow. There was evidence of reputation that the husband of the testatrix died soon after their marriage; that a deed was made to her December 21, 1801, of the very land which she undertook to dispose of by will, in which she was described as Sarah Pendergast, widow, which deed was found among her papers; and she executed the will by the same name as that recited in the deed in which she was described as widow, although that word is not appended to her name in the will. The act done by her, of disposing or assuming to dispose of her property, which she could only lawfully do if a widow, was an assertion of her status, and that of her legal capacity, made in an important transaction,—which might properly have been considered in connection with the other evidence.

The conclusion we have reached renders it unnecessary to decide whether the appellant was lawfully entitled to appeal. Other exceptions taken by it were waived in this court.

Cause to stand for further proceedings.

D. Nelson SKILLINGS

MASSACHUSETTS BENEFIT ASSOCIATION.

A person whose only relation to a deceased member of a **benefit association**, organized under Pub. Stat. chap. 115, is that of a **creditor**, is **not** a person "**dependent**" upon such member, within the meaning of the statute; and a promise by such association to pay such creditor the money payable on the death of such member is void; and the creditor cannot maintain an action thereon, either for his own use or that of any other person.

(Suffolk—Filed March 1, 1888.)

ON plaintiff's exceptions. *Overruled.*

This was an action of contract to recover \$7,000 upon two certificates of membership issued by defendant, a corporation doing business under Pub. Stat. chap. 115, upon the life of Edward A. Clapp.

Defendant asked the court to rule that, as plaintiff was not a relative of Clapp, but only a creditor, he was not a dependent within the meaning of Pub. Stat. chap. 115, § 8, and could not maintain this action. The court so ruled, and ordered a verdict for defendant; whereupon plaintiff alleged exceptions.

Messrs. Robert M. Morse, Jr., and William Richardson, for plaintiff:

One not a relation, nor even a creditor, may under some circumstances be a dependent; and that the Legislature, by the Act of 1882, contemplated such a possibility, is apparent by the use of the words "or any persons dependent upon deceased members."

It was a question of fact for the jury, and not a question of law for the court, to determine whether or not the plaintiff was dependent upon the deceased member.

Legion of Honor v. Perry, 1 New Eng. Rep. 715, 140 Mass. 580, 590.

But even if this ruling was correct, defendant cannot be relieved from its obligation to perform its contract with its member. All the premiums or assessments, which are in law the equivalent of the amount due under the policy or certificate, have been received by the defendant, and performance of the contract on his part has been complete.

2 Morawetz, Priv. Corp. 650, 658, 689; *Whitney Arms Co. v. Barlow*, 68 N.Y. 68; *Bradley v. Ballard*, 55 Ill. 415; *Steam Navigation Co. v. Weed*, 17 Barb. 888; *Darat v. Gale*, 88 Ill. 186; *Wright v. Pipe Line Co.* 101 Pa. 204; *Bloomington Mut. Ben. L. Ins. Assn. v. Blue*, 8 West. Rep. 642, 120 Ill. 121; *Faneuil Hall Bank v. Brighton Bank*, 16 Gray, 584; *Denver F. Ins. Co. v. McClelland*, 9 Col. 11; *Maneely v. Knights of Birmingham of Pa.* 7 Cent. Rep. 683, 115 Pa. 805.

In all the cases in which the statute under which benefit associations are authorized to be formed and to carry on business has been considered, the court has, without exception, enforced payment under the certificate issued by the defendant association.

Briggs v. Earl, 189 Mass. 478; *Legion of*

Honor v. Perry, 1 New Eng. Rep. 715, 140 Mass. 580; *Elacy v. Odd Fellows Mut. R. Assn.* 2 New Eng. Rep. 667, 142 Mass. 224; *Daniels v. Pratt*, 3 New Eng. Rep. 480, 143 Mass. 216; *Saunders v. Robinson*, 4 New Eng. Rep. 171, 144 Mass. 306; *Addison v. New England C. Travelers Assn.* 4 New Eng. Rep. 689, 144 Mass. 591; *Tyler v. Odd Fellows Mut. R. Assn.* 5 New Eng. Rep. 191, 145 Mass. 134.

Messrs. Edward Avery and Albert E. Avery, for defendant:

Within the meaning of Pub. Stat. chap. 115, § 8, this plaintiff was not a dependent.

Legion of Honor v. Perry, 1 New Eng. Rep. 715, 140 Mass. 589.

A creditor is not within the class of persons designated by Stat. 1877, chap. 204 (Pub. Stat. chap. 115), to whom benefit funds could be made payable.

If defendant undertook to issue certificates of membership payable to persons other than those within the classes named in the statute of 1877, said certificates would be *ultra vires*, and of no effect.

Briggs v. Earl, 189 Mass. 478.

Plaintiff, as a mere creditor of Edward A. Clapp, the deceased, was not a dependent, as the term is used in the statute.

Legion of Honor v. Perry, 1 New Eng. Rep. 715, 140 Mass. 580; *Ballou v. Gile*, 50 Wis. 614; *Addison v. New England Travelers Assn.* 4 New Eng. Rep. 689, 144 Mass. 592; *Whitchurst v. Whitehurst*, 79 Va. 556; *Daniels v. Pratt*, 3 New Eng. Rep. 480, 143 Mass. 221; *Presbyterian Mut. Assurance Fund v. Allen*, 4 West. Rep. 712, 106 Ind. 593; *Masonic Mut. Ben. Society v. Burkhardt*, 9 West. Rep. 92, 110 Ind. 189.

Field, J., delivered the opinion of the court:

The exceptions in this case are meagre; but it appears that the defendant was an association doing business under the provisions of Pub. Stat. chap. 115,* and that it issued two certificates of membership on the life of Edward A. Clapp, for sums of money to be paid on his death to the plaintiff, who was described in the application as a dependent. The plaintiff was not a relative of Clapp, and his only relation to him was that of a creditor. It is said in the plaintiff's brief that the certificates were issued, respectively, on February 18, 1885, and March 9, 1885; and it is alleged in the declaration that Clapp died on February 8, 1886.

The reference in the exceptions to Pub. Stat. chap. 115, plainly shows that this is a corporation organized "for the purpose of assisting the widows, orphans, or other persons dependent upon deceased members." Id. § 8; Stat. 1877, chap. 204; Stat. 1874, chap. 375. The powers of corporations organized under these

*The material portion of this Act is as follows: § 8. A corporation organized for any purpose mentioned in § 2 may, for the purpose of assisting the widows, orphans, or other persons dependent upon deceased members, provide in its by-laws for the payment by each member of a fixed sum, to be held by such association until the death of a member occurs, and then to be forthwith paid to the person or persons entitled thereto; and such funds held shall not be liable to attachment by trustee or other process; and associations may be formed under this chapter for the purpose of rendering assistance to such persons, and in the manner herein specified. [Ed.]

statutes were enlarged by Stat. 1882, chap. 185,* so as to include, among the persons to be benefited, other relatives of deceased members, besides widows and orphans. A person whose only relation to the deceased member is that of a creditor is not a person dependent upon him within the meaning of these statutes; and the promise to pay the plaintiff is void. Such a promise is beyond the powers of the association, and contravenes the intention of the statutes under which the association was organized. The plaintiff cannot, therefore, maintain an action on this promise, either for his own use or for that of any other person. *Briggs v. Earl*, 139 Mass. 473; *Legion of Honor v. Perry*, 1 New Eng. Rep. 715, 140 Mass. 580.

Stat. 1885, chap. 183,† passed after these certificates were issued, does not affect the case, for these, among other, reasons, that it does not distinctly appear that this corporation was such an organization as could avail itself of the rights, powers, and privileges conferred by this Act (Id. § 1); or, if it could, that it had ever done so, or that it had done anything that could make valid the promise to pay the plaintiff, which was void when it was made.

As the designation of the plaintiff as the person entitled to receive the sums payable on the death of Clapp is void, we cannot determine in this suit to whom they should be paid, if payable to any one.

Exceptions overruled.

John M. GOODNOW

v.

WALPOLE EMERY MILLS.

1. When an employee is injured in the course of his employment by machinery in motion near where he is at work, but, in view of his knowledge and capacity,

the danger must have been well understood by and apparent to him, negligence can not be imputed to the employer in exposing him to it.*

2. Where the machinery by which an employee is injured was not out of repair, or defective or unsuitable for the purpose for which used, negligence in the employer in using such machinery will not be made out by proof that safer machinery for the same purpose was in common use, where there was no evidence that the machinery used by the employer was not also in common use.

(Suffolk—Filed March 2, 1888.)

ON report. Judgment on verdict.

This was an action of tort for damages received by plaintiff while employed in defendant's mills, and was tried in the superior court. After the plaintiff's evidence was all in, the court ruled that plaintiff could not maintain his action, and ordered a verdict for defendant, and, by agreement of the parties, reported the case for the consideration of this court. If the order and rulings were correct, judgment to be entered on the verdict, otherwise the case to stand for trial.

The facts are fully stated in the opinion of the court.

Mr. Henry W. Bragg, for plaintiff:

Wherever the facts are in dispute, or wherever the alleged facts are the subject of inference from other facts and circumstances, or wherever the question of negligence rests in the consideration of the evidence presented, or as an inference from such evidence, it is the exclusive province of the jury to consider the testimony and ascertain the facts under proper instructions from the court.

Com. v. Fitchburg R. Co. 10 Allen, 192; *Snow v. Housatonic R. Co.* 8 Allen, 448; *Gaynor v. Old Colony & N. R. Co.* 100 Mass. 203, and cases cited; *Ryan v. Tarbox*, 185 Mass. 207; *Ross v. Boston & W. R. Co.* 6 Allen, 92; *Reed v. Deerfield*, 8 Allen, 524; *Chaffee v. Boston & L. R. Co.* 104 Mass. 108; *Williams v. Grealey*, 112 Mass. 79; *Beach, Cont. Neg.* pp. 451, 283; *McKeece v. Market Street R. Co.* 59 Cal. 294-300; *Cumberland C. & I. Co. v. Scally*, 27 Md. 589; *Flori v. St. Louis*, 8 Mo. App. 231; *Stout City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 657 (21 L. ed. 745).

The defendant was culpably negligent. An employer is under an implied contract with those he employs to furnish suitable and safe means for carrying on his business; and the fact that, very near where the workman is employed, there is machinery visible in motion and of a dangerous nature, yet not connected with the work in hand, is not conclusive that he has taken upon himself the risk of being injured by it in modification of the employer's contract; and if the workman meets with an injury while doing his work, the questions whether he met with it through the want of due care on his part, or whether by reason of the neglect of his employer to give him suitable notice of the danger, are for the jury.

Coombs v. New Bedford C. Co. 102 Mass. 572; *O'Connor v. Adams*, 120 Mass. 481.

*See *Cyriack v. Merchants Woolen Mills*, post, p. 723.

*The material portion of this Act is as follows:

§ 2. Section 8 of said chapter (viz., Pub. Stat. chap. 115) is amended so as to read as follows: A corporation organized for any purpose mentioned in § 2 may, for the purpose of assisting the widows, orphans, or other relatives of deceased members, or any persons dependent upon deceased members, provide in its by-laws for the payment by each member of a fixed sum, to be held by such association until the death of a member occurs, and then to be forthwith paid to the person or persons entitled thereto; and such fund so held shall not be liable to attachment by trustee or other process; and associations may be formed under this chapter for the purpose of rendering assistance to such persons in the manner herein specified. [Ed.]

Section 1 provides that "every contract whereby a benefit is to accrue to a party or parties named therein upon the death or physical disability of a person, which benefit is in any degree or manner conditioned upon the collection of an assessment upon persons holding similar contracts, shall be deemed a contract of insurance on the assessment plan. And the business involving the issuance of such contracts shall be carried on in this Commonwealth only by duly organized corporations, which shall be subject to the provisions and requirements of this Act."

Section 3 provides that "any corporation existing under the laws of this Commonwealth, and now engaged in transacting the business of life or casualty insurance on the assessment plan, * * * may continue to exercise all rights, powers, and privileges conferred by the Act," etc.

Section 10 provides that "no corporation doing business under this Act shall issue a certificate or policy * * * upon any life in which the beneficiary named has no interest." [Ed.]

The plaintiff had a right to rely, to a reasonable extent, upon the defendant having taken proper precautions, and giving him warning of the dangers attending the situation.

Gaynor v. Old Colony & N. R. Co. 100 Mass. 213; *Sonier v. Boston & Albany R. Co.* 1 New Eng. Rep. 493, 141 Mass. 10.

In order to charge one with contributory negligence, he must have knowledge of or reason to apprehend the danger.

Beach, Cont. Neg. p. 38; *Langan v. St. Louis, I. M. & S. R. Co.* 72 Mo. 392; *Gray v. Scott*, 66 Pa. 345; *Fowler v. Baltimore & O. R. Co.* 13 W. Va. 579.

The plaintiff is not required to prove due care by direct affirmative evidence; the inference of such care may be drawn from the absence of all appearance of fault, either positive or negative, in the circumstances under which the injury was received.

Mayo v. Boston & M. R. Co. 104 Mass. 137.

The plaintiff is not required to exercise more care than is usual among the class to which he belongs. There is a natural presumption that every one will act with due care; and it cannot be imputed to the plaintiff, as negligence, that he did not anticipate culpable negligence on the part of the defendant.

It cannot be held as a matter of law that he was bound to know and appreciate the danger.

Ferren v. Old Colony R. Co. 3 New Eng. Rep. 330, 143 Mass. 197; *Thomas v. Western Union Tel. Co.* 100 Mass. 157; *Mahoney v. Metropolitan R. Co.* 104 Mass. 73.

Contributory negligence is a question of law when the case decides itself, so that it remains only for the court to declare the rule.

Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99—120.

The case at bar is in line with the adjudged cases in which it was held that the question of negligence was properly left to the jury.

Coombs v. New Bedford Cordage Co. 102 Mass. 572; *Ryan v. Tarbox*, 135 Mass. 207; *Wheeler v. Watson Mfg. Co.* Id. 295, and cases cited; *Hackett v. Middlesex Mfg. Co.* 101 Mass. 101; *Ferren v. Old Colony R. Co.* 3 New Eng. Rep. 330, 143 Mass. 197.

Messrs. R. M. Morse, Jr., and H. G. Nichols, for defendant:

The burden is upon the plaintiff to prove that defendant was negligent and that plaintiff used due care, and, failing to do so, he cannot recover.

Murphy v. Deane, 101 Mass. 455; *Blanchette v. Border City Mfg. Co.* 3 New Eng. Rep. 92, 143 Mass. 21.

There was no obligation on the defendant's part to use one kind of machinery rather than another.

Coombs v. New Bedford Cordage Co. 102 Mass. 572; *Sullivan v. India Mfg. Co.* 113 Mass. 396; *Ford v. Fitchburg R. Co.* 110 Mass. 240; *Indianapolis, B. & W. R. Co. v. Flanagan*, 77 Ill. 865.

If the danger was apparent, and the plaintiff had sufficient knowledge and capacity to understand it, there was no want of care in exposing the plaintiff to it.

Coombs v. New Bedford Cordage Co. and *Sullivan v. India Mfg. Co.* *supra*; *Williams v. Churchill*, 137 Mass. 243; *Felch v. Allen*, 98 Mass. 572; *Russell v. Tillotson*, 1 New Eng.

Rep. 444, 140 Mass. 201; *Taylor v. Carey Mfg. Co.* 1 New Eng. Rep. 210, 140 Mass. 150; *S. C.* 3 New Eng. Rep. 875, 143 Mass. 470.

The plaintiff, having sufficient knowledge and capacity to appreciate the danger, assumed the risk in agreeing to work in the place where he did.

Felch v. Allen, 98 Mass. 572; *Huddleston v. Lowell Machine Shop*, 106 Mass. 282, 285.

The fact that the plaintiff was employed in doing extra work throws no greater responsibility on the defendant, the plaintiff having consented to do the work.

Leary v. Boston & A. R. Co. 139 Mass. 580.

Devens, J., delivered the opinion of the court:

It was for the plaintiff to show both that he himself was in the exercise of due care, and that the injury to him was occasioned by the negligence of defendant. He was an intelligent man, of about thirty-seven years of age, who had been in the employ of the defendant for about three months, and was a machinist and engineer, employed to run the engine and pumps and have charge of them. He had previously been employed in this business elsewhere for three seasons and part of a fourth, taking the whole care of the engine and keeping it in ordinary repair. On the day of the accident he had been asked by the superintendent of defendant's works to fix the stamp under his direction, the superintendent telling him "what he wanted done and how he wanted it done," which was by taking out the lining of the mortar and fitting in a new one. The plaintiff assented, and when ready to go to work the superintendent "went in and showed" him "what he wanted done and what had got to be done." The plaintiff took charge of this job voluntarily. It was not in the regular line of his employment, but was extra work, for which he was to receive extra compensation. The engine was in motion, a shaft passing through the "stamp room," as it was called, and revolving at the rate of 170 times a minute. A set-screw projected about an inch from the collar of the smooth shaft, which collar was about three inches broad and fixed on the shaft contiguous to the base or journal holding the end of the shaft. The set-screw was in the middle of the collar and kept it in its place. The plaintiff was at work about three feet from this set-screw, upon the platform on which the mortar was placed. He describes the accident as follows: "I was at work in the stamp room in front of the mortar here. Mr. Scott from above lowered the lining down and" [it] "was partly in the mortar, and Mr. Morrissey and I were pushing it in. I stepped down, put my shoulder underneath the cover to push the lining in, and I was caught" (the witness illustrated with a model the manner in which he did this). "At that time I didn't know anything about any set-screw being on the shaft,—never had any intimation of any such thing. There was nothing in my duties which would require me to see it or know it was there, or to call my attention to it. The next thing I knew I was going round with the shaft." From his own testimony it further appeared that the plaintiff knew perfectly the object of set-screws, which are very common in machinery and of which

there were four or five on his engine. He knew also the danger of revolving machinery, and intended to keep a safe distance from it. He states that he knew that the shaft was revolving, and "presumed" that he could have stopped the engine, in which event the accident could not have occurred. The plaintiff did not intend to get within sixteen inches of the shaft, nor could he tell how it happened that, in stepping back, he got so near the shafting as he did,—especially as, in moving to put the lining into position, his movement would be away from the shafting. Nor, as he testified, could he see any reason why he should have got within six inches of it.

The plaintiff contends, upon these facts, that the defendant did not furnish him a suitable place in which to do his work, nor apprise him of the danger to be apprehended from the revolving set-screw, which was not in any way connected with the work which he had in hand. But the plaintiff was before familiar with the place in which the work was to be done; he had examined it the same morning, before commencing his work, with the plaintiff's superintendent. He had also, as appeared from his statement, at a former time oiled the shafting at the very journal close to which was the collar and set-screw by which he was caught. Even if he had not then observed the set-screw, or had not seen it on the morning of the accident, on account of the revolution of the machinery or for any other reason, he knew, as an engineer, that set-screws were in constant use, and that from the purpose for which they were employed it might be expected that the collar would be kept in its position by one. There was no danger which, in view of the plaintiff's knowledge and capacity, must not have been well understood by and apparent to him; and there was therefore no negligence on the part of the defendant in exposing him to it. *Coombs v. New Bedford Cordage Co.* 103 Mass. 572; *Sullivan v. India Mfg. Co.* 118 Mass. 396; *Russell v. Tillotson*, 1 New Eng. Rep. 444, 140 Mass. 201; *Taylor v. Carew Mfg. Co.* 1 New Eng. Rep. 210, 140 Mass. 150.

It cannot be claimed that the machinery used by defendant was out of repair, or defective, and unsuitable for the purpose. There was evidence on the part of the plaintiff that a recessed collar was in common use, so made that the set-screw was sunk into the collar flush with its face, upon which there was much less liability of being caught than on that used by the defendant. But the plaintiff offered no evidence that the collar and set-screw, as used by the defendant, were not also in common use. As we are of opinion that the plaintiff has failed to show any sufficient evidence of negligence on the part of defendant, it is unnecessary to inquire whether he has shown that he himself was in the exercise of due care.

Judgment on the verdict.

F. Otto SCHRAMM *et al.*

v.

BOSTON SUGAR REFINING CO.

1. A contract of sale of articles thereafter to be selected cannot be rescinded.
3 MASS. N. E. R., V. V.

ed because, before the making of the contract, there may have been an honest expression of opinion that, when the articles are selected in conformity with the contract, they will be of a better quality than they prove to be.

2. The measure of damages for failure of vendee to accept goods contracted for for future delivery is the difference between the contract price and the market value at the time and place of delivery.

3. The admission of competent evidence is not ground for a new trial because rendered unnecessary by the concession of the other side.

(Suffolk—Filed March 1, 1888.)

ON defendant's exceptions. *Overruled.*
This was an action of contract to recover damages for a breach of the following agreement:

Boston, December 24, 1885.

Sold for account of Messrs. Schramm & Co., Maroim, Brazil, through Messrs. Smith & Schipper, New York, representing, to the Boston Sugar Refining Company, Boston, a cargo of about 400 tons more or less of Maroim brown sugars, at 5½ cents per pound, duty paid, landed terms. Less 2½ per cent payable in cash ten days from average date of delivery. Sugar to be shipped per Swedish schooner "Sylphide" (or, in case of disaster to that vessel, by another vessel) to Boston during January or February, 1886. Settlement basis 84° test, allowance at rate of ¼ c. per degree down, ¼ c. per degree up, fractions of a degree *pro rata*. Buyers to advance money for duties, sellers allowing interest for such money advanced at rate of 6 per cent per annum. Two per cent tare guaranteed, and custom-house weight taken as basis of settlement. Samples to be taken from every bag as landed, jointly, by samplers of buyers and sellers. The mutual sample to be tested by two chemists, one of whom to be named by each party, and the average of these two tests to be basis of settlement. Damage, if any, to be taken at a fair allowance, to be settled by the undersigned. No arrival, no sale.

Accepted. E. D. Verplanck,
Boston Sugar Refining Co. Broker.
Alfred Winsor, Treasurer.

After the cargo arrived, defendant wrote plaintiff's agent a letter, declining to accept it, upon the ground that it was below the test named in the contract, and received the following reply:

April 8, 1886.

Boston Sugar Refining Company,
52 Central Street, Boston, Mass.

We sold you cargo of Maroim brown sugar without guarantee of quality further than price to be settled on basis of test.

Unless you can show that the Sylphide cargo is not Maroim brown sugar, contract has been filled, and you will be held strictly answerable for any attempt to evade it.

Smith & Schipper.

Defendant refused absolutely to receive the sugar, and requested plaintiffs to remove it.

whereupon the cargo was sold and the proceeds applied to the reduction of plaintiffs' claim, and this action was brought to recover the difference between the amount so realized and the contract price. The jury, under the evidence and rulings of the court, returned a verdict for plaintiffs, and defendant alleged exceptions.

Further facts appear in the opinion of the court.

Mr. D. E. Ware, for defendant:

False representations, which the principal knows to be false, made by an agent by authority of the principal, are fraudulent, and render a contract induced by such representations voidable.

Barwick v. English J. S. Bank, L. R. 2 Exch. 259.

Verplanck's representation that the cargo was 84° sugar was made without personal knowledge, and the defendant understood it was so made; but there was evidence to show it was made on the defendant's understanding that Verplanck had trustworthy information on which he based his statement. As a matter of fact he did not have such information; and a false representation made by him as though he had such information, when he had not, is fraudulent in law, unless he believed the representation to be true and had reasonable grounds for such belief.

Jarrett v. Kennedy, 6 C. B. 319, 322; *Doyle v. Hort*, L. R. 4 Ir. Exch. Div. 661; *Milliken v. Thorndike*, 103 Mass. 382, 385; *Morse v. Dearborn*, 109 Mass. 593; *Litchfield v. Hutchinson*, 117 Mass. 195; *Benj. Sales*, 4th Am. ed. 461 a.

The representation of Verplanck, made without express authority from the plaintiffs or their agents, and in good faith, would be fraudulent in law if, when made without the plaintiffs' knowledge, the plaintiffs knew it to be false.

Pollock, Torts, 257; *Pollock*, Cont. 4th ed. 580; 2 Smith, Lead. Cas. 88; *National Ex. Co. v. Drew*, 2 Macq. 145, 146; *Wheddon v. Hardisty*, 8 El. & Bl. 282-270; *Barwick v. English J. S. Bank*, L. R. 2 Exch. 262; *Ludgate v. Love*, 44 L. T. 694; *Fitzsimmons v. Joslin*, 21 Vt. 129; 2 Pars. Cont. 921, note; *Whart. Ag.* §§ 167-170; *Coddington v. Goddard*, 16 Gray, 436.

The knowledge of the agent is imputed to the principal, to prove fraud in him. Why should not the knowledge of the principal *a fortiori* be imputed to the agent to qualify his act as one for which the principal is responsible?

Seaman v. Fonereau, 2 Str. 1183; *Fitcherbert v. Mather*, 1 T. R. 12; *Mayhew v. Eames*, 3 Barn. & C. 601; *Doe v. Martin*, 4 T. R. 39; *Willis v. Bank of England*, 4 Ad. & El. 21.

There may be deceit in law where the false representation was made in the belief that it was true, if, through his fault, the party making the representation as though he knew, did not know.

Litchfield v. Hutchinson, 117 Mass. 195.

The injustice and wrong to the party misled are the same; and it is the natural consequence of the withholding of the truth from the agent, and should have been foreseen. The principal must be held in law to have intended the natural consequences of such withholding.

Lobdell v. Baker, 1 Met. 193.

The innocent principal is liable for the fraudulent representations of his agent made in the scope of his agency for the principal's benefit.

Bennett v. Judson, 21 N. Y. 238; *Griswold v. Haven*, 25 N. Y. 595; *Mundorff v. Wickscham*, 63 Pa. 87; *Bowers v. Johnson*, 10 Smed. & M. 169; *Lawrence v. Hand*, 23 Miss. 103; *Morton v. Scull*, 23 Ark. 289; *Locke v. Stearns*, 1 Met. 560; *Lobdell v. Baker*, Id. 193; *White v. Sawyer*, 16 Gray, 586; *Cook v. Castner*, 9 Cush. 266; *Jewett v. Carter*, 132 Mass. 335.

This court will not hold to the identity of principal and agent to such an extent that the principal shall be liable for the fraud of the agent within the scope of his agency and contrary to the principal's instructions, and fail to impute the knowledge of the principal to the agent in making representations within the scope of his agency.

Holmes, C. L. 231, 232.

Under Stat. 1883, chap. 223, §§ 14, 17, the defendant was entitled to establish, as a defense in equity, the fact that it was induced by the plaintiffs to execute this contract by false representations, without proof of actual fraud in the plaintiffs or their agents.

Such a defense is good in equity.

1 Story, Eq. Jur. § 193; 2 Pom. Eq. Jur. 887 and note; *Neville v. Wilkinson*, 1 Bro. Ch. 546; *Ainsley v. Medleycott*, 9 Ves. Jr. 21; *Burrows v. Lock*, 10 Ves. Jr. 475; *Ex parte Carr*, 3 Ves. & B. 111; *Rawlins v. Wickham*, 3 De G. & J. 304; *Atty-Gen. v. Ray*, L. R. 9 Ch. App. Cas. 397-405; *Harte v. Swaine*, L. R. 7 Ch. Div. 42, 46; *Arkwright v. Newbold*, L. R. 17 Ch. D. 301, 320; *Torrance v. Bolton*, L. R. 8 Ch. App. Cas. 118; *Smith v. Richards*, 38 U. S. 13 Pet. 26 (10 L. ed. 42); *Smith v. Babcock*, 2 Woodb. & M. 246; *Daymon v. Mitchell*, 1 Md. Ch. 496; *Converse v. Blumrich*, 14 Mich. 123; *Wilcox v. Iowa Wesleyan University*, 33 Iowa, 367; *Day v. Lown*, 51 Iowa, 364; *Cooley*, Torts, 498.

It is an equitable right to set aside a contract obtained by innocent misrepresentation, to enjoin an action brought to enforce such a contract, and to cancel the written agreement.

Stewart v. Great Western R. Co. 2 Dr. & Sm. 488; *Fuller v. Percival*, 126 Mass. 881; *Clark v. Manning*, 7 Beav. 162; *Daniel v. Mitchell*, 1 Story, 172; *Doggett v. Emerson*, 3 Story, 700; *Hamilton v. Cummings*, 1 Johns. Ch. 517; *Glastonbury v. McDonald*, 44 Vt. 450; *Kerr*, Inj. pp. 578, 579.

Under reform procedures allowing equitable defenses to legal claims, any facts that show that the plaintiff ought not to recover are available to the defendant that would be a good defense in equity.

Dobson v. Pearce, 12 N. Y. 156-168; *Craig v. Goodman*, Id. 266-268; *N. Y. Cent. Ins. Co. v. National Protec. Ins. Co.* 14 N. Y. 85, 90; *Troost v. Davis*, 81 Ind. 34, 39.

Where an equitable defense to a legal cause of action is allowed, it is now recognized law that misrepresentations by which a defendant is induced to make a contract are a defense to the contract, where its enforcement is sought, although there is no actual fraud.

Redgrave v. Hurd, L. R. 20 Ch. Div. 1, 12, 13; *Benj. Sales*, 4th Am. ed. § 461 a; 1 Story, Eq. Jur. 13th ed. p. 211, note.

The shipment of the cargo by the vessel or kind of vessel mentioned in the agreement was

a condition precedent that the plaintiffs must perform, or allege and prove to have been waived, to entitle him to recover.

Levett v. Hamilton, 5 Mees. & W. 639; *Hale v. Rawson*, 4 C. B. N. S. 85; *Chanter v. Hopkins*, 4 Mees. & W. 389; *Bowes v. Shand*, L. R. 2 App. Cas. 455; 1 Pars. Cont. 7th ed. 606; *Hare*, Cont. 557.

The specification of one ground of rejecting the cargo does not waive all other grounds.

Bigelow, Est. 4th ed. 686, 687.

There is no waiver of a right without a knowledge of the facts on which the right is based.

Hosie v. Home Ins. Co. 32 Conn. 21; *Swan v. Drury*, 22 Pick. 485-489; *Gerrish v. Norris*, 9 Cush. 168-170; *Carpenter v. Holcomb*, 105 Mass. 280-286; *Moulton v. McOwen*, 103 Mass. 587, 598; *West v. Platt*, 120 Mass. 421-423; *West v. Platt*, 127 Mass. 872.

Messrs. Moorfield Storey and J. L. Thorndike, for plaintiffs:

It was not material that the vessel should be a schooner, as appears by the provision that, in case of disaster to the Sylphide, the sugar should be shipped "by another vessel." If part of the description was inaccurate, the maxim *fallax demonstratio non nocet* applies to it.

Bosworth v. Sturtevant, 2 Cush. 392.

The schooner's rig was evident when she reached the wharf, but the defendant did not refuse to receive the cargo which she brought. On the contrary, the cargo was placed in the defendant's warehouse, and afterwards rejected on another ground. The defendant's course was a clear waiver of any objection to the manner of performing the contract.

Barrie v. Earle, 3 New Eng. Rep. 112, 148 Mass. 1; *Leather Cloth Co. v. Hieronimus*, L. R. 10 Q. B. 140, 145.

In order that a representation may be a ground for avoiding a contract, it must be a representation of an existing fact.

Ex parte Burrell, L. R. 1 Ch. Div. 552; *Anderson v. Maddison*, L. R. 5 Exch. Div. 296; *Petrick v. Porter*, 5 Allen, 324, 326.

But the evidence does not even show that Verplanck made the statement as claimed by the defendant.

The evidence must be reasonably sufficient, but here there is not a scintilla of evidence.

Denny v. Williams, 5 Allen, 1, 5; *Metropolitan R. Co. v. Jackson*, L. R. 3 App. Cas. 198, 207.

A warranty by parol cannot be grafted upon a written contract.

Lamb v. Crafts, 12 Met. 353; *Dutton v. Gerriak*, 9 Cush. 89; *Whitmore v. South Boston Iron Co.* 2 Allen, 52; *Tucker v. White*, 125 Mass. 344.

In a suit to recover damages for nonacceptance of a cargo, the measure of damages is the difference between the contract price and the market price at the time of the nonacceptance.

Barry v. Cavanagh, 127 Mass. 394; *Mayne*, Dam. 3d ed. 145.

Field, J., delivered the opinion of the court:

The jury have found, under instructions to which no exception was taken, that the sugars delivered were Marofim brown sugars, within the meaning of the contract, and that there was no usage by which the defendant was en-

titled to reject the sugars because they fell below the test which the contract made the basis of settlement, by more than two or three degrees of the polariscope.

It is plain that the sugars were shipped by the vessel intended by the parties to the contract; that this vessel might well have been called a Swedish schooner; that the defendant did not refuse to receive the sugars because the vessel carried some square sails; and that this fact was immaterial.

The defendant contends that there was evidence of a false representation of fact made by the agent of the plaintiffs, whereby the defendant's agent was induced to make the contract. If any such representation was made, it was made by Verplanck, the broker, and it is said that there was evidence that a representation was made by him that the sugars were "of 84° test." "The defendant's counsel admitted to the court that he had no evidence to show that Verplanck or Smith & Schipper knew, at the time of the sale, that the quality of the cargo was not as defendant claimed it was stated by Verplanck." There was no evidence that the plaintiffs knew that Verplanck ever made any such representation, or ever authorized him to make any such representation. The contention is that if Verplanck, as agent of the plaintiffs, made such a representation,—although he was not authorized by him to make it, and they did not know that he had made it, and although he believed it to be true,—yet if the defendant's agent relied upon it in making the contract, the defendant could rescind the contract if the representation was actually false. If we assume that this is the law, we are yet of opinion that the evidence recited in the exceptions would not have warranted the jury in finding that Verplanck made any statement which was, or was understood by the defendant's agent to be, a positive representation of an existing fact, relating to an ascertained lot of sugars.

There was no evidence that there was an ascertained lot of sugars in existence which Verplanck offered to sell, or that the defendant's agent, who made the contract, understood that Verplanck represented that there was such a lot of sugars which would test exactly 84°. It appears that the defendant's agent clearly understood that the sugars, when selected and put on board, would vary somewhat from this test; and no contract was made limiting the extent of this variation, and no representation that it would not exceed any definite limit. So far as appears, Verplanck showed to the defendant's agent all the information he had concerning the sugars; and there is no evidence that the defendant's agent understood that Verplanck had any personal knowledge of the quality of the sugars, or that he made any representations of the quality as of his own knowledge. If the plaintiffs made any representation, it was by the telegram, and that was not false. The contract contains no warranty of the quality of the sugars, and none could be shown by the testimony to add to or vary the terms of the written contract. Taking the most favorable view of the whole evidence that can be taken for the defendant, it amounts to this, that in December, 1885, Verplanck, as agent of the plaintiffs, offered for sale a cargo

of about 400 tons, more or less, of Maroim brown sugars, to be shipped by the Swedish schooner Sylphide in the following January or February, and that he said that he thought they would test about 84°, and, induced by this, the defendant's agent made the written contract in which 84° was taken as the "settlement basis," and the price was agreed upon with stipulated variations up or down, if the sugars tested more or less than this. Contracts of sale of articles thereafter to be selected cannot be rescinded because, before the making of the contract, there may have been an honest expression of opinion that, when the articles are selected in conformity with the contract, they will be of a better quality than they prove to be. We are not aware that in this Commonwealth there is in this respect any different rule in equity from that which obtains at law. *King v. Eagle Mills*, 10 Allen, 548; *Pike v. Fay*, 101 Mass. 184; *Ormsrod v. Huth*, 14 Mees. & W. 652; *Litchfield v. Hutchinson*, 117 Mass. 195.

The measure of damages was the difference between the contract price and the market value at the time and place of delivery. If the evidence that the market price of sugars had fallen between the date of the contract and the time when the cargo arrived and was landed, was admitted for the purpose of proving the damages, it was competent; the fact that the evidence was rendered unnecessary by the concession of the defendant does not make the admission of it a ground for a new trial. *Priest v. Groton*, 108 Mass. 540; *Jennings v. Whitehead & A. Machine Co.* 138 Mass. 594.

It does not appear that this evidence was admitted for any other purposes, and the objection taken is general. We cannot say that evidence of the amount of the fall in price of sugars generally was not some evidence of the amount of the fall in price of this particular kind of sugars. The defendant contends that it was prejudiced by the admission of this evidence, and that the plaintiffs' counsel might argue from it that the defendant refused to receive the sugars because they had fallen in price, and not because they did not test 84°. The exceptions do not state that any such argument was made, but, if it was, we cannot say that it was not legitimate, or that it could not as well have been made upon the concession of the defendant as upon the evidence.

Exceptions overruled.

Stephen BROCK

v.

OLD COLONY R. R. CO.

1. When the location of a railroad, as filed, identifies the land, it satisfies the statute (Rev. Stat. chap. 89, § 75), although the name of the owner of land taken is not stated therein; and filing the location is sufficient notice of the taking.
2. It will be presumed that the owner of land included within a railroad location was notified of the petition for authority to take land, as required by Rev. Stat. chap. 89, §§ 46-48.

8. In such a proceeding in rem it is not necessary that all landowners should be notified personally by name.

4. The failure of a railroad company to furnish the owner of land taken by it with a plan of the location, will not affect the company's title to the land or suspend the running of the time for applying for damages.

(Norfolk—Filed February 29, 1886.)

ON defendant's appeal. *Judgment affirmed.* This was a writ of entry for a parcel of land in Stoughton, and was submitted upon an agreed statement of facts, the substance of which was as follows:

The tenant disclaims title to the demanded premises, except a right to occupy and use the same for railroad purposes under the location hereinafter mentioned.

On September 27, 1854, plaintiff owned a tract of land in Stoughton which was bounded on its easterly side by land of O. Ames & Sons.

The Easton Branch Railroad Company, to whose rights and liabilities the defendant has succeeded, was incorporated by the Acts of 1854, chap. 55, and on September 27, 1854, filed the location of its railroad in the office of the county commissioners of the county of Norfolk. A plan accompanied, and made part of, said location. By said location and plan the plaintiff's name did not appear as one of the persons whose land was taken in and by said location, though the name of O. Ames & Son did so appear; but, by an application of the monuments, boundaries, courses, and distances given in said plan and location to the land itself, it appears that the plaintiff's land, above described and sued for in this action, was included in said location.

The Easton Branch Railroad Company afterward constructed its road over the land described in its location, but did not, before doing so, furnish the plaintiff with a plan of his land included in its said location, nor did the plaintiff request such a plan.

Neither the Easton Branch Railroad Company nor the defendant ever fenced or entered into actual occupation of the demanded land until the year 1879, since which time the defendant has been in actual occupation, against the objection of the plaintiff, who up to that time had no actual knowledge that any of his land was included in said location, nor any notice of that fact except such as was given by the filing of the location as aforesaid. The plaintiff has never parted with his title to the demanded premises except as herein stated, nor did the Easton Branch Railroad Company or the defendant ever pay the plaintiff any damages or compensation for the taking of his land.

If, by said location, the Easton Branch Railroad Company acquired a right to occupy and use said land for railroad purposes, judgment is to be rendered for the tenant; otherwise, for the defendant.

The court entered judgment for tenant, and defendant appealed.

Mr. Oscar A. Marden, for defendant: The defendant's land has been taken for a

public use, and he has received no compensation therefor, and can receive none if the position assumed by the tenant is correct.

Unless the failure to receive compensation is attributable to his own fault, either the tenant's predecessor in title or the Legislature has failed in a duty to the demandant.

Declaration of Rights, art. 10.

The notice given the demandant was insufficient, and it was not his duty to employ a surveyor, or to run out the lines of the location in order to determine whether any of his land was included therein.

Vail v. Morris & E. R. Co. 21 N. J. L. 191.

Did the Easton Branch Railroad, the tenant's predecessor in title, observe its duty toward the demandant? The demandant claims that, even if that duty had been defined only by Rev. Stat. chap. 89, § 75, there was a failure on the part of the railroad to discharge it.

Vail v. Morris & E. R. Co. supra; Boonville v. Ormrod, 26 Mo. 195.

Stat. 1848, chap. 827, § 2, in terms required the Easton Branch Railroad to furnish the demandant with a plan of so much of his land as was included in its location, and that without any previous request. Rev. Stat. chap. 89, § 60, gave landowners the right to a plan or description of their land or other property upon demanding the same within three years.

If the statutes are to be construed as not requiring the landowner's name to appear in the location, or any plan to be furnished him unless upon his request, then these statutes are unconstitutional, inasmuch as they permit private property to be taken for public uses without making any adequate provision for compensation to the owner.

Declaration of Rights, art. 10; *Boonville v. Ormrod*, and *Vail v. Morris & E. R. Co., supra; Chicago & A. R. Co. v. Smith*, 78 Ill. 96.

Mr. J. H. Benton, for tenant:

By applying the terms of the location and accompanying plan to the ground, it appears that the land sued for was within the location filed by the tenant; and this was a sufficient compliance with Rev. Stat. chap. 89, § 75, under which this location was filed, to give the tenant a right to occupy and use the land for railroad purposes.

Grand Junction R. & D. Co. v. Middlesex County, 14 Gray, 553, 564.

The right of eminent domain is an inherent sovereign power, and can be exercised by the Legislature in any manner it sees fit, subject only to the constitutional provision that compensation must be made to the owner. No notice to the owner is necessary unless the law under which the land is taken requires it.

Johnson v. Joliet & C. R. Co. 23 Ill. 202; *Georges Creek, C. & I. Co. v. New Central C. Co.* 40 Md. 425-438.

The right of eminent domain would be of little avail in many cases without the power to proceed "against the land itself," without personal notice to the owner.

Cupp v. Seneca County, 19 Ohio St. 178.

A proceeding to condemn land under the right of eminent domain is strictly a proceeding *in rem*, and binds the land whether the owner has notice of the proceeding or not.

Stewart v. Board of Police, 25 Miss. 479, 483.

3 MASS.

But even if notice is required, the mode in which it is to be given to the landowner is wholly within the power of the Legislature to fix, and is not necessarily personal. It may be, and often is, constructive only.

Owners of Ground v. Albany, 15 Wend. 374; *Wilson v. Hathaway*, 42 Iowa, 178-176; *Wilkin v. St. Paul & P. R. Co.* 16 Minn. 271-281.

It was sufficient if the tenant described the land taken by it with such reasonable certainty that any person could, by applying its terms to the ground, ascertain whether his land was covered by it.

Grand Junction R. & D. Co. v. Middlesex County, 14 Gray, 564.

Holmes, J., delivered the opinion of the court:

The location identified the land, and therefore satisfied Rev. Stat. chap. 89, § 75. Filing it was sufficient notice of the taking. *Woodbury v. Marblehead Water Co.* 5 New Eng. Rep. 504, 145 Mass. 509; *Grand Junction R. & D. Co. v. Middlesex County*, 14 Gray, 553, 564. As pointed out by the tenant, it must be presumed that the demandant was notified of the petition for authority to take, as required by Rev. Stat. chap. 89, §§ 46-48. The authority and its limits are contained in the charter, Stat. 1854, chap. 55, and Acts referred to. It would be impracticable to make the validity of the taking depend upon notifying all owners personally by name; and in proceedings *in rem* of this sort it is not necessary. In view of the above decisions, we do not think it requisite to do more than cite a few cases from other States which sustain or go beyond our opinion. *Johnson v. Joliet & C. R. Co.* 23 Ill. 202; *Cupp v. Seneca County*, 19 Ohio St. 178; *Stewart v. Board of Police*, 25 Miss. 479; *Wilson v. Hathaway*, 42 Iowa, 178, 176; *Owners of Ground v. Albany*, 15 Wend. 374; *Georges Creek, C. & I. Co. v. New Central C. Co.* 40 Md. 425, 438. It should be added that the agreed facts do not warrant the assumption of the demandant in his argument that the names of other owners did appear in the location and plan in such a way as naturally to mislead him into the assumption that no part of his land was included.

The objection that the demandant was not furnished a plan is pretty nearly disposed of by *Abbott v. New York & N.E. R. Co.* 5 New Eng. Rep. 527, 145 Mass. 450. The fact that the land in controversy belongs to a different person from the owner of the adjoining land actually used by the railroad, whether or not it might be important under other circumstances, is not so in this case. The failure to furnish a plan did not affect the tenant's title (145 Mass. 451), or suspend the running of the time for applying for damages, which has long gone by (Rev. Stat. chap. 89, § 53; *Charlestown Branch R. Co. v. Middlesex County*, 7 Met. 78; *Hazen v. Boston & M. R. Co.* 2 Gray, 574, 580; *Meriam v. Brown*, 128 Mass. 391, 393). The right of the demandant now to require a plan, if it exists, is a naked right of no practical use, and does not entitle him to recover in this action.

Judgment affirmed.

John N. ROBERTS

v.

Francis L. WHITE.

1. A tender of the amount due the holder of a first chattel mortgage, if available under any circumstances as a defense to the holder of a second mortgage, in an action of replevin for the mortgaged chattels brought by the holder of the first mortgage, is not available where not followed up by bringing the money into court for the plaintiff's use.
2. In such an action, an allegation, in the answer, that certain sums should be deducted from the amount due on plaintiff's mortgage, and that defendant should be required to pay only the balance, if any, to plaintiff, on return of the replevied property, is not available as an equitable defense, under Stat. 1883, chap. 223, § 14.
3. Facts which have occurred since the commencement of an action of replevin, and which have no tendency to prove that, at the time of the caption, plaintiff had not the right to the possession of the goods, are not available as a defense to such action, but should be availed of by a bill to redeem the goods.

(Suffolk—Filed March 2, 1888.)

ON defendant's exceptions. *Overruled.*

This was an action of replevin to try the title to a quantity of household furniture claimed by the parties, respectively, as assignees of mortgages upon the same.

Plaintiff's mortgage was dated March 5, 1877, and was to secure the payment of a note for \$1,200, payable in one month, with interest at 2½ per cent a month, given originally to one Edward Ridgeway, and by him assigned to plaintiff May 26, 1877, and was a first mortgage.

Defendant's mortgage, bearing date the same day, was made by the same parties to Rebecca L. Marston, covering the same property mentioned in the prior mortgage given to Ridgeway, to secure a note for \$1,743.43, on thirteen months, with interest at 9 per cent per annum, payable semi-annually. The mortgage provided "that said sum (\$1,743.43) shall be paid: \$100 on the 5th day April, and \$100 on the 5th day of May, and \$150 on the 5th day of each month afterwards, the last payment of \$43.43 to be made in thirteen months from this date." The assignment to the defendant was dated March 21, 1877.

The defendant, by leave of court, filed an amendment to his answer, to avail himself of the provisions of Acts 1883, chap. 223, § 14. This answer was read at the trial, and the defendant was prepared to offer evidence upon all the matters set up in the same; but the court ruled that the defendant could not avail himself, in this case, of the equitable defense set up in his said amended answer. The defendant introduced evidence to show that, for a breach of the condition of his mortgage, he entered the premises, No. 2 Bulfinch Street, took possession of the mortgaged property, for the purpose of foreclosure, on the 15th day of May,

1877, and directed the same to be sold on June 5, 1877, in pursuance of the provisions of the mortgage, and was in possession of the mortgaged property under said entry continuously down to the time this replevin writ was served. And the defendant introduced evidence of a tender, made after the service of said writ, by the defendant to the plaintiff, of the amount due on his mortgage, with interest and costs; but the court ruled that the tender was invalid because it was not followed up by bringing the money into court for the plaintiff's use.

The defendant excepted to this ruling, and to the said ruling respecting the equitable defense set up in the defendant's amended answer.

The court directed a verdict for plaintiff, and defendant alleged exceptions.

Messrs. Edward Avery and George M. Hobbs, for defendant:

A tender, in case of a mortgage of real estate, is good without bringing the money into court.

Manning v. Burges, 1 Ch. Cas. 29; *Way v. Mullett*, 3 New Eng. Rep. 200, 143 Mass. 49.

From the nature of the contract, the rule is equally applicable to mortgages of personal property.

Burtis v. Bradford, 122 Mass. 181.

The common-law doctrine as to a pledge is that a tender and refusal, at any time, of the full amount of the debt, extinguishes the lien.

Com. Dig. *Mortgage, A*; *Kortright v. Cady*, 21 N. Y. 843.

In bills to redeem mortgages of personal property, a tender in the bill is all that is required.

Flanders v. Chamberlain, 24 Mich. 305; *Lavigne v. Naramore*, 52 Vt. 267.

The defendant, upon failure of plaintiff to accept the tender, could not maintain an action of tort for conversion of the property (*Clapp v. Campbell*, 124 Mass. 50), nor attach it (*Evans v. Warren*, 122 Mass. 303).

His only right is to redeem.

Pecker v. Sibley, 123 Mass. 108.

Messrs. Richardson & Hale, for plaintiff:

If the action is, as it is usually stated to be, an action to determine the right of possession at the time of bringing the action, it is difficult to see how what the plaintiff does with the property afterwards can affect that question.

Wells, Replevin, §§ 82, 89, 685; *Fowler v. Parsons*, 3 New Eng. Rep. 445, 143 Mass. 401.

The question now is, not what order or judgment can or may be entered, but only whether the plaintiff had a right to bring the action; and this must be determined by the law and facts existing at the time. If the action was rightly brought, nothing done by the defendant under the Act of 1883 can defeat it.

Wheatland v. Lovering, 10 Gray, 16; *North Bridgewater v. Copeland*, 7 Allen, 189; *Hill v. Duncan*, 110 Mass. 288; *Abington v. Duxbury*, 105 Mass. 292; *Wells, Replevin*, § 94, note 3; *Kingsbury v. Buchanan*, 11 Iowa, 387.

There was no allegation that the money tendered was paid into court or left on deposit anywhere for the plaintiff. Such an offer is not a tender, and cannot affect the plaintiff's title to the property.

Brickett v. Wallace, 98 Mass. 538; *Smith v.*

Phillips, 47 Wis. 202; *Currier v. Gale*, 9 Allen, 522; *Patchin v. Pierce*, 12 Wend. 61; *Maynard v. Hunt*, 5 Pick. 248; Pub. Stat. chap. 166, § 25; chap. 181, § 26.

The title to the property was in the plaintiff, by the mortgage to him.

Robinson v. Sprague, 125 Mass. 562; *Allen v. Butman*, 138 Mass. 587.

Recoupments and accounts in set-off may be sometimes made in replevin, but such recoupments and accounts must exist at the time of the commencement of the action.

Wells, Replevin, § 630.

Morton, Ch. J., delivered the opinion of the court:

It appears that the plaintiff, who is the first mortgagee of the goods replevied, had, at the time he sued out his writ, a right to the immediate and exclusive possession of the goods. This entitles him to maintain this action, the object of which is to give him in fact the possession to which he is entitled in law. It is difficult to see how any tender, after suit brought, can avail the defendant; but if it can, under any circumstances, it must be a tender followed up by bringing the money into court for the plaintiff's use. *Storer v. McGaw*, 11 Allen, 527; *Brickett v. Wallace*, 98 Mass. 528. No such tender was pleaded or proved, and the ruling of the superior court on this subject was sufficiently favorable to the defendant.

The court correctly ruled that the defendant could not avail himself of the equitable defense set up in his amended answer. This defense in substance is that all sums received by the plaintiff for the use of the property replevied, the amount of any depreciation in the value of the property since he took possession, together with the damages for the taking and detention in this suit, should be deducted from the amount due on his mortgage, and this defendant should be required to pay only the balance, if any, to the plaintiff on the return of said property. The answer does not allege that these items, if allowable, will fully pay and discharge the plaintiff's mortgage, and therefore does not set up facts which would entitle the defendant "to be absolutely and unconditionally relieved against the plaintiff's cause of action. Stat. 1883, chap. 223, § 14.

But, further, all the facts set up have occurred since this action was commenced, and they have no tendency to prove that at the time of the caption he had not the right to the possession of the goods. The defendant has mistaken his remedy, which plainly was to bring a bill to redeem after the plaintiff gained possession of the goods, in which action he could avail himself of the equities, if any, in his favor.

Exceptions overruled.

Seth W. BOYNTON

v.

SHAW STOCKING CO.

Plaintiff, a drygoods merchant doing business as Boynton & Co., having advertised for sale stockings made by the defendant company as first quality,
3 Mass,

defendant caused the following to be published:

CAUTION.—An opinion of Shawknit hosiery should not be formed from the navy-blue stockings advertised as first quality by Messrs. Boynton & Co. at 12½ cents, since we sold that firm, at less than 10 cents a pair, some lots which were damaged in the dyehouse.

Shaw Stocking Co.

—Held, in an action of libel for such publication, that the words, taken in their natural sense, did not contain an imputation upon plaintiff's character, and hence that they were **not actionable, in the absence of proof of special damage.**

(Middlesex—Filed March 1, 1888.)

ON plaintiff's exceptions. *Overruled.*

This was an action of tort, brought to recover damages for the publication of an alleged libel.

At the trial plaintiff offered evidence tending to show that he was a tradesman, doing business in Waltham under the style of S. W. Boynton & Co.; that he was proprietor of a drygoods store; that he had been for the past three years purchasing stockings manufactured by the defendant, sometimes directly of the defendant, and often in market, of defendant's selling agents; that on May 3, 1886, Henry C. Guild, who sold defendant's goods on commission, called at the plaintiff's place of business, and represented that he had a large stock of navy-blue first-quality Shawknit stockings to sell; that said stockings were in such sizes that defendant would sell them cheap, as it desired to reduce its very large stock; that plaintiff examined samples of said stock then in Guild's possession, which were first-quality navy-blue Shawknit stockings; and, after being assured by Guild that the stock was like the samples and of the very first quality, the plaintiff purchased 100 dozen pairs of said stockings, which he received; that after the receipt of said stockings the plaintiff caused to be inserted, in six issues, on six different days, of the "Charles River Laborer," a weekly paper published in Waltham, the following advertisement, to wit: "Shawknit Hose, navy-blue, size 8 to 11, first-quality goods, at 12½ cts. per pair;" that thereafter the defendant caused the following to be inserted in six issues, on six different days, of the "Waltham Daily Tribune," a newspaper published in Waltham, to wit: "Caution: An opinion of Shawknit hosiery should not be formed from the navy-blue stockings advertised as of first quality by Messrs. S. W. Boynton & Co. at 12½ cents, since we sold that firm, at less than 10 cents a pair, some lots which were damaged in the dyehouse. Shaw Stocking Company, Lowell, May 29, 1886."

The court ruled that the action could not be maintained, and instructed the jury to return a verdict for defendant, and plaintiff alleged exceptions.

Mr. Thomas Curley, for plaintiff:

The question of libel or no libel should have been left to the jury.

Twombly v. Monroe, 136 Mass. 464. See also *Baylis v. Lawrence*, 11 Ad. & El. 990; *Donaghue v. Gaffy*, 8 New Eng. Rep. 545, 54 Conn. 257.

The natural and necessary meaning of the

words contained in the defendant's publication are defamatory of the plaintiff. Whatever words have a tendency to hurt, or are calculated to prejudice, a man who seeks a livelihood by any trade or business, are actionable.

Whittaker v. Bradley, 16 Eng. C. L. 810; *Fowles v. Bowen*, 80 N. Y. 20; *Orr v. Skofield*, 56 Me. 488; *Weiss v. Whittemore*, 28 Mich. 886; *Harman v. Delany*, 2 Str. 898. See also *Jenner v. A'Beckett*, L. R. 7 Q. B. 11.

Any written words are libelous which impute to a merchant fraud or dishonesty, or any mean or dishonorable trickery in the conduct of his business, or which in any other method are prejudicial to him in the way of his employment or trade.

Odgers, Lib. & Sland. Bigelow's ed. p. 80.

To impute that the goods which the defendant sells or manufactures are adulterated, to his knowledge, is a distinct charge against the defendant of fraud and dishonesty in his trade.

Id. p. 81; *Jenner v. A'Beckett*, *supra*.

Messrs. J. N. Marshall and M. L. Hamblet, for defendant:

The caution, at most, only impugned the quality of the hose which the plaintiff had advertised to sell, and, though false and malicious, no action could be maintained without allegation and proof of special damage.

Dooling v. Budget Pub. Co. 4 New Eng. Rep. 50, 144 Mass. 258, and cases cited.

The caution does not hold the plaintiff up to hatred, contempt, or ridicule, and it cannot be tortured into disparagement of the plaintiff's character. It was within the limits of fair criticism and dealing.

Boynston v. Remington, 8 Allen, 897; *Evans v. Harlow*, 5 Q. B. 624.

A tradesman advertising goods for sale challenges public criticism; and it is not by averring such criticism to be "false, scandalous, malicious, and defamatory" that a party can found a charge of libel upon them.

Evans v. Harlow, *supra*; *Paris v. Levy*, 9 C. B. N. S. 342.

The caution is only in relation to one article which the plaintiff, as a dealer in dry goods, had to sell, and cannot be libelous upon him.

Tobias v. Harland, 4 Wend. 587.

The statement that the "caution" was published "concerning the plaintiff" is insufficient. The words do not necessarily or intelligibly apply to him in a defamatory sense. There should have been some allegation showing how the words apply to him, in what sense they were used, and how they are defamatory.

McCallum v. Lambie, 5 New Eng. Rep. 274, 145 Mass. 234, and cases cited.

Words cannot be defamatory unless they directly affect some person, either in his individual capacity, or in his office, profession, or trade. This publication does not touch the plaintiff.

Odgers, Lib. & Sland. p. 187; *Townshend, Lib. & Sland.* § 190.

Words which merely might tend to produce injury to the reputation of another are not defamatory; and, even though false, are not actionable, unless, as a matter of fact, some appreciable injury has followed from their use.

Odgers, Lib. & Sland. pp. 1, 18.

It was a question for the court whether the words were defamatory or not.

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Twombly v. Monroe, 186 Mass. 464.

To sustain an action for libel, the plaintiff should show special damage.

Stone v. Cooper, 2 Denio, 299.

The law proceeds upon the hypothesis that what is the ordinary meaning and nature and force of language is a question of law.

Carter v. Andrews, 16 Pick. 1, 5; *Dunnell v. Fiske*, 11 Met. 553; *Barrows v. Bell*, 7 Gray, 810.

As judgment would have been arrested, on motion, if the verdict had been for the plaintiff, it was the duty of the court to rule as it did.

Shattruck v. Allen, 4 Gray, 540; *Odgers, Lib. & Sland.* pp. 251, 543.

C. Allen, J., delivered the opinion of the court:

An action will not lie for mere disparagement of the plaintiff's goods, without averment and proof of special damage. *Dooling v. Budget Pub. Co.* 4 New Eng. Rep. 50, 144 Mass. 258. But the plaintiff contends that the words used by the defendants contain an imputation upon his character, and that they imply that he was deceiving the public by advertising goods as of first quality which he knew were damaged. The question therefore is this: Taking the words in their natural sense, and without a forced or strained construction, do they contain this imputation? If the words may fairly bear that meaning, then the case should have been submitted to the jury; otherwise not. *Twombly v. Monroe*, 186 Mass. 464; *Simmons v. Mitchell*, L. R. 6 App. Cas. 156; *Capital & Counties Bank v. Herty*, L. R. 7 App. Cas. 741, 744, 771, 772, 790, 798. We are of opinion that the words, fairly construed, do not bear that meaning, and that, in order to reach such a construction, it is necessary to include something which the defendants did not say, and which their words do not imply. No doubt a case might be imagined, where, from peculiar circumstances,—as, for example, from the nature of the article offered for sale, or from the long-continued habit of selling goods of a different character or quality from that represented,—it would be a natural inference, from a charge otherwise like that which is the subject of this action, that the party was practicing fraud or imposition, or was guilty of trickery or meanness. In the present case, such an inference does not naturally arise, and the object of the defendant's advertisement, judging from its language, appears to have been rather to uphold and maintain the character of their goods, than to attack the plaintiff's character. The court might properly withdraw the case from the jury. See *Boynston v. Remington*, 8 Allen, 897; *Evans v. Harlow*, 5 Q. B. 624; *Solomon v. Lawson*, 8 Q. B. 823.

Exceptions overruled.

Charles CIRIACK

v.

MERCHANTS WOOLEN CO.

1. A master is only bound to give such instructions as are reasonably necessary in order to enable the servant to under-

stand the perils to which he is exposed by reason of his employment.*

2. A servant is held to take the risk of such dangers connected with his employment as are known to and understood by him; and the master is not required to explain anything which the servant already sufficiently understood.
3. It must be assumed that a boy twelve years of age knew the danger of coming in contact with revolving cog-wheels in a room where he had been employed for about two months.

(Suffolk—Filed February 29, 1886.)

ON defendant's exceptions. *Sustained.*

This action was in tort to recover damages for personal injuries alleged to have resulted from negligence.

Plaintiff was a boy about twelve years old at the time the injuries were received. He was employed in defendant's mill, and his injury arose from coming in contact with the revolving cog-wheels of a machine, whereby his arm was drawn in and mangled. The jury returned a verdict for plaintiff for \$8,000 damages, and defendant alleged exceptions to the rulings and refusals to rule.

Further facts appear in the opinion.

Messrs. R. M. Morse, Jr., H. G. Nichols, and C. K. Cobb, for defendant:

The burden is upon the plaintiff to show negligence on the part of the defendant, and due care on his own part.

Blanchette v. Border City Mfg. Co. 8 New Eng. Rep. 92, 143 Mass. 21.

"If the plaintiff had such instruction, caution, information, or knowledge, as would enable him, with a reasonable exercise of care on his part, to do the errand with safety to himself, the defendant is not liable; and it makes no difference whether he derived it from the defendant's officers, or from the foreman or other fellow servant, from a stranger, or from his own perceptions and intelligence."

Sullivan v. India Mfg. Co. 113 Mass. 396.

The question of negligence on the part of a corporation is, in the words of *Colt, J.*, "whether the corporation, in any part of its organization, by any of its agents or for want of agents, failed to exercise due care to prevent injury to the plaintiff."

Ford v. Fitchburg R. Co. 110 Mass. 261.

"The mere relation of master and servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is, no doubt, bound to provide for the safety of his servant in the course of his employment, to the best of his judgment, information, and belief."

Huddleston v. Lowell Machine Shop, 160 Mass. 280, 285.

There is a distinction between failing to give instructions which a foreman is required to give as or instead of the master, and those which, if necessary at all for the plaintiff's safety, are a part of a personal discretionary act of the foreman.

See *Duffy v. Upton*, 113 Mass. 544; *O'Connor v. Roberts*, 120 Mass. 227; *Zeigler v. Day*, 123

Mass. 152; *Felch v. Allen*, 98 Mass. 572; *Flynn v. Salem*, 184 Mass. 351; *Johnson v. Boston*, 118 Mass. 114.

The master having furnished proper materials and appliances for the work, the use and application of them, according to the exigencies of the work, is the duty of the servant; and an injury received by a workman, in consequence of instructions of the superintendent or foreman of the work, gives no ground of action against the master.

Floyd v. Sugden, 184 Mass. 568; *Johnson v. Boston Towboat Co.* 185 Mass. 209; *Robinson v. Blake Mfg. Co.* 3 New Eng. Rep. 741, 143 Mass. 584; *Kenney v. Shaw*, 183 Mass. 501; *Curran v. Merchants Mfg. Co.* 180 Mass. 374; *Wilson v. Merry, L. R.* 1 H. L. Cas. 826.

The foreman or overseer of a room in a mill is a fellow servant with hands employed under him, and, for injury happening in consequence of the negligence of such foreman, the master is not liable.

Albro v. Agawam Canal Co. 6 Cush. 75; *Zeigler v. Day*, 123 Mass. 152; *Felch v. Allen*, 98 Mass. 572; *Duffy v. Upton*, 113 Mass. 544; *O'Connor v. Roberts*, 120 Mass. 227; *Flynn v. Salem*, 184 Mass. 351.

And the fact that the servant injured is a minor does not vary the rule.

King v. Boston & W. R. Co. 9 Cush. 112; *Curran v. Merchants' Mfg. Co.* 180 Mass. 374.

And whether the employee, through whose negligence the accident occurred, acted as a fellow servant, or as the representative of the master, is a question of law and not of fact.

Johnson v. Boston Towboat Co. 185 Mass. 209.

"When a plaintiff offers no evidence that he was in the exercise of care, but, on the contrary, the whole evidence on which his case rests shows that he was careless, * * * the court may rightfully instruct the jury, as a matter of law, that the action cannot be maintained."

Gahagan v. Boston & L. R. Co. 1 Allen, 187, 190; *Todd v. Old Colony & F. R. Co.* 3 Allen, 18.

"The burden is always upon the plaintiff to establish either that he himself was in the exercise of due care, or that the injury is in no degree attributable to any want of proper care on his part."

Murphy v. Deane, 101 Mass. 455, 466; *Witherley v. Regents Canal Co.* 12 C.B.N. S. 2; *Blanchette v. Border City Mfg. Co.* 8 New Eng. Rep. 92, 143 Mass. 21; *Leary v. Boston & A. R. Co.* 189 Mass. 580; *Lovejoy v. Boston & L. R. Co.* 125 Mass. 79; *Williams v. Churchhill*, 137 Mass. 243, where the injunction to "hurry up" was held not to be material; *Russell v. Tillotson*, 1 New Eng. Rep. 444, 140 Mass. 301; *Taylor v. Carew Mfg. Co.* 1 New Eng. Rep. 210, 140 Mass. 150; *Butterfield v. Western R. Co.* 10 Allen, 532.

Messrs. Henry W. Bragg and Elisha Greenwood, for plaintiff:

An employer must see that servants are properly warned of the dangers of the place in which they are put to work; and he is not relieved of responsibility for the consequences of a failure on the part of such servants to receive such warning, by any delegation of such duty to warn to any agent or overseer, or by a neglect on his part to give such warning.

Gilman v. Eastern R. Co. 13 Allen, 433; *Grizzle v. Frost*, 3 Fost. & F. 622; *Coombs v. New Bedford Cordage Co.* 102 Mass. 572.

*See *Goodnow v. Walpole Emery Mills*, ante, p. 719.

Every employer is under an implied contract with those whom he employs to adopt and maintain suitable instruments and means with which to carry on the business in which he requires their services; and this includes an obligation to provide a suitable place in which the servant, being himself in the exercise of due care, can perform his duty safely.

Coombs v. New Bedford Cordage Co. supra.
See *Wheeler v. Wason Mfg. Co.* 185 Mass. 294.

The undisputed evidence reported must conclusively show contributory negligence on the part of the plaintiff, considering all the admitted or undisputed facts in the case,—including the age, experience, and intelligence of the plaintiff, and the danger to which he was exposed, and the means and knowledge afforded to him,—to justify the court in taking the case from the jury on the question of due care. In other words, the conduct of the plaintiff at the time of the injury, considering all the circumstances shown by him or indisputably shown against him, must have been of such a strikingly careless character that no rational man of ordinary experience and prudence could reasonably come to any other conclusion than that the plaintiff was himself responsible, or contributed to the responsibility, for the injury suffered by him.

Lane v. Atlantic Works, 107 Mass. 104; *Tyler v. N. Y. & N. E. R. Co.* 187 Mass. 238.

The refusal of the judge to withdraw the case from the jury cannot in any case be construed as an indication that in his opinion the jury ought to find in the plaintiff's favor. On the contrary, it is his duty to submit it to the jury if there is any evidence to justify a finding, although in his opinion its preponderance should be against the plaintiff.

Gaynor v. Old Colony & N. R. Co. 100 Mass. 212; *For v. Sackett*, 10 Allen, 585; *Warren v. Fitchburg R. Co.* 8 Allen, 227; *Measel v. Lynn & B. R. Co.* 8 Allen, 284; *Reed v. Deerfield*, 8 Allen, 528; *Gahagan v. Boston & L. R. Co.* 1 Allen, 187; 100 Mass. 212.

In a case of a boy of thirteen years of age, who incited a dog which bit him, the court held that a ruling which "entirely disregards the thoughtlessness and heedlessness natural to boyhood" would be erroneous; that the test is, "Would the injury have been prevented if the boy had exercised the thoughtfulness of one of his age, at the moment, without stopping to reflect?"

Plumley v. Birge, 124 Mass. 57. See also *Murley v. Roche*, 180 Mass. 880; *O'Connor v. Boston & L. R. Co.* 185 Mass. 852; *Munn v. Reed*, 4 Allen, 481; *Carter v. Towne*, 98 Mass. 567; *Lane v. Atlantic Works*, 107 Mass. 104; 187 Mass. 240.

C. Allen, J., delivered the opinion of the court:

In order to show negligence on the part of the defendant, the plaintiff relies on the omission to give him suitable instructions in reference to the dangers to which he would be exposed in the course of his employment. His injury arose from coming in contact with the revolving cog-wheels of a machine; and the instructions which he was entitled to receive must therefore have been concerning the danger from that cause. But it seems to us that it must fairly be assumed that the plaintiff had all such knowledge as it was the duty of the

defendant to impart to him. There was no peculiar or secret source of danger. Anybody seeing the machine in motion must soon become aware of the danger which would arise from coming in contact with it. The duty of the defendant would be sufficiently discharged by pointing out to the plaintiff the situation of the machine, and the rapid revolution of the wheels when in operation, and explaining the probable effect of touching them under those circumstances. Certainly the duty of the defendant did not extend so far as to require the giving of a special caution on every occasion when he might be called upon to pass near the machine. The defendant is only bound to give such instructions as are reasonably necessary in order to enable the servant to understand the perils to which he is exposed by reason of his employment. A servant is held to take the risk of such dangers as are known and understood. In the present case, the duty of the defendant to the plaintiff would not require an explanation of anything which he already sufficiently understood. In order to show actionable negligence on the defendant's part, it was incumbent on the plaintiff to show an omission to inform him of something which he needed to know in order to be safe. *Sullivan v. India Mfg. Co.* 113 Mass. 396. In the absence of anything to show the contrary, the plaintiff must be assumed to have had the intelligence and understanding which are usual with boys of his age. There is nothing to show that he did not know the danger of coming in contact with the revolving wheels of the machine. It must be assumed that he was well aware of it. The accident happened in consequence of his omitting to guard against a known peril. He had been employed in the same room for a period of nearly two months. There is no reason to suppose that explicit instructions, if given to him at the beginning of his employment, in reference to the danger of touching these wheels when in motion, would have added anything to what he must fairly be presumed to have known at the time of the accident. It would be carrying the doctrine of holding employers to the duty of giving reasonable instructions to their servants quite too far, to require a special caution every time a boy is sent on an errand, under circumstances like those disclosed in the present case. The injury appears to have arisen from a lack of sufficient precaution on his part, and not from the negligence of the defendant. *Russell v. Tillotson*, 1 New Eng. Rep. 444, 140 Mass. 201; *Williams v. Churchill*, 187 Mass. 243; *Wheeler v. Wason Mfg. Co.* 185 Mass. 294.

In *Coombs v. New Bedford Cordage Co.* 102 Mass. 572, 598, which is chiefly relied on by the plaintiff, the plaintiff had been at work for the defendant only one day, and under these circumstances the evidence of the nature of the work, and of the position in which he was to do it, were considered to warrant the jury in finding that the plaintiff was manifestly incapable of understanding and appreciating the dangers to which he was exposed by the gearings, or manifestly incapable of performing the work there with safety.

In the present case, we are of the opinion that there was no sufficient evidence of negligence on the part of the defendant.

Exceptions sustained.

John T. DOOLEY

v.

Arnold G. POTTER.

1. Where, on the conveyance of land, a mortgage thereon was given by the grantee to the grantor to secure certain notes, which were placed in the hands of a third party under an agreement that they were not to be used for the benefit of the mortgagee until the land should be measured and any defects in title made good; and thereafter such agreement was waived by the mortgagor and the notes were treated as valid by all parties,—*Held*, that an objection by the holder of a second mortgage, seeking to redeem from such first mortgage, that there was nothing due on the first mortgage because such agreement had not been complied with and the notes had not been delivered, and the mortgagor could not waive performance of such agreement after the execution of the second mortgage, was without force.

2. *Held*, also, that an agreement (by which the assignee of the first mortgage bought of the mortgagor certain standing timber, the amount thereof to be sufficient to pay the mortgage debt, and which provided that interest on the mortgage notes should stop, but under which nothing was applied on the mortgage debt, and which was wholly abandoned) did not extinguish or satisfy the mortgage debt, nor stop interest on the notes.

3. The agreement under which said mortgage notes were deposited with a third party provided that if, on measurement, there was found a deficiency or excess in the quantity of land estimated in the mortgage, the notes should be reduced or increased proportionately, at a certain rate per acre. The land fell short of the estimated quantity, but it appeared that other considerations than the price of the land entered into the notes,—*Hence, held*, that the amount of the notes was only to be reduced by the value of the number of acres deficiency at the fixed rate, and was not to be reduced to the amount to which the actual number of acres conveyed would come at that price per acre.

4. A note is not to be excluded from the mortgage debt merely because the time at which it is payable is incorrectly stated in the mortgage.

5. Where a decree in foreclosure allows interest from the date of the decree, it is proper to include, in the amount to be deducted from the value of the land in ascertaining the amount applicable to the mortgage debt, interest on the costs from the date of the decree until foreclosure is completed.

(Berkshire—Filed February 28, 1888.)

This was a bill in equity, brought to redeem certain mortgaged real estate. The case was referred to a master, and he filed his report, and the questions of law arising thereon were heard and determined by the court. The case is reported in 1 New Eng. Rep. 85, 140 Mass. 49. The court recommitted the case to the master, and it now comes before the court on exceptions to his report.

Before 1869 one Wiley and Peter Dooley entered into a contract for the sale and purchase of certain land. Dooley brought a suit to compel the specific performance of this contract. On May 10, 1869, Wiley conveyed to Dooley a tract of land situated partly in Vermont and partly in Massachusetts. Dooley made notes for the aggregate sum of \$2,260, to secure which he gave a mortgage deed of the lands, of even date with the conveyance to himself. The notes were placed in the hands of one Robinson, who was to retain them until the land had been measured, and in case of surplus or deficiency the notes were to be increased or diminished accordingly. The notes remained in Robinson's hands until defendant, after he took title to the mortgage, obtained them, without the knowledge of Dooley. On November 27, 1869, Wiley assigned his mortgage to one Ketchum. While Ketchum held the mortgage, he entered into a contract with Dooley, by which he was to cut a certain amount of timber from the lands, for which a certain price was to be allowed, which was to be applied in reduction of the notes. Under this contract, timber enough was cut to amount to \$683.80, which amount was applied on the notes. Certain other credits were indorsed upon the notes.

On April 6, 1869, Wiley conveyed to Ketchum 25 acres of land, part of the so-called Johnson Lot, which was included in the survey to Dooley under his deed of May 10, 1869. Ketchum took off the most valuable timber from the tract, and on January 11, 1876, released his title to Wiley. Plaintiff claimed the right to have the mortgage reduced by the amount represented by the value of this 25 acres, which claim was rejected by the master.

On August 7, 1871, Dooley made a mortgage to one Edmunds of the land in Massachusetts covered by the Wiley mortgage, and this mortgage was, on November 30, 1878, duly assigned to John T. Dooley, who brought this suit to redeem the land from the first mortgage to Wiley.

On January 1, 1875, while Ketchum still held his mortgage, he entered into the following agreement with Dooley:

Clarksburg, Jan. 1, 1875.

Eleazur Ketchum this day bought of Peter Dooley a quantity of spruce timber standing on the south and west corner of the Wiley lot, joining the Massachusetts line, situated in the town of Stamford, Vt., at \$5.50 per thousand, the amount to be ascertained hereafter, and be sufficient to pay the balance on certain notes and mortgage assigned to said Ketchum by Hazael Wiley, and against said Dooley; and said Ketchum is to have three years to take said timber off said lots, and is to take all merchantable timber clean down to six inches in diameter at the top end. * * * The interest on the afore-mentioned notes at the date of this instru-

CASE reserved on master's report and exceptions thereto. *Exceptions overruled.*

ment, per agreement, is to stop. Also 44,000 feet standing on the Hix Lot situated in Florida, Mass., and bounded north by the Vermont line, and adjoining the afore-mentioned Vermont land. And said Ketchum further agrees, in consideration of the foregoing contract, to quitclaim-deed the land known as the Hix Lot, in Florida, Mass. (quitclaim-deeded to said Ketchum by John F. Arnold), to Peter Dooley \$220, and deliver up notes that was given in consideration of said deed to Peter Dooley, but not so as to invalidate the mortgage and notes that Peter Dooley gave to Hazael Wiley, and said Wiley assigned to said Ketchum only the amount of \$220.

Plaintiff claimed that by force of this agreement the mortgage debt was extinguished and nothing was due thereon.

Before the conveyance from Wiley to Dooley in 1869, Wiley had conveyed to one Arnold, by deed, part of the land included in the deed to Dooley. This deed was intended as security for a debt due to Arnold from Wiley. On November 21, 1870, Ketchum paid Arnold the amount of the debt, and received a quitclaim deed for the land. This was the land and title referred to in the above agreement to be quitclaimed by Ketchum to Dooley. The master found that Ketchum took off timber enough under the agreement to satisfy the Arnold claim. On August 17, 1876, Ketchum quitclaimed this land to defendant; but the master did not find that it was claimed to constitute an independent title in defendant, distinct from the mortgage from Dooley to Wiley.

Ketchum assigned his mortgage to defendant; and he sued out a writ of entry June 10, 1876, to foreclose the mortgage on the Massachusetts lands; and on June 29, 1877, he was put in possession. He afterwards commenced proceedings to foreclose the mortgage on the Vermont lands, and a decree was entered that the right of redemption should be forever foreclosed unless the amount due should be paid on or before December 22, 1883. Plaintiff allowed the time to pass without paying the amount due.

Further facts appear in the opinion of the court.

Mr. Mark E. Couch, for plaintiff:

A legal delivery of the notes mentioned in the defendant's mortgage would be necessary before they would acquire any validity.

1 Jones, Mort. 8d ed. § 87.

These notes and defendant's mortgage, being made at the same time, as parts of the same transaction, together constitute, and are to be construed as, one instrument.

Barnard v. Cushing, 4 Met. 280; *Hunt v. Livermore*, 5 Pick. 395.

The said notes left in the hands of Robinson were nothing but escrows, without legal existence as contracts at the time they were so made and left.

1 Jones, Mort. § 87; *Foster v. Mansfield*, 3 Met. 412-414.

A subsequent legal delivery was necessary to give them any legal force or effect, in law, as contracts.

Fairbanks v. Metcalf, 8 Mass. 230-236.

The delivery by Robinson, before the performance of the terms of the contract, without

the consent of P. Dooley, would not be a legal delivery.

Boydell v. Webster, 18 Pick. 416, 417; *Foster v. Mansfield*, *supra*.

In determining what, if anything, is due on the defendant's mortgage, the notes are to be treated as if unsecured; and no more is due on defendant's mortgage than the defendant, if owner of the notes, could now recover of Peter Dooley, the maker, in a personal action, were he, Dooley, not to plead the Statute of Limitations.

Davis v. Bean, 114 Mass. 360; *Vinton v. King*, 4 Allen, 562.

The terms and conditions necessary to render the notes valid must have been performed within a reasonable time; it now being almost twenty years since notes and agreement were made, and fifteen since the notes, by their terms, were to have been paid, it is now too late to perform them.

Woods v. Rice, 4 Met. 481, 485; *Ross v. Tremain*, 2 Met. 495; *Carter v. Carter*, 14 Pick. 424.

Mr. A. Potter, for defendant:

The only question referred to the master or open under the pleadings was the amount due on the mortgage.

Pub. Stat. chap. 181, § 28.

The mortgage was delivered at the time it was made. The notes constituted no part of the mortgage, and were not necessarily the only evidence of the debt secured by it.

Smith v. Johns, 3 Gray, 517.

The master erred in not allowing annual interest. It is a part of the contract, and the defendant has done nothing from which a waiver can be inferred.

Henry v. Flagg, 18 Met. 64; *Hastings v. Wiswell*, 8 Mass. 455; *Greenleaf v. Kellogg*, 2 Mass. 563; *Wilcox v. Howland*, 23 Pick. 167.

W. Allen, J., delivered the opinion of the court:

In May, 1869, Peter Dooley made a mortgage to Wiley, who assigned it on November 27, 1869, to Ketchum, who assigned it on August 17, 1876, to the defendant. The plaintiff holds the equity of redemption under a mortgage deed given by Peter Dooley, August 7, 1871, to Edmunds, and assigned by Edmunds's administrator to the plaintiff in 1878, and seeks in this suit to redeem the land from the first mortgage. The case was referred to a master, to report the amount due upon the mortgage held by the defendant, and was reserved for the full court upon the master's report and exceptions thereto. We will first consider the plaintiff's exceptions in their order.

1. The first exception is to the allowance of anything as due upon the mortgage. The mortgage, which was of land conveyed by Wiley to Dooley as part of the same transaction, was to secure the payment of six notes,—one of \$100, and five of \$432 each,—one of which was reduced by the indorsement of a payment of \$260. The mortgage was delivered, but the notes were put into the hands of one Robinson, with a writing signed by the mortgagee, to the effect that it was agreed by him that the notes should remain in the hands of Robinson for safe keeping, and not to be used for the benefit of the mortgagee until the land should

be measured; and, if there was found a deficiency or an excess in quantity, the notes were to be reduced or increased in proportion, and all incumbrances were to be paid, and any defects in the title made good. The objection is that the terms of the memorandum have not been complied with, and the notes have never been delivered. The land was measured and was found to be deficient in quantity. No indorsement was made on the notes. There were some defects in the title, but they appear to have been subsequently remedied. But that is not material, because it is obvious that the terms of the memorandum were not performed; the performance was waived by the mortgagor; and that the memorandum was treated by all parties as not in force, and the notes as valid, subsisting notes. It is not necessary to consider the objection of the plaintiff that Peter Dooley could not, as against the plaintiff, waive performance after his mortgage to Edmunds in 1871. Before that time, one of the large notes had been taken up, and a payment made upon another. Before that time, in November, 1868, when only the small note was due, the mortgage had been assigned by Wiley to Ketchum, under whom the defendant claims, and Peter Dooley had made an agreement with Ketchum which made no reference to the memorandum, but recognized the notes as in force, and provided for payments to be made upon them; and at that time, in the mortgage to Edmunds, under which the plaintiff claims, the mortgage is excepted from the covenants, and the amount to be paid upon it stated. The plaintiff also claims that there was an accord and satisfaction of the mortgage debt, under the agreement between Peter Dooley and Ketchum, dated January 1, 1875; which was in substance, so far as relates to this point, that Ketchum that day bought of Dooley a quantity of timber standing on certain land in Vermont, at a certain price per thousand, the amount to be thereafter ascertained, and to be sufficient to pay the balance due on the notes and mortgage, and Ketchum was to have three years in which to take off the timber. Very little, if any, timber was taken out by Ketchum under this agreement, and none was applied by him on the mortgage debt. Neither the agreement nor anything done under it extinguished or satisfied the debt.

2. The plaintiffs' second exception is to the amount allowed by the master on account of the deficiency in the quantity of land. The master found the deficiency to be 18 acres, and allowed \$4 an acre, under the memorandum before referred to, which provided that "if said land falls short the required number of acres to amount to the sum set forth in the said notes at \$4 per acre, the said notes are to be reduced in that proportion." The plaintiff contends that the notes were given only for the price of the land which was at that time conveyed by Wiley to Peter Dooley, and that the agreement is to be so construed as to reduce the notes to the sum that the land, when measured, would amount to at \$4 an acre. This is one, and the most natural, construction of the language of the memorandum; but it is not plain, and the subject-matter and attending circumstances show that it was not the meaning of the parties. The land lay partly in Vermont and partly in this

State. The part in Vermont was fixed by the deed at 200 acres, the part in this State was said to be 250 acres, more or less. It was only the land in this State which could fall short or exceed 250 acres on measurement. This makes the required number of acres in it to make up the amount of the notes to be 365, or 115 more than was estimated and stated in the deed, and the notes and mortgage to be \$460 more than the parties believed to be the whole purchase money for the land, which it is found they put at the price of \$4 an acre. It was found by the master that there had been a contract between Wiley and Peter Dooley, by which Wiley had agreed to convey to Dooley 800 acres of land, which included that which was conveyed; that Dooley had been in possession under this contract, and cut off wood and timber, and that there were difficulties and litigation between them in regard to it. The indorsement of \$260 on one of the notes was made at the time the deed and mortgage were delivered, but did not represent any consideration then advanced, but was the result of some arrangement between the parties which is not disclosed; and it reduced the notes to the amount of the consideration named in the deed and mortgage, — \$2,000. This shows what, without it, would be the only reasonable way of accounting for the amount of the notes, — that other considerations than the price of the land entered into them. Construing the agreement in the light of these circumstances, — that the parties were settling differences as well as selling and buying land; that they did include something besides the price of the lands in the notes; that they estimated the quantity of land at 450 acres, and fixed the price at \$4 an acre, — we think that, by the words "sum set forth in said notes," they did not mean the whole amount of the notes, but that sum included in them which was the price of the number of acres mentioned in the deed at \$4 an acre. This would give the result reached by the master.

3. The plaintiffs' third exception is to the refusal of the master to make deductions and allowances for certain supposed defects in title. Two defects in title are specified, which existed when the mortgage was given; but the master finds that both have been made good, and there is no occasion to consider whether the plaintiff could avail himself, as against the defendant, of a breach by Wiley of the agreement made when the mortgage was given.

It is argued that the conveyance, by Ketchum to Wiley of the 25 acres of the Johnson Lot in Vermont, was made after the land had been diminished in value by the cutting off of timber by Ketchum, and that the plaintiff cannot be required to accept that reconveyance as making good the title. The title to the land was made good by the deed to Wiley, and it was held under the mortgage, and the title to it was made absolute in the defendant by the foreclosure in Vermont, and its value was properly allowed by the master as part of the value of the land in Vermont. Whether any timber was cut from it by Ketchum, under his paramount title, under such circumstances as would make the allowance of its value upon the mortgage debt proper; and what amount, if any, was so cut; and whether any right there may have been to a reduction of the debt on that account

was waived by Peter Dooley,—we need not consider; no exception was taken to any finding or action of the master in that respect.

4. The plaintiff's fourth exception is to the allowance of two of the notes, on the ground that they are not correctly described in the mortgage. The only discrepancy which appears is that the note payable in five years from its date is described in the mortgage as payable in four years; that is, the mortgage describes two notes payable in four years, instead of one payable in four years and one in five years. The note payable in five years is the one on which the \$260 was indorsed at the time the mortgage was given. The master properly treated the amount due on it as due on the mortgage.

5. The exception to the allowance for payment of taxes, and of interest on such payment, must be overruled.

6. The sixth exception is to the allowance of any interest on the notes after January 1, 1875, on the ground that, by the agreement of that date between Ketchum and Peter Dooley, interest on the notes was to stop at that time. The words relating to interest on the notes are: "The interest on the afore-mentioned notes at the date of this instrument, per agreement, is to stop." This agreement has already been adverted to in considering the first exception. Besides giving to Ketchum the right to cut timber on the land of Dooley in Vermont, to apply on the mortgage notes, it gave him the right to cut a certain quantity of timber on the mortgaged premises in this State. One Arnold held a deed of the land in this State at the time of the mortgage, as security for a note of Wiley, and Ketchum had paid him and taken a quitclaim deed of the land from him. By the agreement, Ketchum agreed to quitclaim this land to Peter Dooley. The whole agreement was in the form of a sale of timber standing in Vermont, in sufficient quantity to pay the mortgage debt, to be cut and removed within three years, and of a certain quantity of timber standing in this State, at a fixed price, which was equal to the amount Ketchum had paid to Arnold; and Ketchum was to relinquish any claim under Arnold's deed by quitclaiming to Peter Dooley. Under this agreement, Ketchum cut off about, but a little less than, the amount of timber he was authorized to cut on the Massachusetts land. The master finds that some of it, but he cannot tell how much, was cut from the land in Vermont. All that was cut was applied by Ketchum to reimburse himself for the money he had paid to

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Arnold. It was not an executed sale of the timber in Vermont, and Ketchum's right to cut it was limited to three years, and nothing was ever done under the part of the contract that related to the mortgage notes. No payment was made on the notes by Ketchum, and he did not give the quitclaim to Dooley. All that was done under the whole agreement was that Ketchum cut off the timber to repay himself what he had paid to Arnold. He gave a quitclaim of the right he had from Arnold, not to Peter Dooley, but to the defendant, when he became assignee of the mortgage which Ketchum held and which this bill is brought to redeem. The agreement, so far as related to that mortgage, was never acted on by the parties, and was wholly abandoned by them. The agreement as to interest on the notes fell with the rest.

7. The seventh exception is to the allowance of interest on the costs of the foreclosure suit in Vermont. The same mortgage covered lands in Vermont, and the plaintiff obtained a decree of foreclosure in that State. The decree was entered on December 23, 1863; fixed the amount due on the mortgage, and the costs of suit; and required payment of these sums, and interest, by a fixed day, or the right of redemption would be foreclosed. The payment was not made and the foreclosure was completed. In fixing the value of the land to be applied to the mortgage debt, the master deducted from its full value the amount of the costs, with interest from the date of the decree until the foreclosure was perfected. The objection is to the allowance of the interest. We think this was right. The amount of the costs when the mortgage was foreclosed should be deducted from the value of the land to ascertain the amount that was applicable to the debt, and that, by the terms of the decree, included interest from the date of the decree.

8. The eighth exception is to the application to the Arnold mortgage of the value of the timber cut by Ketchum, as stated under the sixth exception. The application to the Arnold mortgage was made by Ketchum. The master applied the value of the timber cut by Ketchum to the defendant's mortgage.

The defendant's exception to the refusal of the master to allow annual interest must be overruled. His other exceptions become immaterial.

Exceptions of both parties overruled.

3 MASS.

VERMONT.
SUPREME COURT.

Re Charles W. MARRON.

The Legislature has authority to make reasonable laws regulating the mode in which the right of trial by jury in criminal causes shall be enjoyed; but it cannot impair the right. Thus, a statute which in effect requires a prisoner convicted in a justice's court, where a jury is composed of only six men, to procure copies of appeal at his own expense, if he appeals and would enter his appeal in the county court, where a jury is composed of twelve men, is a reasonable regulation, and does not infringe the constitutional right of trial by jury.*

(Washington—Filed February 23, 1888.)

HABEAS CORPUS. The writ was returnable before Veazey, J., May 17, 1887, and the case was by him adjourned to the Washington County Supreme Court, then in session. The relator was convicted by a justice of the peace of the crime of selling intoxicating liquors. *Prisoner remanded.*

The facts are fully stated by the court.

Messrs. Senter & Kemp, for relator:

Article 10 of the Bill of Rights declares that "in all prosecutions for criminal offenses a person hath a right to * * * a speedy, public trial by an impartial jury of the country."

The jury referred to here is the common-law jury of twelve men, and such a jury and trial cannot be had under our law in a justice's court. Here the Legislature enacted Rev. Laws, § 1678, which gives a right of appeal to one convicted by a justice of the peace, unconditionally, except as to time. It is not made dependent upon the payment of any fees by the respondent, or the procurement of bail.

Re *Kennedy*, 55 Vt. 1; Const. arts. 4, 10; Rev. Laws, § 1673.

The administration of criminal law in Vermont proceeds upon the theory that the State must furnish the machinery for the trial of all crimes and misdemeanors; and that no respondent shall be subjected to the payment of any fees or costs unless and until he be finally convicted; neither can a respondent recover any costs from the State; and if he be compelled to pay for his appeal and for the copies of the record in order to obtain an appeal, and the judgment from which he appeals be reversed after trial by a traverse jury in county court, he cannot recover any fees or costs so paid.

State v. Wallace, 41 Ind. 445.

The Legislature could not abridge the constitutional right to a trial by jury, given to every person charged with crime; and, in order to give effect to this right, a respondent must of necessity be entitled to an appeal from a justice's court where a trial by jury may be had.

*Rev. Laws, § 1673: "No appeal shall be allowed in a criminal cause when the respondent is acquitted; but the respondent may appeal from any judgment or sentence of a justice against him, if the appeal is claimed within two hours after the rendition of the judgment."

1 Vt.

Johnson's Case, 1 Me. 280; Bish. Writ. L. 90. Mr. E. W. Bisbee, State's Atty., for the State:

The statute casts the burden upon respondents appealing from the judgments of justices of the peace to enter their appeals in the county court.

Rev. Laws, §§ 1678-1678.

That involves the procurement of a copy of the proceedings in the justice's court; the fee for which is 75 cents.

Rev. Laws, § 4506.

The two courts had concurrent jurisdiction over the subject-matter. The relator desired to avail himself of a trial in the county court, and asserted his rights to an appeal.

Where is the distinction between the expense of the copy of the proceedings before the justice, to get his case into the county court, and the other expense to which he is subjected,—the procurement of witnesses, or counsel in his behalf, and the other incidental expenses of a trial?

The Constitution has placed about accused persons the guaranty of a fair trial,—not necessarily a free trial,—before a common-law jury.

It is only when respondents are of insufficient pecuniary ability to properly present their defense, that the courts grant them relief at the expense of the State.

Rowell, J., delivered the opinion of the court:

This is a complaint for a writ of habeas corpus.

The case is this: The prisoner was convicted before a justice for selling intoxicating liquor, and appealed. Afterwards he seasonably applied to the justice for copies of appeal, that he might enter his case in the county court, which the justice refused to furnish him unless he would advance therefor the statutory fee of 75 cents; which he did not do, but applied to the county court at its then next session for leave to enter his appeal and for an order on the State's attorney to procure and file the necessary copies of appeal; which application was refused, and the case was not entered. After the adjournment of the county court, the justice issued a warrant to carry his judgment into effect, as provided by statute, upon which the prisoner was arrested and is now detained; and this imprisonment is complained of as illegal, on the ground that the Constitution secures to the prisoner the right of a trial by a jury of twelve men, which he can have only in the county court, and that, by being required to pay for copies of appeal before he could get them, he has been deprived of this right, which he says should be accorded to him by the State without money and without price.

The purpose of the declaration of the Bill of Rights, that in all prosecutions for criminal offenses a person hath a right to a speedy public trial by an impartial jury of the country, was to announce a great and fundamental principle to govern the action of those who make and those who administer the law, rather than to establish precise and positive rules by which that action is to be governed. *Jones v. Robbins*, 8 Gray, 829, 840; *Post v. Morse*, 132 Mass. 854.

But, notwithstanding the right is secured by

organic law, it is nevertheless considered that the Legislature, in which is vested the supreme legislative power of the State, may regulate the mode and manner of its enjoyment, provided it does not impair the right itself. But from the very nature of the case, no definite rule can be laid down that will be a guide in all cases, to determine what will and what will not be deemed to impair the right. Every case must be determined upon its own circumstances.

Thus, in *Walter v. People*, 82 N. Y. 147, 159, Wright, J., speaking for the court, said: "Trial by jury cannot be dispensed with in criminal cases, but it is obviously within the scope of legislation to regulate such trial." There it was held that the Legislature might give the people peremptory challenges in criminal cases. Again, in *Stokes v. People*, 53 N. Y. 164, 173, it is said: "While the Constitution secures the right of trial by an impartial jury, the mode of procuring and impaneling such jury is regulated by law, either common or statutory, principally the latter; and it is within the power of the Legislature to make from time to time such changes in the law as it may deem expedient, taking care to preserve the right of trial by an impartial jury." And in *Foster v. Morse*, 132 Mass. 354, it is said that the Legislature has "authority to make reasonable laws regulating the mode in which the right shall be enjoyed and used."

So it has been held that a city charter was not unconstitutional because it did not provide for a trial by jury in criminal cases in the recorder's court; but for not giving a right of appeal to the accused it was held unconstitutional. *State v. Peterson*, 41 Vt. 504.

In most inferior courts, probably, either no jury trial at all can be had, or only one by a jury of less than twelve men, as in our justice courts; but it has always been held in such cases that, if an unfettered right of appeal is given to a court in which a constitutional jury can be had, the right to a jury trial is not infringed. *State v. Peterson*, 41 Vt. 522; *Sullivan v. Adams*, 8 Gray, 476; *Hagood v. Doherty*, 8 Gray, 878.

A statute requiring in a civil action that the defendant shall be defaulted unless within ten days of the return day he files an affidavit of defense, has been held to be constitutional, and not an unreasonable restriction of his right to a trial by jury. *Hunt v. Lucas*, 99 Mass. 404. It is to be noticed that the Bill of Rights gives a trial by jury in civil cases as well as in criminal. But it has always been held in civil cases that the advancing party must pay the jury fee in order to secure such trial.

In *Com. v. Whitney*, 108 Mass. 5, the court says: "It has been the uniform practice of the Legislature, since the adoption of the Constitution, to pass laws regulating the mode in which the rights secured to the subject by the Bill of Rights and the Constitution shall be enjoyed; and if the subject neglects to comply with these regulations he thereby waives his constitutional privileges. The statute in question falls within this principle. It gives any person convicted before a justice of the peace or a police court the right to appeal to the superior court, and to have a trial by jury, and makes regulations, which are reasonable and necessary, as to the mode in which he may enter

and prosecute his appeal; and if he neglects to enter and prosecute his appeal, he waives his right to a trial by jury, and the provision of the statute that he may thereupon be defaulted and sentenced is not unconstitutional."

So a statute that in effect provides that in civil cases a party shall not be entitled to a jury trial unless he files within a certain time a notice that he wants such trial, is constitutional. *Foster v. Morse*, 132 Mass. 354.

But it is unnecessary to pursue the subject further. The cases referred to sufficiently show the existence and general scope of legislative authority in this behalf, and illustrate with sufficient fullness the extent to which it may properly be exercised.

The result is, we hold, that the statute which in effect makes it the duty of a respondent who appeals to procure copies of appeal at his own expense if he would enter his appeal in the appellate court, is a reasonable regulation, not infringing the constitutional right of a trial by jury.

It is therefore adjudged that the prisoner is lawfully detained, and he is remanded to his former custody.

Boyce, Ch. J., and Powers, J., were absent.

Adoniram S. CANFIELD

v.

Elias BENTLEY'S ADMINISTRATOR.

Where a surety on a promissory note has paid it, in an action by him against the estate of a deceased surety on the same note, the maker is a witness, under the statute (Rev. Laws, § 1002), to prove that the plaintiff was not a cosurety, but only a surety for the deceased.

(Bennington—Filed February 22, 1886.)

APPEAL by defendant from a decision of commissioners upon the estate of Elias Bentley, deceased. Trial by jury, June Term, 1887, Ross, J., presiding. Verdict for plaintiff. *Affirmed.*

The case appears in the opinion.

Mr. J. C. Baker, for defendant:

The contract or cause of action on trial in this case was the contract, express or implied, between Elias Bentley, deceased, and A. S. Canfield, when the note was executed to Jane Mattison; and the question in dispute was whether Elias Bentley and Canfield were sureties for Abel Bentley, or whether Canfield was surety for Elias Bentley.

If both Elias Bentley and Canfield were joint sureties for Abel, Abel was the other party to the agreement to indemnify his sureties, and this being the contract or cause of action in issue and on trial, Abel Bentley was not a competent witness as against the estate of Elias Bentley.

Rev. Laws, § 1002; Whart. Ev. § 466.

The other party referred to in the statute is the other party to the contract or cause of action in issue and on trial, and not the party to the suit on the record. Whether the witness is a party to the record, or not, makes no difference as to the statutory incompetency of the witness.

Barnes v. Dow, 4 New Eng. Rep. 717, 59 Vt. 530.

The exclusion relates as well to the substantial issues made by the evidence as to the formal issues made by the pleadings.

Hollister v. Young, 41 Vt. 156; *Same v. Same*, 42 Vt. 408; *Farmers Mut. F. Ins. Co. v. Wells*, 53 Vt. 14; *Pember v. Congdon*, 55 Vt. 58; *Barnes v. Dow*, *supra*.

Messrs. Batchelder & Barber, for plaintiff:

Abel Bentley was a competent witness. He was not one of the original parties to the contract or cause of action in issue. The contract in issue was between the plaintiff and the deceased.

Manufacturers Bank v. Scofield, 39 Vt. 594; *Lytle v. Bond*, 40 Vt. 618; *Benior v. Paquin*, Id. 205; *Cole v. Shurtleff*, 41 Vt. 811; *Hollister v. Young*, Id. 156; *Downs v. Belden*, 46 Vt. 674; *Morse v. Low*, 44 Vt. 561; *Taylor v. Finley*, 48 Vt. 78; *Chaffee v. Hooper*, 54 Vt. 513; *Farmers Mut. F. Ins. Co. v. Wells*, 53 Vt. 14; *Pember v. Congdon*, 55 Vt. 58; *Richardson v. Wright*, 2 New Eng. Rep. 608, 58 Vt. 371; *Barnes v. Dow*, 4 New Eng. Rep. 717, 59 Vt. 545.

Taft, J., delivered the opinion of the court: Jane Mattison held the note of Abel Bentley. The plaintiff and Elias Bentley, the defendant's intestate, were sureties thereon. The plaintiff paid the note, and seeks in this action to recover of the defendant estate the amount so paid, upon the ground that, by contract with said Elias, he was surety for him, not co-surety with him for Abel, the principal. Whether the plaintiff was surety for Elias, or co-surety with him, was the sole question in controversy; and the only point reserved by the exceptions is, Was Abel a competent witness? The question of Abel Bentley's liability to his sureties was not in issue. It was lawful for the plaintiff to contract with his co-surety as to the relation he, the plaintiff, should sustain to him; and in this contract Abel Bentley had no interest and was no party to it, and, in an action to enforce it, would be a competent witness,—would not be excluded by Rev. Laws, § 1002.

Judgment affirmed.

STATE of Vermont

v.

Omer MILLER.

Whether an indictment in the words of the statute is sufficient depends on whether every fact necessary to constitute the offense is charged or necessarily implied from the language used. Thus, where the statute (Rev. Laws, § 4241) provided: "A man with another man's wife, or a woman with another woman's husband, found in bed together under circumstances affording presumption of an illicit intention, shall each be imprisoned," etc.,—*Held*, that an indictment which charged that the respondent, "being then and there a man," was found in bed with another

man's wife "under circumstances affording presumption of an illicit and felonious intention," was bad in that there was no allegation as to what the illicit intention was.

(Washington—Filed February 24, 1886.)

INDICTMENT charging respondent with having been found in bed with another man's wife, etc. Trial by jury, September Term, 1886. Powers, J., presiding. Verdict of guilty. *Indictment quashed.*

The respondent demurred to the indictment; but the court overruled the demurrer, and ordered him to plead without prejudice to the exception.

It was alleged "that Omer Miller * * * was found in bed feloniously together with one Josephine Yatter, under circumstances affording presumption of an illicit and felonious intention, the said Josephine Yatter being then and there a married woman, and having then and there a lawful husband alive other than the said Omer Miller, and the said Omer Miller being then and there a man other than the husband of the said Josephine Yatter, and the said Omer Miller and the said Josephine Yatter not being then and there lawfully married to each other."

Messrs. Pitkin & Huse and C. H. Heath, for respondent:

With the exception of the word "feloniously,"—evidently used because of Rev. Laws, § 4834,—each count follows and uses these words of the statute, namely, "found in bed together under circumstances affording presumption of an illicit intention;" and there is no other allegation as to intent. The word "illicit" means what is unlawful or forbidden by the law. Bouv. L. Dict.; Webster, Dict. But the statute in Rev. Laws, § 4241, must by construction have a specific application narrower than the general words, for it is clear that the "illicit intention" contemplated by it can be only the intention to have an unlawful sexual connection.

An indictment must state all facts and circumstances necessary to constitute the offense; although an indictment may, generally, lay the offense in the words of the statute, where the statute specifies all the elements constituting the crime the Legislature had in view. *State v. Jones*, 38 Vt. 448; *State v. Cook*, 38 Vt. 487; *State v. Daley*, 41 Vt. 564. Yet, where the general terms of the statute must be narrowed by construction, it is not sufficient to follow the words of the statute, but the indictment must correspond as well with the judicial interpretation as with the letter of the enactment. Were it otherwise, all the allegations of the indictment may be true, and still the respondent be not guilty.

1 Bish. Cr. Proc. (2d ed.) §§ 628-629; *United States v. Pond*, 2 Curt. C. Ct. 265; *State v. Northfield*, 18 Vt. 565; *State v. Day*, 3 Vt. 138.

Messrs. E. W. Bisbee, State's Atty., and *George W. Wing*, for the State:

The indictment is sufficient.

Rev. Laws, § 4241; Bish. Cr. Proc. § 77 et seq.; Bish. Stat. Cr. § 167.

Veney, J., delivered the opinion of the court:

The first exception is to the judgment of the

county court overruling the demurrer and adjudging the indictment sufficient.

It is claimed that the indictment was sufficient to meet the case provided for in Rev. Laws, § 4241, viz: "A man with another man's wife, or a woman with another woman's husband, found in bed together, under circumstances affording presumption of an illicit intention, shall each be imprisoned" etc.

Each count charges in these words: "affording presumption of an illicit and felonious intention," being in the words of the statute, except the words "and felonious" are added. There is no allegation as to what the illicit intention was.

The rule as to when it is sufficient to charge an offense in the words of the statute was stated in *State v. Higgins*, 58 Vt. 191, being quoted from Mr. Pomeroy, and was thus: "Whether an indictment in the words of a statute is sufficient, or not, depends on the manner of stating the offense in the statute; if every fact necessary to constitute the offense is charged, or necessarily implied, by following the language of the statute, the indictment in the words of the statute is undoubtedly sufficient; otherwise not."

That rule in substance has always been the test applied to indictments in this State. Under it this indictment is insufficient. The word "illicit," as its derivation indicates, means that which is unlawful or forbidden by the law.

Bouv. L. Dict.; Webster, Dict. It is not claimed that every illicit intention would warrant a conviction under this statute. It must be a particular unlawful intention. Therefore, as the indictment stands, all the allegations might be true, and the respondent be not guilty. The illicit intention might have been to steal, burn, or murder, as well as to have unlawful sexual connection. In *U. S. v. Pond*, 2 Curt. C. Ct. 268, Curtis, J., observed: "This indictment follows the words of the statute. It is sufficient, therefore, unless the words of the statute embrace cases which it was not the intention of the Legislature to include within the law. If they do, the indictment should show this is not one of the cases thus excluded." Mr. Chief Justice Marshall, in the case of *The Mary Ann*, 21 U. S. 8 Wheat. 390 (5 L. ed. 641), speaking of an information, said: "If the words which describe the subject of the law are general, embracing a whole class of individuals, but must necessarily be so construed as to embrace only a subdivision of that class, we think the charge in the libel ought to conform to the true sense and meaning of those words as used by the Legislature."

As the indictment must fall, there is no occasion to pass upon the exceptions taken in the trial.

Exceptions sustained. Indictment adjudged insufficient, and quashed. Respondent discharged.

MASSACHUSETTS.

SUPREME JUDICIAL COURT.

COMMONWEALTH of Massachusetts

v.

Frank FERRY.

1. In a complaint under Stat. 1885, chap. 342, § 1, charging defendant with being present and engaging in registering bets and selling pools, in a room kept by another person, containing apparatus, books, and other devices for registering bets and selling pools, no detailed description of the apparatus, etc., is necessary, provided it is charged that they were used for the unlawful purpose set forth.
2. Such complaint is not bad for duplicity in charging the defendant with having been engaged "in the business and employment" forbidden by the statute.
3. Nor is the allegation, in a single count, that defendant was engaged in the business and employment of both registering bets and selling pools, open to the objection of duplicity.
4. It is not necessary that such complaint should describe in detail the method of registering bets or selling pools, or the particular contests which were made the subject of gambling.
5. When the evidence given on a trial in the superior court corresponds with the allegations in the complaint on which defendant had been convicted in a lower court, it will be presumed, in the absence of proof to the contrary, that the offense proved is the same as that of which defendant was convicted in the lower court.
6. On the trial of a complaint under said statute of 1885, for assisting in pool-selling, evidence as to the business conducted in the room, immediately previous to the date on which the offense is charged to have been committed, is competent for the limited object of showing that such room was kept for the unlawful purpose alleged.
7. In such case, — Held, that an instruction to the jury that it was essential to a conviction that they should find that the defendant, at the time named, "was present in such a place as that named in the statute," was not rendered fatally defective by the addition of the words: "that is, any place like or similar to that named in the statute;" it being apparent that the latter expression was used synonymously with the preceding, and that the defendant was not prejudiced thereby.

(Suffolk — Filed February 28, 1888.)

ON defendant's exceptions. *Overruled.*
 Complaint to the Municipal Court of the City of Boston on the Statute of 1885, chap. 342, § 1, charging the keeping of a room for
 3 MASS.

the purpose of registering bets and buying and selling pools, and also the engaging in the business of registering bets and selling pools, etc.

At the trial in the Superior Court, before Bacon, J., defendant was found guilty, and thereupon alleged exceptions.

Further facts appear in the opinion of the court.

Mr. E. W. Burdett, for defendant:

It is not, in general, competent to introduce evidence tending to prove a similar but distinct offense for the purpose of raising an inference or presumption that the accused committed the crime with which he is charged.

Jordan v. Osgood, 109 Mass. 457; *Com. v. Jackson*, 132 Mass. 16, 18.

There are certain cases where evidence tending to prove an offense similar to, but distinct from, that charged, is admitted. Thus, as in most cases a criminal intent must be proved, evidence which legitimately bears upon the guilty knowledge or criminal intent of the defendant may be introduced, even though it be derived from circumstances which also show the commission of another offense.

Com. v. Bigelow, 8 Met. 235.

It is, further, admissible to show independent acts or crimes, where such acts or crimes are connected with the act or crime in question by unity of plan or motive, and therefore bear upon the purpose the criminality of which is in question; but where there is no connection between the act alleged and the other transactions, from which the jury can find a purpose common to all, evidence of such other transactions will not be admitted.

Horton v. Weiner, 124 Mass. 92; *Com. v. Jackson*, 132 Mass. 16; *Com. v. Damon*, 186 Mass. 441.

Upon the same principle, evidence has been held admissible of other transactions, where previous attempts have been made to commit some crime, — the previous acts tending to show a then existing purpose, which may be presumed to continue.

Com. v. Bradford, 126 Mass. 42; *Com. v. Abbott*, 130 Mass. 472.

The evidence admitted in this case does not come within any of the exceptions to the general rule.

Com. v. Jackson, 132 Mass. 16, 21.

Mr. Andrew J. Waterman, Atty-Gen., for the Commonwealth:

The complaint follows the language of the statute, and the offense was sufficiently defined by indicating the purpose for which the apparatus was used.

The case falls within the analogy of the rule, that where one breaks and enters with intent to steal, it is not necessary to describe the goods intended to be stolen.

Joselyn v. Com. 6 Met. 289.

It is not necessary to describe the apparatus, books, or devices. The being "present in any such place, engaged in any such business or employment," referred to in the statute, is being present in any building or room, or any part of any building or room or place, kept or occupied with apparatus, books, or device of any kind, for any of the unlawful purposes.

Com. v. Clark, 14 Gray, 367; *Com. v. Conant*, 6 Gray, 482.

By the expression "business and employ-

ment," in the complaint, but a single offense is charged, and the complaint is not bad for duplicity.

Com. v. Brown, 14 Gray, 419-430; *Com. v. Moody*, 3 New Eng. Rep. 301, 143 Mass. 177. See *Stevens v. Com.* 6 Met. 242; *Rea v. Fauntleroy*, 1 Mood. C. C. 52; *Reg. v. Bowen*, 1 Car. & K. 501.

The pleader is exempt from specifying the kind of gaming carried on in a house resorted to for the purpose of gambling.

Fitzgerald v. Com. 135 Mass. 266; *Com. v. Eads*, 14 Gray, 406.

The question of election is one of discretion in the court, and is not subject to exceptions; and in no case will the court order an election till the evidence is all in.

Com. v. Pratt, 137 Mass. 98; *Downs v. Hawley*, 112 Mass. 237; *Com. v. Slate*, 11 Gray, 60; *Com. v. Davenport*, 2 Allen, 299; *Com. v. Sullivan*, 104 Mass. 552; *Com. v. Bennett*, 118 Mass. 448.

Under the English law, where one act is charged, the prosecutor may give evidence of three larcenies committed within six months, and may not be put to his election.

1 Archb. 312.

In an indictment for obtaining property of another by false pretenses in a sale, evidence of similar pretenses made by the defendant in sales to other persons a short time previous to the sale in question is inadmissible for showing the intent with which the defendant made the sale charged in the indictment.

Com. v. Jackson, *supra*. See also *Maguire v. Middlesex R. Co.* 115 Mass. 239; *Whitney v. Gross*, 1 New Eng. Rep. 512, 140 Mass. 232; *Hatt v. Nay*, 4 New Eng. Rep. 173, 144 Mass. 186; *Com. v. Campbell*, 7 Allen, 541; *Costello v. Crowell*, 139 Mass. 588.

It did not appear at the trial in the superior court that the defendant was being tried for the same offense of which he was convicted in the court below, and the burden was on the government to establish this fact affirmatively.

Com. v. Blood, 4 Gray, 31; *Com. v. Phelps*, 11 Gray, 72; *Com. v. Foyne*, 126 Mass. 267.

Devens, J., delivered the opinion of the court:

The indictment sets forth the keeping, by a person unknown, of a certain room described, with apparatus, books, and other devices for the purpose of registering bets and selling pools upon the results of trials of skill and contests of speed, endurance, etc., and that the defendant on May 28, 1887, was present and "then and there engaged in the business and employment of registering bets and selling pools upon the results of certain trials and contests of speed between contesting beasts, to wit, contesting horses." Stat. 1885, chap. 342, § 1.

1. The defendant contends that a more particular description of the apparatus, etc., used should have been given, especially as it appeared at the trial that the complainant might have done this. But all such apparatus, books, etc., might have been and probably were entirely lawful and proper instruments in themselves; the important matter charged was that they were used for an unlawful purpose, set forth in the complaint. If this was alleged

and proved, any detailed description of them was unnecessary.

2. The complaint is not bad for duplicity in charging the defendant in having been engaged "in the business and employment" forbidden by the statute. These words are used as substantially synonymous terms, to describe the transaction of registering bets and buying or selling pools. It would be an extremely forced construction to hold, as defendant urges, that by the use of these two words he is charged with being both principal and agent and as employer and employee.

3. Nor is the allegation, in a single count, that defendant was engaged in the business and employment "of both registering and selling pools," open to the objection of duplicity. They are not distinct kinds of unlawful business, but different parts of one transaction, representing different stages of it. In *Stevens v. Com.* 6 Met. 242, it was held that Rev. Stat. chap. 126, § 20, prescribing the punishment of "every person who shall buy, receive, or aid in the concealment of any stolen goods, knowing the same to have been stolen," describes only one offense, which may be committed either by buying, receiving, or aiding in the concealment of such goods; and that an indictment which alleged that a defendant received and aided in the concealment of such goods charged but a single offense.

A pool was, we think, correctly defined as a combination of stakes, the money derived from which was to go to the winner. Registering the bets and "buying and selling pools" would appear to be but one transaction. If, however, they were distinguishable criminal acts, the indictment would not be bad for duplicity. In *Com. v. Moody*, 3 New Eng. Rep. 301, 143 Mass. 177, assuming that the registering of bets and the selling of pools were distinct offenses, it was held that the offense of keeping a room for these various purposes was but a single one, and that it made no difference how many unlawful purposes the room was kept for. The offense with which the defendant was charged was being present in a room of this character, kept by another person, aiding in the unlawful business there conducted, under the clause of the statute which renders culpable "whoever is present in any such place engaged in any such business or employment." Whatever portion of the unlawful business there conducted he engaged in, he was guilty of the offense denounced by the statute: *not* was he guilty of more than a single offense if he both registered bets and bought or sold pools.

4. It was not necessary to describe the method or manner of registering bets or selling pools, or the particular contests which were made the subject of gambling. The defendant was sufficiently informed of the charge against him, although the indictment did not go into this minute detail.

5. At the trial, the defendant objected that it was not sufficiently shown that the offense for which defendant was tried in the superior court was the same of which he had been convicted in the lower court. The government relied, in the superior court, upon the 28th day of May, as alleged in the complaint, as the day

of the offense. Where the evidence corresponds with the allegation in the complaint, the jury, in the absence of proof to the contrary, may presume the offense proved to be the same as that of which the defendant had been convicted in the lower court. *Com. v. Field*, 119 Mass. 105. It was shown also that the defendant had contended in the lower court that there was not sufficient evidence to convict him of the offense upon the day named, which indicated that the day alleged was the day there relied on by the prosecution.

6. Evidence was admitted that, at various times between May 18 and May 28, the defendant was present at the room described, engaged in doing certain things which tended to show he was engaged in the business alleged in the complaint. The presiding judge received this evidence, not requiring the government to make its election, until the evidence was in, as to which date it should rely upon. He then directed the jury to consider the evidence as to that occurred at other dates previous, only as bearing upon the question whether the premises were kept for that purpose on the 28th of May. The character of the room was a vital point in the case, as the defendant was only to be held guilty, under the statute, if he had engaged in the business in a room kept or occupied for the unlawful purpose described. For the limited object of showing this, evidence as to the business conducted there immediately previous to the date in question was competent. The offense of keeping and occupying such a room is a continuing one, and, as bearing upon the inquiry whether the room was kept on May 28 for the unlawful purpose of registering bets and selling pools, evidence that this business was there conducted at various times during the ten days previous had a legitimate bearing. *Com. v. Carney*, 108 Mass. 417. It could not be excluded because it had also a tendency to show that the defendant was at other times engaged in assisting in it. We must assume that the jury received this evidence to the limited extent only allowed by the judge,—that of ascertaining the character of the room described.

7. The defendant requested the judge to instruct the jury "that, in order to convict, the jury must find every element present in the case, viz., that the defendant was, upon the date named, present in a place or room fitted with apparatus, books, and other devices designed and intended for the purpose of registering bets and of buying and selling pools upon the results of certain trials and contests of speed between contesting beasts, to wit, contesting horses; and was then and there engaged in the business and employment of registering bets and selling pools upon the results of said trials and contests." The judge declined so to rule, but instructed the jury "that, in order to convict, they must find every element present in the case, viz., that if the defendant, at the time named, was present in any such place as that named in the statute,—that is, any place like or similar to that named in the statute,—and was then and there engaged in any such business or employment as that named in the statute, he would be guilty." To this ruling and refusal to rule the defendant excepted. The ruling, as given, while it met the request

of defendant fairly in the main, is in one respect unfortunately phrased,—in using, in reference to the place where the defendant must have been found aiding in the unlawful act charged, the expression, "that is, any place like that or similar to that named in the statute." This is preceded, however, by the words "any such place as that named in the statute, that is," etc. It is evident that the judge used the phrases as synonymous with each other, and that it could not have been supposed by the jury that the defendant could have been convicted unless he was present in a place clearly and distinctly of the character defined in the statute. The argument of the defendant is that it might have been inferred by the jury that, if the place bore a likeness or similarity to that described in the statute, while yet it differed therefrom, the defendant might be convicted. Connected as it was with the previous expression, we do not think this misunderstanding could have arisen. If not, this verbal inaccuracy, to which the judge's attention was not called, can have done the defendant no harm.

Other exceptions taken by defendant, as well as the numerous reasons assigned in arrest of judgment, have been considered, so far as seemed desirable, with those already discussed.

Exceptions overruled.

Patrick DONNELLY

v.

BOSTON CATHOLIC CEMETERY ASSOCIATION.

1. A cemetery association incorporated for the purpose of establishing and perpetuating a place for the burial of the dead, which sold lots in its cemetery, but declared no dividends, and used its receipts in caring for the grounds, and, to a large extent, in charity, by furnishing free burials, as well as free lots, for the poor.—*Held, not to be a public charity, and hence not exempt from the ordinary rules of liability for a tort,—here, for negligence in burying in plaintiff's lot a person not entitled to be buried there.*
2. *Held, also*, that such association was not an agent of a municipality in the performance of a municipal duty, and therefore was not on that ground exempt from liability.

(Suffolk—Filed February 29, 1888.)

ON report. *Judgment for plaintiff.*

This was an action of tort. It appeared at the trial in the superior court that plaintiff, in 1878, had purchased from defendant a deed of a grave, entitling him and his heirs and assigns to said grave as a place of burial for the dead. His wife having, in the month of March, 1884, died, her remains were brought to the cemetery for interment in the plaintiff's grave. Upon the arrival of the funeral procession at the grave, there appeared upon the side of the grave, which had previously been opened by a gravedigger in the employ of the corporation,

two small coffins, one of which bore the name of John McDonald. Plaintiff testified that no John McDonald had ever been buried in his grave with his consent, and offered testimony tending to show that this body of John McDonald, and the coffin containing the same, had been negligently buried by the employees of the corporation in the plaintiff's grave; and for this injury he brought this action. Plaintiff offered evidence to show that, at the time of the burial of his wife, there was in the possession of the defendant no books of record which would enable its officers to determine in all cases, without considerable delay, who might be buried in any specified single grave, and there were not, at the time of the burial of the plaintiff's wife, any regulations or orders of the corporation requiring or directing the keeping of such records.

Defendant claimed, and offered testimony to show, that the coffin and body of John McDonald had never in fact been buried in the plaintiff's grave, or, if so buried, such burial was not made by any person for whom the corporation was responsible.

It appeared that the defendant corporation was especially incorporated by the Acts of 1851, chap. 292, for the purpose of establishing and perpetuating a place for the burial of the dead; and that by subsequent amendments, the last of which was passed in 1877, it was authorized to hold real and personal estate for the purposes for which it was established, to the amount of \$132,500. It also appeared that the defendant corporation had no capital stock; that there were no certificates of shares issued; that there were no dividends paid or any profits; that no member of the corporation, by virtue of his membership, received any pecuniary benefit whatever from the association; and that all of the money received by the corporation, whether from the sale of graves or otherwise, was exclusively used for ornamenting the grounds, burying the poor, giving graves to public institutions, and carrying out the purposes for which the corporation was formed; that when persons died without leaving sufficient funds for burial, the corporation gave graves, and furnished the coffin and hearse, and, in case of the death of any of the inmates of public and charitable institutions, the graves were, upon application, furnished for nothing, and that this had been the character and course of the association from its organization. No claim was made, or evidence offered, by the plaintiff, that there was any negligence in the employment or selection by the corporation of the gravedigger, or any of its servants or employees. There was evidence tending to show that some 60,000 bodies were buried in the cemetery of the defendant corporation at the time of the trial; and it also appeared that the agent or superintendent of the corporation, who had charge of the cemetery, received a salary of \$300 per annum, and that the gravediggers, who were employed by him, also received pay for their services from the corporation. It also appeared that when a grave had been sold, and the same was subsequently opened at the request of the owner for the purpose of a fresh interment, a charge of \$8 was made by the corporation for such opening; which sum, however, was devoted, with the other receipts of the corporation, to carry-

ing out the general purposes of the corporation.

Upon these facts the presiding judge ruled that the action could not be maintained, and directed a verdict for defendant, and reported the case for the consideration of the supreme judicial court. If the ruling was correct, judgment is to be entered on the verdict. If the ruling was incorrect, judgment to be entered for the plaintiff.

Mr. J. L. Eldridge, for plaintiff:

This case does not come within the rule in—*McDonald v. Massachusetts General Hospital*, 120 Mass. 482; *Benton v. Boston City Hospital*, 140 Mass. 18; *Gooch v. Indigent Female Assn.* 109 Mass. 558.

The defendant was not a public charitable association; and a contract existed between the defendant and the plaintiff; and the defendant owed a duty to the plaintiff and neglected it. The defendant was negligent in failing to provide and keep proper and sufficient records.

Messrs. Gaston & Whitney, for defendant:

The defendant is a public charitable corporation, carrying on a work exclusively for the benefit of the public, without any private advantage or emolument, and, as such, is not liable for the negligence of its employees, in the absence of negligence in selecting them.

McDonald v. Massachusetts General Hospital, 220 Mass. 482; *Tindley v. Salem*, 137 Mass. 171; *Benton v. Boston City Hospital*, 140 Mass. 18.

In *McDonald v. Massachusetts General Hospital*, *supra*, it was held that the public charitable character of the institution was not affected by the fact that only those could enjoy its benefits whom the trustees chose to admit.

See *Jackson v. Phillips*, 14 Allen, 539, 354; *Schouler, Petitioner*, 184 Mass. 426.

It makes no difference whether all or a portion of defendant's revenues are derived from private gift, or from the sale of graves to those who are able to pay for them. It appears in the case of *McDonald v. Massachusetts General Hospital*, *supra*, that a large portion of the funds of the Massachusetts General Hospital were received from the Massachusetts Hospital Life Insurance Company, an insurance company carrying on a regular insurance business for the purpose of supplying funds to the hospital, and another portion was derived from paying patients.

See also *Gooch v. Indigent Female Assn.* 109 Mass. 558.

Holmes, J., delivered the opinion of the court:

There was evidence warranting a verdict for the plaintiff if the defendant was subject to the ordinary rules of liability. We are of opinion that it was subject to those rules, and that, by the term of the report, judgment must be entered for the plaintiff.

McDonald v. Massachusetts Gen. Hospital, 120 Mass. 482, was decided on the ground that the defendant was a public charitable institution under the laws of the Commonwealth; and *Benton v. Boston City Hospital*, 140 Mass. 18, on the ground that, if it was not within the former decision, then the defendant was a mere agent to perform a duty which the city of Boston had assumed solely for the benefit of the

public under the authority of a statute; that the city of Boston would not be liable under the rules peculiar to municipal corporations stated in *Tindley v. Salem*, 137 Mass. 171, and *Hill v. Boston*, 122 Mass. 344; and that therefore a mere statutory agent, without property, intervening between the city and the actual wrongdoer, was also free from liability.

The latter ground has no application here. There is no pretense that the defendant is acting as an agent for the city. We think that there is equally little ground for calling it a charitable corporation. Assuming, for the sake of argument, that it would have no right to declare dividends to its members in case of realizing profits, there is nothing in the charter which compels the application of any part of its funds to charitable uses. It would be acting strictly within its powers if it sold all its lands for full price. The purpose of the charter is to secure permanent care of graves, and such advantages to the persons interested as may be deemed incident to burial in such a cemetery. The beneficiaries are a definite number of persons clearly pointed out by law. Stat. 1841, chap. 114, §§ 4, 5; *Old South Soc. v. Crocker*, 119 Mass. 1, 28. See *Evergreen Cemetery Assn. v. Beecher*, 2 West. Rep. 308, 53 Conn. 551; *Re Deaneville Cemetery Assn.* 66 N. Y. 569.

The provision in Stat. 1841, chap. 114, § 8, that all the real and personal estate of the corporation "shall be applied exclusively to purposes connected with, and appropriate to, the objects of such organization," does not mean to exempt its property—and thus the corporation—from ordinary civil liabilities. There is a similar restriction, expressed or implied, in the case of a railroad. The fact that the funds received were actually applied, to a considerable extent, in charity, is no more material than evidence of a similar application of a part of his income by a private citizen would be in a suit against him.

Judgment for plaintiff.

Charles ROBINSON *et al.*, Admrs.,

v.

George W. SIMMONS *et al.*

1. As a general rule, where a surviving partner continues to use the capital of a deceased partner in the business, the representatives of the latter, in the absence of any agreement to the contrary, have the election either to demand interest on the capital used or the profits earned by its use. There is, however, no inflexible rule governing all cases, but each case depends upon its own circumstances and equities.
2. In such case, where the profits are divided, they should (where there are no circumstances which render the application of the rule inequitable) be divided according to the capital, after deducting such share of the profits as is attributable to the skill and services of the surviving partner.
3. The withdrawal, by the representa-

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tives of the deceased partner, of any part of their capital, will diminish *pro tanto* the proportion of the profits to which they are entitled.

4. Amounts applied by the surviving partner, in good faith, in payment of debts of the deceased partner,—*Held*, to go in reduction of the capital of the deceased partner on which his representatives were entitled to profits.

5. The effect of an agreement by the widow and certain of the heirs of the deceased partner to let their shares in the deceased partner's interest in the firm remain in the business of the succeeding new firm—composed of the surviving partners—at interest, is to change the amount of the widow's and such heirs' shares from capital to a debt of the new firm, and to transfer the same amount of capital to the credit of the surviving partner.

6. Where the surviving partner had paid certain of the heirs of the deceased partner nearly all the share in his capital to which such heirs were entitled, and was willing to pay them all to which they were entitled, and litigation arose in reference thereto, for which such heirs were largely responsible,—*Held*, that, under the circumstances of the case, the surviving partner should not be compelled to pay such heirs the profits attributable to their nominal capital remaining in the business subsequent to such payment, but that interest thereon was all that was equitably called for.

7. Where suit was brought by the administrator of the deceased partner, against the surviving partner, to settle the balance due the heirs of the deceased partner from the firm,—*Held*, that a decree for the payment to such heirs of the balance found due them (all persons interested being parties to the suit) was proper, and that it was not necessary to compel the surviving partner to pay to the administrator the whole amount originally due the decedent's estate, the greater part of which would be immediately repayable to such survivor.

(Suffolk—Filed February 29, 1888.)

CASE reserved on the pleadings and master's report for the consideration of the whole court. *Recommended.*

The facts are sufficiently stated in the opinion of the court.

Mr. Robert M. Morse, Jr., for plaintiffs:

The surviving partner is bound to wind up the partnership, and ordinarily to make sale of all the personal assets, and, not only to pay the debts of the firm, but to distribute to the representatives of the deceased partner the share to which they may be entitled. This duty of the surviving partner may not be strictly that of a trustee, but it is analogous; and he is not allowed to derive a distinct and independent personal advantage, either directly or indirectly, from the use of the partnership as-

sets, but he must manage and dispose of them with a single eye to the advantage of the partnership estate which he is to administer.

Bowen v. Richardson, 133 Mass. 293; *Freeman v. Freeman*, 136 Mass. 260; *Emerson v. Senter*, 118 U. S. 8 (30 L. ed. 51).

"In ascertaining the share of the deceased, the surviving partners must not only bring into account the assets of the firm which actually existed at the time of his death, but also whatever has been obtained by the employment of these assets up to the time of the closing of the account; for, so long as profits are made by the employment of the capital of the deceased partner, so long must such profits be accounted for by the surviving partners."

2 Lind. Partn. 1046; *Crawshaw v. Collins*, 15 Ves. Jr. 218; *Yates v. Finn*, L. R. 13 Ch. Div. 889; *Washburn v. Goodman*, 17 Pick. 519; *Townend v. Townend*, 1 Giff. Ch. 201; *Goodburn v. Stevens*, 1 Md. Ch. 420; *S. C.* 5 Gill. 1; *Brown's App.* 89 Pa. 139; *Forrester v. Oliver*, 1 Bradw. 259; *Skidmore v. Collier*, 8 Hun, 50; *Cook v. Collingridge*, Jac. 607.

Defendants cannot discharge themselves from their liability for the amount of capital which they took, except by a payment to the administrator.

The knowledge of the defendant Simmons will not be imputed to the administrator.

Innerarity v. Merchants Nat. Bank, 139 Mass. 332.

Surviving partners are not entitled to compensation.

Dunlap v. Watson, 124 Mass. 305; *Beatty v. Wray*, 19 Pa. 516; *Brown v. McFarland*, 41 Pa. 129; *Washburn v. Goodman*, and *Brown's App.*, *supra*.

It has been allowed only in exceptional cases, as, e. g., where the surviving partner, with the consent of the representative of the deceased partner, carried on the business of completing important contracts with the government during the war for the manufacture of cannon under patents (*Schenkl v. Dana*, 118 Mass. 236); where the surviving partner carried on the business under a claim of right to buy the business by the terms of the partnership agreement (*Yates v. Finn*, L. R. 13 Ch. Div. 839); where at the time of the death of the deceased partner the firm was insolvent, and was rendered solvent by the credit and connections of the surviving partners (*Wedderburn v. Wedderburn*, 2 Keen, 722; 4 Myl. & C. 41; 22 Beav. 84).

The fact that the defendant Simmons is administrator, and as such entitled to compensation, is a sufficient reason why no compensation should be allowed him as surviving partner.

Heathcote v. Hulme, 1 Jac. & W. 122.

Mr. Warren K. Blodgett, Jr., for defendants Virginia A. Beals and Edith W. Beals:

It was the duty of the surviving partners, upon the death of George W. Simmons, to wind up the business. They were trustees for that purpose. Continuance of the business was a breach of trust.

The court will compel the defendants, so long as they continue the business without liquidation, to account to the administrators for the whole capital of the intestate estate thus wrongfully used by those defendants, and for its proportionate share of the profits. And defendants Simmons and Spofford will not be allowed

compensation for their services in thus wrongfully continuing a trust business for the purpose of appropriating it to their own use.

Burden v. Burden, 1 Ves. & B. 170; *Crawshaw v. Collins*, 15 Ves. Jr. 218; 1 Jac. & W. 267; 2 Russ. 325; *Yates v. Finn*, L. R. 13 Ch. Div. 839.

It is important, in considering this question, to bear in mind the distinction between the above cases,—which are on all fours with the case at bar,—and those cases in which the surviving partners had, by agreement or otherwise, a right to continue the partnership business, as—

Brown v. De Tastet, 1 Jac. 284; *Cook v. Collingridge*, Id. 607; *Wedderburn v. Wedderburn*, 2 Keen, 722; 4 Myl. & C. 41; 22 Beav. 84; *Willett v. Blanford*, 1 Hare, 253; *Simpson v. Chapman*, 4 De G. M. & G. 154; *Vyae v. Foster*, L. R. 8 Ch. App. Cas. 809; *S. C. L. R.* 7 H. L. Cas. 818; *Schenkl v. Dana*, 118 Mass. 236; *Freeman v. Freeman*, 136 Mass. 260; *S. C.* 2 New Eng. Rep. 520, 142 Mass. 98.

Messrs. W. G. Russell and J. O. Teale, for defendants George W. Simmons *et al.*:

Any act done by Simmons in the course of administration in August or September, 1883, was rendered valid by his appointment as administrator in November, 1883.

Alvord v. Marsh, 12 Allen, 603. See *Hatch v. Proctor*, 102 Mass. 351.

It is the duty of the administrator to get in the assets of the estate with reasonable diligence, and particularly that portion of the assets which is exposed to the risks of trade.

Wms. Exrs. 6th Am. ed. p. [986].

It is the right of the administrator, at any time when he may safely do so, to make a partial distribution among those entitled. Although he may insist upon an order of distribution for his own protection, it is no part of his duty to wait for such an order; and, as a matter of practice, the accounts of administrators are usually settled without such order being made.

Pub. Stat. chap. 136, §§ 20, 21; *Smith*, Prob. L. 255.

It is hardly necessary to say that it is the right of each administrator to receive and hold and administer the assets.

McKim v. Aulbach, 130 Mass. 481; *George v. Baker*, 3 Allen, 326, note; Wms. Exrs. p. [950].

The transactions of August 27, 1883, amount, then, simply to a partial collection and distribution of the assets of the estate through legal and proper channels. An executor *de son tort* may show, in mitigation of damages, that he has made payments in rightful course of administration.

Wms. Exrs. p. [270]; Pub. Stat. chap. 132, § 18. See also *King v. Bangs*, 130 Mass. 514; *Perry v. Chandler*, 2 Cush. 287.

The assent of the *cestuis que trust* can be shown in defense of an action against a trustee for a breach of trust; and where some have assented and others have not, the assent is a defense *pro tanto*.

Blake v. Pegram, 109 Mass. 541; *Lewin*, Tr. 5th Eng. ed. p. 918; *Vyae v. Foster*, L. R. 8 Ch. 309.

A court of equity can look behind the nominal parties, to the real parties in interest. This can be done even at law.

See *Shurtliff v. Ferry*, 138 Mass. 259; *Stearns*

v. *Palmer*, 15 Gray, 505; *Poole v. Munday*, 108 Mass. 174.

The rents collected belonged to the heirs, and were not assets of the estate.

Towle v. Swasey, 106 Mass. 100.

As to the rule for determining the liability of the surviving partners, by reason of their use of the capital of the deceased, see—

Romilly, M. R., in *Wedderburn v. Wedderburn*, 22 Beav. 101. See also 2 Lind. Partn. 990, note; *Id.* 4th Eng. ed. p. 980; *Crawshay v. Collins*, 15 Ves. Jr. 218; 1 Jac. & W. 267; 2 Russ. 325; *Cook v. Collingridge*, 1 Jac. 607; *Brown v. De Tastet*, 1 Jac. 284; *Willet v. Blanford*, 1 Hare, 258; *Simpson v. Chapman*, 4 De G. M. & G. 154; *Wedderburn v. Wedderburn*, 2 Keen, 722; 4 Myl. & C. 41; 22 Beav. 84; *Yates v. Fynn*, L. R. 18 Ch. Div. 839; *MacDonald v. Richardson*, 1 Giff. Ch. 81; *Townend v. Townend*, *Id.* 201; *Flockton v. Bunning*, L. R. 8 Ch. App. Cas. 323, note; *Freeman v. Freeman*, 136 Mass. 260; *S. C.* 2 New Eng. Rep. 520, 142 Mass. 98.

The whole profit made since the death of Simmons, senior, cannot be attributed solely to the capital employed in the business, when the services of the continuing parties contributed so obviously to the general result.

Schenkl v. Dana, 118 Mass. 236.

Morton, Ch. J., delivered the opinion of the court:

George W. Simmons died intestate on December 14, 1882, leaving a widow and seven children. He was a member of the firm of G. W. Simmons & Son, in which his son G. W. Simmons, Jr., and Phillip A. Spofford, were his partners. Immediately upon his death the two surviving partners formed a new firm under the name of G. W. Simmons & Co., and continued the business at the same place, using the capital and stock in trade of the old firm. Owing to a disagreement between the heirs, administration was not taken out until November, 1883, when the plaintiff and the defendant Simmons were appointed administrators. In the mean time, the defendant Simmons had paid debts of his father, to a large amount, out of the property in the hands of the surviving partners; the widow and three of the children had on September 1, 1883, made an agreement that their respective shares in the interest of the intestate "in the firm of G. W. Simmons & Son, Oak Hall, shall remain in the business as at present conducted by" the surviving partners, at interest at the rate of 7 per cent per year; and on August 25, 1883, the defendant Simmons had paid to the other three children \$20,000, to be accounted for in settlement of the estate of the intestate on account of their respective shares in his interest in the firm of G. W. Simmons & Son. The surviving partners continued the business, using the capital of the intestate, with the consent and approval of the widow and the three children first above named; the other three children, being the married daughters, never gave any such consent, but objected thereto. The suit was originally brought by two of the administrators against the surviving partners; but by amendment the widow and all the children of the intestate, and the representatives of a deceased child, were made parties defendant.

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The only controversy is between the three married daughters and the surviving partners, the ultimate object of the suit being to recover the share, to which they are respectively entitled, of the profits of the business since the death of the intestate.

There is nothing in the case to show any want of fairness or good faith in the conduct of the surviving partners; but the master has found that the interest of the intestate was of such a character that the only way to realize its fair or substantial value was to deal with it as the defendants did, and "that the manner in which the defendants dealt with the full stock was necessary in order to obtain its full value."

The master found that, upon the death of the intestate, the capital standing to his credit was \$66,480.10; that to the credit of the surviving partners \$14,787.88,—making the whole capital \$81,267.48.

This is an outline of the principal facts in the case, and upon them the master reserved, for the decision of this court, the rule for the measure of the liability of the surviving partners.

If the accounts could have been settled at the death of the intestate, his representatives would have been entitled to receive the above-named amount of capital standing to his credit. As we have seen, this was impracticable; and the surviving partners continued the business, using the capital of the intestate, with the consent of those who represented five sevenths of his interest, and under the objections of the three dissenting heirs who represented two sevenths.

As a general rule, where a surviving partner continues to use the capital of a deceased partner in the business, the representatives of the latter, in the absence of any agreement to the contrary, have the election either to demand interest on the capital used or the profits earned by its use; the latter being accretions to the fund owned by them. There is, however, no inflexible rule governing all cases, but each case depends upon its own circumstances and equities.

The plaintiffs contend that, in this case, the rule should be that the profits accruing after the death of the intestate should be divided according to the amount of capital which each partner or person interested had in the business, and that no compensation or allowance should be made to the surviving partners for their services and skill in conducting the business. We do not think that this rule is supported by the authorities, or is just, applied to this case. It finds some support in *Crawshay v. Collins*, 15 Ves. Jr. 218; 1 Jac. & W. 267; 2 Russ. 325. This case, which was before Lord Eldon at intervals for eighteen years, was a suit by an assignee of a bankrupt against the continuing partners of the firm of which he was a member. The assignee was held to be entitled to three eighths of the profits accruing after the bankruptcy, that being the proportion of the bankrupt's capital and profits in the business; but a just allowance was made for the services of the continuing partners. The case has been much commented on in later cases, and it has never been regarded as establishing an inflexible rule applicable to all cases. Indeed, in this case Lord Eldon says: "The

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rule which is to be applied must be deduced in almost every case from the particular circumstances of that very case;" and he fully recognized the justice of making allowance for the skill and services of the surviving partners.

The later English authorities regard this as the effect of *Lord Eldon's* decisions in the various stages of *Crawshay v. Collins, supra*; *Brown v. De Tastet*, 1 Jac. 284; *Cook v. Collingridge*, Id. 607; *Wedderburn v. Wedderburn*, 2 Keen, 722; 4 Myl. & C. 1888; 22 Beav. 84; *Willett v. Blanford*, 1 Hare, 253; *Yates v. Finn*, L. R. 13 Ch. Div. 839.

In most of these cases the rule applied was that the profits should be divided according to the capital after making allowance for profits earned by the personal activity, attention to business, skill, and services of the surviving partners, though in *Wedderburn v. Wedderburn* the representatives of the deceased partner were held to be entitled to interest at the rate of 5 per cent on their capital, instead of a share of the profits. We think a just rule to be deduced from the authorities is that, where there are no circumstances which render its application inequitable, the profits should be divided according to the capital after deducting such share of them as is attributable to the skill and services of the surviving partner.

When his good faith and fairness are not impeached, the most that the representatives of the deceased partner can justly demand is that he should account to them for their capital, and, in addition, for whatever it has earned. This involves the necessity of inquiring how much of the profits is attributable to the services and skill of the surviving partners, and how much to the capital invested in the business. The latter portion of the profits shows what the capital has earned, and should rightfully be divided among the owners of the capital in proportion to their shares of the capital. It is clear that, in applying this rule, any withdrawal or subtraction, by the representatives of the deceased partner, of any part of their capital, would diminish *pro tanto* the proportion of the profits to which they are entitled. *Willett v. Blanford, supra*.

In the case at bar, as we have said, there is nothing to impeach the good faith or fairness of the surviving partners. The defendant Simmons, who is the principal surviving partner, upon the death of his father was placed in a very difficult and embarrassing position. A large amount of property belonging to his father was invested in the business. Owing to a quarrel among the heirs, no administrators were appointed for nearly a year. There was no one with any power to close up the business, either by a sale of the interest of the intestate or otherwise; a majority of the heirs in number and amount desired him to continue the business. It is difficult to see how he could have done better than he did; he appears to have acted with due regard to the interests of all concerned, and no rule of a punitive character could justly be applied in the case. We think the rule of division of profits we have stated above will work out substantial justice to all parties for that period of time when the surviving partners employed the whole or the principal part of the capital of the intestate as the basis of their

business; that is, up to August 27, 1883. In applying the rule, some questions arise as to the amount of the capital belonging to the plaintiffs which was from time to time embarked in the business and thus earning profits.

Among the individual debts of the intestate was a subscription of \$5,000 to the stock of a corporation recently established in Ballardvale, and a note of \$18,000 secured by a mortgage of real estate at Ballardvale. It was for some reason deemed necessary that these should be promptly paid, and the widow and all the heirs agreed in writing that the defendant Simmons should pay them out of any personal assets of the intestate. Accordingly, on May 4, 1888, he paid the subscription out of the assets of the new firm, and charged his father's account with the amount. The facts found by the master show that this was the only means he had of paying this debt. At one time he intended to apply to this debt the proceeds of the fifteen St. Paul & Sioux City bonds mentioned in the report; but the proceeds of these bonds were not in fact received in time to pay this debt. He could only carry out the wishes of all the interested parties by paying it as he did out of the property of the estate in the hands of the new firm. Such payment had the effect in law which it had in fact,—of reducing the capital of the intestate in use in the new firm. We think the same rule should apply to the other debts in good faith paid by the defendant Simmons, and charged to his father's account; and that, after applying to such payments the amounts received by him for rents and used in making such payments, the balance should go in reduction of the capital of the intestate in use in the new firm. After the death of the intestate, the surviving partners were desirous of paying, as soon as could be, the amount of the capital which he left in the business. As we have seen, delay occurred in appointing administrators, and on August 25, 1888, the defendant paid to the three dissenting heirs the sum of \$20,000, which, in the words of the receipt signed by them, was "to be accounted for in settlement of the estate of George W. Simmons, deceased, as received on account of our respective shares in his interest in the firm of George W. Simmons & Son, and which to that extent shall be a discharge of the liability of the surviving partners to us as heirs of said deceased, directly or through administrators." There can be no doubt that this was, in intention and effect, a withdrawal by the three dissenting heirs of \$20,000 of their share of the capital. The only question is as to the mode in which this payment should be applied. It seems to us that the just mode is to ascertain what was the interest of the dissenting heirs at the time the payment was made, both in capital and accumulated profits which are attributable to capital, and from this amount to deduct the payment. The balance will represent the amount of their capital which continues in the firm, and for the use of which they are entitled to compensation. In ascertaining the amount of profits in this computation, there should be deducted from the gross profits that share which is attributable to the services and skill of the surviving partners, which we understand the master finds to be 40 per cent, and the balance should be divided

according to the respective shares of the parties in the capital.

It also appears that on September 1, 1888, the surviving partners made an arrangement with the widow and three of the children, by which they agreed that their respective shares in the interest of the deceased in the firm of G. W. Simmons & Son, should remain in the business of the new firm at an interest of 7 per cent per annum. The effect of this was to change the amount of their shares, so far as they were concerned, from capital to a debt of the new firm, and to transfer the same amount of the capital to the credit of the surviving partners. The widow and three children who signed it and the defendant Simmons were entitled to five sevenths of the estate of the intestate, and the result of this arrangement, therefore, was that the surviving partners became the owners of the whole of the capital except the small balance due to the dissenting heirs. As we have before intimated, the principles we have discussed should be applied in ascertaining how much was due to the dissenting children on August 27, 1888. But, as we have seen, at that time a material change occurred in the circumstances and the relations of the parties, which justifies and requires the application of a different rule for the future. The surviving partners then, evidently as parts of the same scheme or purpose of relieving themselves of the responsibility of the care of the property of the intestate, which was forced upon them, virtually paid to the widow and four of the heirs the amount of their shares of the estate of the intestate, and also paid to the three dissenting heirs \$20,000 on account of their shares. This is more than the amount of their original shares, with interest; but, upon applying the rule we have adopted, it is less than the amount they were entitled to at the time of the payment. The parties differed as to the basis upon which the accounts should be settled. The facts show that the surviving partners were willing to pay all that the heirs were entitled to; that they offered to have the books and accounts examined by any impartial expert to be named by the dissenting heirs; that they offered to have the amount determined by arbitration; and that they were, when the administrators were appointed, active in urging and procuring the bringing of this suit as the only means of fixing the amount of their liability. It also appears that the business of the new firm was prosperous and its profits very large; the surviving partners were anxious to pay what they justly owed the heirs; and it is not an unfair inference that the payment of this amount by the firm would not in any measure cripple its resources or injure its business. It is difficult to believe that the retention or withdrawal of this comparatively small amount would, in any considerable degree, affect the volume of business or the amount of the profits.

Under these circumstances it would be inequitable to apply the rule of the division of the future profits according to the nominal capital. It would be unjust to the surviving partners, as it would compel them to work for the benefit of a compulsory partner, against their wishes, and to bear the most of the burden of a protracted litigation for which the dissent-

ing heirs are at least equally to blame. It would give the latter more than they are fairly entitled to as the earnings or income of the debt which is due them, and swell unjustly the amount they receive from their father's estate. We are therefore of opinion that, unless the parties can agree, the case should be recommitted to the master, to ascertain the balance due to the three dissenting heirs after the payment of August 25, 1888, upon the principles we have stated; and that thereafter the surviving partners should pay interest upon such balance at the rate of 7 per cent per year. We adopt this rate of interest, because the defendants, at the time of the payment in August, fixed this as the worth to them of the capital retained.

A question remains as to the payment by the defendant Simmons of the Ballardvale mortgage above referred to. This payment was not made until after August 25, 1888, and cannot therefore be applied in reduction of the capital of the intestate before that day, in determining the amount due to the dissenting heirs on that day. But it was made by virtue of an agreement with all the heirs. The dissenting heirs were responsible for two sevenths of it, and we think that, when paid, two sevenths of the amount should be charged to them in diminution of the amount then found to be due them.

The plaintiffs contend that this suit is to be treated as simply a suit between the administrators and the surviving partners, and that the latter should be decreed to pay to the former the whole amount of the accrued profits, without any regard to their payments to and agreements with the heirs, leaving the sum so paid to be distributed in the probate court. We do not think this is necessary or just. All the persons interested are parties to this suit. None have any controversy with the surviving partners, except the three dissenting heirs; and the object of the suit is to determine the amount to which they are entitled. This being determined and paid, either directly or through the administrators, the object of the suit is accomplished, and the rights of all parties are protected. The amount, if paid to the administrators, would be for the sole benefit of these three heirs; no one else would have any claim upon it; and it is to be assumed that the probate court would order its distribution and payment to them. There would be no conflict between the two courts, and no mandatory order to the probate court. The decree would operate personally upon all the parties, and, by its force, would enable the dissenting children to receive the amount they are entitled to. There is no necessity of going through the form of ordering the surviving partners to pay a large sum to the administrators, which must be immediately repaid to them.

Case recommitted.

Sarah L. BROOKS *et al.*, *Appts.*
v.

Charles F. ALLEN *et al.*

1. Where the guaranty of a lease is forged, the lessors, on discovery of the fraud, may treat the lease as invalid.

2. **Notice to quit** for nonpayment of rent is not a rescission of the lease.
3. The rescission of a lease to an **individual** will not relate back, so as to make the **firm** of which the lessee was member **liable for use and occupation** prior to the time of such rescission.
4. The contract of a **firm** for rent will not be implied from **use and occupation**, where the same are had under an express contract with an individual member of the firm.

(Suffolk—Filed February 20, 1888.)

ON appeal from a decree of the Superior Court dismissing an appeal from the Court of Insolvency heard on an agreed statement of facts. *Affirmed.*

The appellants being owners of a store in Boston, on the 21st day of January, 1885, made a lease thereof, in writing and under seal, to the defendant Allen, who was at the time occupying said premises under a prior lease. Allen agreed to have the lease granted by one Ralph W. Allen. The lease was in the form of an indenture of two parts, which, duly prepared, were delivered to the defendant Allen, who undertook to execute them and to procure the aforesaid guaranty, and, in accordance with said undertaking, returned and delivered to appellants one part duly executed by himself, and bearing a name affixed to a contract of guaranty written at the end of said lease, purporting to be the signature of said Ralph W. Allen.

On the 1st day of February, 1885, said Allen, defendant, took into partnership the defendant Dennan, and henceforward the said premises were occupied by the defendants under the firm name and style of Allen, Dennan, & Co., which fact was known to the appellants. The bills for rent continued to be made to Allen, and the present appellants took no step looking to a recognition of the firm of Allen, Dennan, & Co., as their tenants.

On the 7th day of December, 1885, the rent being in arrears to the amount of \$334.71, the appellants served on defendant Allen a notice to quit, for nonpayment of rent, within fourteen days from date; on said December 7, appellants were notified, by a son of Ralph W. Allen, that that which purported to be his signature upon said lease was a forgery. The fact of the forgery is admitted.

On December 17, 1885, the defendant Dennan petitioned himself and the said firm into insolvency; the appellants claimed to prove against said firm for the arrears of rent, but their claim was disallowed against the separate estate of the defendant Allen, who has never gone into insolvency.

The rent claimed by the appellants in this proceeding all accrued while said premises were occupied by the firm of Allen, Dennan, & Co.

Mr. Frederic Cunningham, for appellants:

A party to a contract, who has been induced by a fraud of the other party to enter into it, may, upon discovery of the fraud, if he so elect, rescind the contract.

Nealon v. Henry, 181 Mass. 153; *Leake*, Cont. 1st Eng. ed. 193.

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The right to rescind applies to specialties.

Bigelow, Fr. p. 407; *Ballou v. Billings*, 136 Mass. 308.

This was in the nature of a divisible contract, and could thereafter be rescinded in part. That part only may be taken, on the facts, to have been rescinded, which the defendant Allen failed to carry out,—that is, the contract was rescinded from the time when Allen failed to pay the rent.

Montgomery v. Pickering, 116 Mass. 227; 2 Pars. Cont. 7th ed. 64, 80, 780.

The contract was rescinded immediately upon the discovery of the fraud, by the notice to quit, which answered the double purpose of rescinding the contract and laying the foundation for ejectment proceedings, if they became necessary. But if the notice to quit was not a sufficient rescission, the letting of the premises anew constituted a rescission.

Bigelow, Fr. 405, 406.

The notice was in no sense an affirmation of the contract; on the contrary, it was a notice to quit and deliver up the premises in noncompliance with the contract.

Dorrell v. Johnson, 17 Pick. 263.

It being established that the plaintiffs had a right to rescind the lease, and that their acts constituted a rescission, the parties to it are in the same position as if it had never existed.

Ballou v. Billings, 136 Mass. 309; *Leake*, Cont. 1st Eng. ed. 195; *Ecans v. Reed*, 5 Gray, 308; *Merrill v. Bullock*, 105 Mass. 486, 491; *Kinsley v. Ames*, 2 Met. 29; *Taylor, Land & T.* §§ 19, 65.

The acceptance of rent after the date to which the rescission of the lease relates back did not, however, constitute the firm tenants at will; for at the time of such acceptance the plaintiff had not discovered the fraud, and therefore the law would not imply an intention to create such a tenancy.

The case of *Browning v. Haskill*, 22 Pick. 310, shows that, if a lease is obtained by fraud, the lessor may avoid it and recover against the lessee upon a count for use and occupation. If, then, a count for use and occupation would lie against the firm, the appellants are entitled to prove their claim against the firm in insolvency.

Messrs. Prince & Alexander and **William F. Slocum**, for appellees:

These appellants have no right of appeal according to statute, their claim having been allowed against the estate of Allen, and the proof never having been expunged or the proceedings thereunder vacated.

Pub. Stat. chap. 157, § 36.

The claim here presented for the consideration of the court cannot be maintained against the estate of the insolvent firm.

It is clearly and emphatically a claim for rent; it is, in express and explicit terms, for "arrears of rent," for "rent claimed by the appellants," for a sum fixed and certain.

Now there having been no privity, no contract, no letting or lease, between appellants and the firm, now insolvent, the estate of the latter cannot be liable to the former for rent.

Para. Partn. 2d ed. 487; *Collyer*, *Partn.* *Perkins's* ed. p. 480, § 526; *Allen v. Thayer*, 17 Mass. 299-301; *Hoby v. Roebuck*, 7 Taunt. 157.

The proper form of claim, if any, for appel-

lants to present against the estate of said firm, would be for "use and occupation,"—defined to be "for the recovery of a reasonable compensation for the use of premises where there is no demise by deed, or where no certain rent is reserved."

Codman v. Jenkins, 14 Mass. 98-95; *Warren v. Ferdinand*, 9 Allen, 857; *Smiley v. McLauthlin*, 188 Mass. 863.

The lease—Brooks to Allen—was clearly voidable at lessors' option by reason of fraud of the lessee. That lessors did not exercise that option and avoid the lease is also clear.

Lessor was notified of the forgery December 7, 1885; they rented the premises anew January 1, 1886.

Between these dates the lessors did absolutely nothing in the matter beyond sending to their tenant, Allen, on said December 7, a notice to quit within fourteen days from date, for non-payment of rent.

Said notice must have been one of two things; either, according to appellants' view, it was an avoidance of the lease for fraud, or—the rational view—it was the usual notice from landlord to tenant to quit because his rent is in arrears, the statutory method for determining a lease in case of nonpayment of rent.

Said notice recognized the existing tenancy of Allen; it in no way disaffirmed the lease, but rather affirmed it by inference. Allen was, in fact, a tenant of appellants under the lease until December 21, 1885, fourteen days from said December 7, at which time, his rent still remaining unpaid, his tenancy came to an end by virtue of said notice.

Pub. Stat. chap. 121, § 11.

Notice to quit is, in itself, a virtual acknowledgment of an existing relation of landlord and tenant; where there is not this relation, notice to quit is at least unnecessary.

Brune v. Prideaux, 10 East, 165.

If, then, the lease was not avoided by lessors, it remained in force, and no claim for use and occupation can be maintained against the estate of the insolvent firm.

If the court be of opinion that the said lease was properly avoided, still no claim for use and occupation against the estate of the insolvent firm can be maintained.

This action, namely, that for the use and occupation, is founded on contract; and unless there be a contract, express or implied, between the parties, it cannot be maintained.

Allen v. Thayer, *supra*; *Leonard v. Kingman*, 186 Mass. 123; *Wales v. Chase*, 139 Mass. 538-542; 2 Chitty, Pl. p. 181.

There is no evidence of such contract between these appellants and the said firm.

When there is no evidence of a demise to defendant, there must be evidence that he held by permission of plaintiffs, and on express or implied terms of payment for occupancy.

Levy v. Lewis, 9 C. B. N. S. 872-879.

This action,—i. e., use and occupation,—requires evidence of occupation by permission of, and under contract with, plaintiff.

Churchward v. Ford, 2 Hurlst. & N. 446; *Sloper v. Saunders*, 29 L. J. Exch. 275.

A presumption in favor of a contract, arising from ownership on the one hand and occupancy on the other, may be destroyed by any evidence negating a contract.

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Camden v. Batterbury, 28 L. J. C. P. 835.

The firm was not a tenant at sufferance; lessors already had a tenant in the person of Allen, their lessee.

If the said firm was in as a trespasser, the appellants cannot waive the tort and proceed for use and occupation.

Tew v. Jones, 18 Mees. & W. 12.

The agreed statement does not show any contract, express or implied, between the appellants and the firm of Allen, Dennan, & Co., whereby the latter became bound to pay the former either rent or for use and occupation; nor, as a matter of law, is there any necessary inference from the facts stated that there was any such contract; and, unless as matter of law such a contract is a necessary inference from the facts stated, the court cannot infer that there was one.

Mayhew v. Duffee, 138 Mass. 584, 585.

So, also, as to whether the appellants revoked the lease to Allen on the ground of his fraud. It does not appear from the agreed statement that they did, nor, as matter of law, is it a necessary inference from the facts stated.

C. Allen, J., delivered the opinion of the court:

According to the understanding of all parties, the rent was to be paid by Allen, alone, and not by the firm. There could be no pretense for holding the firm, but for the fraud in respect to the guaranty of the rent. This fraud was practiced by Allen alone, before the time when Dennan became his partner. There is nothing to show that Dennan had any more reason to suspect this fraud than the lessors had. The lessors relied only on Allen and on his supposed guarantor, for the rent. Upon discovery of the fraud, they were entitled to treat the lease as invalid; or, at their option, they might treat it as valid. The lease was voidable; valid till avoided. The notice to quit for nonpayment of rent was no rescission of the lease, and if it were it did not take effect till after fourteen days. There was no rescission of the lease till after the firm was in insolvency. Now, however it might be with regard to Allen alone, a rescission of the lease cannot relate back so as to make the firm liable for the use and occupation of the store prior to the time of such rescission. There was no express contract binding the firm; and there was no ratified contract arising from the use and occupation, because the use and occupation were under an express contract with Allen. If the lessors were deceived and misled by Allen, that does not show an implied promise on the part of Dennan or of the firm, until the happening of something further. Prior to the rescission, the firm was not liable, because their use and occupation was by virtue of the lease to Allen, which was still in force. After the rescission, the firm was not liable, because it no longer occupied the store; and the rescission did not have the effect to make it liable for past use and occupation enjoyed under a special contract or lease by which Allen promised to pay the rent. *Leonard v. Kingman*, 186 Mass. 123; *Earls v. Coburn*, 180 Mass. 596; *Massachusetts Gen. Hosp. v. Fairbanks*, 129 Mass. 81; *Central Mills Co. v. Hart*, 124 Mass.

125; *Hills v. Snell*, 104 Mass. 177; *Boston v. Binney*, 11 Pick. 1.

The result is that the claim was properly disallowed against the estate of the firm; and this is the only question before us. In respect to this, therefore, the entry must be—

Decree of Judge of Insolvency affirmed.

John J. ROSENBERG

John DOE.

1. It is not essential to the validity of a release, under U. S. Rev. Stat. § 4552, executed by a shipmaster and seaman before a shipping commissioner, that it should be under seal.
2. If the execution of such release before the shipping commissioner, and his signature and attestation, are established, the absence of his seal (provided for by U. S. Rev. Stat. 4506) to authenticate his act, does not deprive the release of its effect.
3. When such instrument follows the words of the statute, it has, at least, the effect of a release under seal, irrespective of any question of consideration.
4. Such a release, if executed and attested as required by the statute, and without fraud or coercion, is conclusive upon the parties; and one who has signed such release cannot deny the effect of his assent, imported by his signing, on the ground of an undisclosed state of his mind, for which no one else was responsible.
5. The common law makes no exception to the above principles in favor of seamen.

(Suffolk—Filed February 29, 1888.)

ON defendant's exceptions. *Sustained.*

The action was one of contract, brought by a seaman against the master of a vessel to recover a balance of wages alleged to be due.

The jury returned a verdict for plaintiff, and defendant alleged exceptions to instructions and refusals to instruct.

Further facts appear in the opinion of the court.

Mr. Frederic Cunningham, for defendant:

It is not enough for the plaintiff to show, in order to make out fraud, that he did not know what he was signing, or that he thought that it was something different, or that the commissioner did not inform him what it was, or that he supposed, from what the commissioner said, that the release was something different from what it was; he must show that the commissioner, with a purpose to deceive him and induce him to sign, knowingly, or recklessly, in ignorance, represented to him that what he was signing was not—what it in fact was—a release which would act as a conclusive bar to any future claim.

Grinnell, Deceit, § 87.

A misrepresentation of law is no ground for avoiding a release.

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Upton v. Tribilcock, 91 U. S. 50 (23 L. ed. 205).

In the absence of fraud or imposition, one who enters into a release under seal is conclusively presumed to understand the terms and legal effects of it, and to assent to them.

Jackson v. Olney, 1 New Eng. Rep. 885, 140 Mass. 195; *Leddy v. Barney*, 189 Mass. 896; *Upton v. Tribilcock*, 91 U. S. 45 (23 L. ed. 203).

It is true that this was not a release under seal, but it is one executed with even greater formalities than a release under seal; is made before the shipping commissioner, attested by him, and kept on record by him; that it should be accorded the same weight as a release under seal is evident from an inspection of the statute. U. S. Rev. Stat. § 4552.

Even in admiralty, a release signed before an official—as, for instance, a consul—is held to be conclusive.

Lamb v. Briard, Abb. Adm. 367, 371.

Mr. J. M. Browne, for plaintiff:

The release did not bear the official seal of the commissioner, as required by law.

U. S. Rev. Stat. 4506.

Not being under seal, it cannot be termed a release.

Thomas v. Lane, 2 Sumn. 11.

The alleged "release" must be construed as a common receipt, and good for only the sum actually paid the plaintiff.

Lathrop v. Page, 129 Mass. 19, and cases cited; *The Galloway C. Morris*, 2 Abb. U. S. 164; *Bennett v. Flanagan*, 54 Vt. 549; *Harden v. Gordon*, 2 Mason, 562; *Kidder v. Kidder*, 33 Pa. 269; *Bemis v. Hoesely*, 16 Gray, 63; *Harriman v. Harriman*, 12 Gray, 841.

The alleged release "was not read to the plaintiff by the commissioner, nor its legal effect explained to him;" and plaintiff testified that he did not know the contents of the release when he signed it, and did so thinking it was a mere receipt for the money actually received; that the commissioner told him to sign it, and that he could go to the master afterwards; and plaintiff understood the "English language very imperfectly."

Under such circumstances, even if it be conceded that the instrument is upon its face a release, the instructions of the court to the jury were correct.

Small v. Sumner, 6 Gray, 239; *Curley v. Harris*, 11 Allen, 122; *Caldwell v. Gillis*, 2 Port (Ala.) 526; *Solomon R. Co. v. Jones*, 34 Kan. 455.

Holmes, J., delivered the opinion of the court:

This is an action by a seaman against the master of a vessel, to recover a balance of wages alleged to be due. The defendant denies the liability, and also sets up a release, executed before a shipping commissioner, under U. S. Rev. Stat. § 4552.

The plaintiff is a Finnish sailor, and spoke the English language very imperfectly. At the trial, he testified that he did not know the contents of the release when he signed it, and did so thinking it was a mere receipt for the money actually received. He also testified to circumstances which he relied on as showing fraud on the part of the commissioner, but which it is unnecessary to state, as the instructions to the jury required them to find that the release was signed, not only without any fraud,

deception, or coercion, but also with knowledge of its contents, in order to constitute a bar. This we think was too broad, and started an inquiry which the statute cannot have intended to leave open.

The statute enacts that, upon the completion, before a shipping commissioner, of any discharge and settlement, the master and seaman shall sign "a mutual release of all claims for wages in respect of the past voyages or engagements," in his presence, and that he shall also sign and attest it, etc., provided both the master and seaman assent to such settlement, or the settlement has been adjusted by the shipping commissioner. "Such release, so signed and attested, shall operate as a mutual discharge and settlement of all demands for wages between the parties thereto, on account of wages, in respect of the past voyage or engagement."

The release in this case did not bear the seal either of the parties or of the shipping commissioner. But from the nature of the transaction, and from the word used ("sign"), we assume, as it was assumed by the court below, that the release need not be a technical release under seal, in order to have the effect given it by statute. We are also of opinion that if the execution before the commissioner, and his signature and attestation, are established, the absence of his seal to authenticate his act (§ 4506) does not deprive the release of its effect. The instrument followed the words of the statute, and therefore, by the terms of the Act, it had at least the effect of a release under seal, irrespective of any question of consideration.

Coming now to the ruling, it authorized the jury to find for the plaintiff if they found that he did not know the contents of the release, although they should be of opinion that there was no direct or indirect misrepresentation to him of its contents, or other fraud, or any declaration by him of what he understood its contents to be, or any request by him to have it read in a language which he understood (if he could not read English), or any pressure brought to bear upon him to make him sign without having it read. This would not be the law in the case of a release under seal. *Leddy v. Barney*, 139 Mass. 894, 896; *Upton v. Tribblecock*, 91 U. S. 45, 50 (23 L. ed. 208, 205); *Shep. Touch.* 56; *Com. Dig. Fait*, B. 2. We think that it is not the true construction of the statute. We are of opinion that the statute means to make the release conclusive, if it is executed and attested as required, without fraud or coercion. See *Lamb v. Briard*, Abb. Adm. 367. Reading the Act in the way most favorable to the plaintiff, the proviso that "both the master and seaman assent to such settlement" is only attached to the requirement that the parties shall sign. If they do sign, the effect of their signature must be determined by the ordinary rules of law. Signature, under such circumstances as we have supposed, conclusively imports assent to the instrument, and the instrument expresses consent to the settlement. It is contrary to first principles to allow a person whose overt acts have expressed assent, to deny their effect on the ground of an undisclosed state of his mind, for which no one else was responsible. *O'Donnell v. Clinton*, 5 New Eng. Rep. 433, 145 Mass. 461. The 3 MASS.

common law makes no exception to these principles in favor of seamen, nor do we see any evidence that the statute meant to make one. *Exceptions sustained.*

Catherine MURPHY, Admx. of James Sinnott, Deceased,
v.
Leander GREELEY.*

1. The contractor for all the carpenter work on a building contracted with a carpenter to do certain work on a particular room. The carpenter, having remained at work until it was so dark that he could not see in a certain passageway through which it was necessary for him to pass, wandered from it and fell though an opening in the floor and was injured. Thereupon he sued the contractor for negligence. *Held*, that the cause of the injury must be deemed to have been an ordinary risk of the business, or a risk growing out of the peculiar manner in which the plaintiff chose to do it, and that the action was not maintainable.
2. *Held*, also, that evidence as to the usage of builders in reference to openings in floors of buildings in process of construction, in connection with evidence showing that plaintiff was an experienced carpenter, was competent upon the question whether he exercised due care.

(Suffolk—Filed February 29, 1888.)

ON plaintiff's exceptions. *Overruled.*
The action was in tort to recover damages for personal injuries alleged to have resulted from negligence. Defendant had a contract with the owner of a certain building in process of construction, to do all the carpenter work thereon, and engaged plaintiff's intestate to furnish certain rooms. It was in connection with the performance of such agreement that the injuries were received for which this action was brought. The original plaintiff having died, his administratrix came in and prosecuted the action in behalf of the estate.

Upon the close of the testimony the presiding judge ruled that the action could not be maintained, and directed a verdict for defendant, and plaintiff alleged exceptions.

Further facts appear in the opinion of the court.

Messrs. Gaston & Whitney, for plaintiff
Certain persons were permitted to testify to a usage among builders and contractors not to guard or light openings in the flooring of buildings in the process of erection. Such evidence was clearly incompetent on any ground.

Miller v. Pendleton, 8 Gray, 547.

The necessity for a guard or light at any particular opening depends upon the particular nature of the surroundings and the likelihood of an accident happening there. The practice of builders upon other buildings, and under other circumstances, would not afford any

*For a similar case, see *Gleason v. Excelsior Mfg. Co.* (Mo.) 13 West. Rep. 244.

criterion for determining whether the defendant had exercised due care in the present case.

Batley v. New Haven & Northampton Co. 107 Mass. 496.

There was evidence of due care on the part of the plaintiff's intestate, to go to the jury. The question of the due care of the plaintiff depends upon whether he had reasonable cause to believe that he could pass in safety, and whether, in fact, he used reasonable care in passing.

Thomas v. Western U. Tel. Co. 100 Mass. 156; *Mahoney v. Metropolitan R. Co.* 104 Mass. 78; *Lawless v. Connecticut River R. Co.* 136 Mass. 1; *Lyman v. Hampshire County*, 1 New Eng. Rep. 227, 140 Mass. 811.

And if a servant in the course of his employment is compelled to go into a dangerous place, the question of whether or not he exercised due care in so doing is not to be judged by the same standard as in the case of a stranger.

Snow v. Housatonic R. Co. 8 Allen, 441; *Goodfellow v. Boston, H. & E. R. Co.* 106 Mass. 461; *Lawless v. Connecticut Riv. R. Co. supra.*

Even if, from his experience as a carpenter, plaintiff must be presumed to have known that it is in general dangerous to go in the dark about a building in the process of construction, nevertheless this is not conclusive upon the question of due care; for the jury might have found, from the evidence, that an ordinarily prudent man, under the same circumstances, could reasonably expect to go through the passageway in safety while using ordinary care. He had no other way of getting out.

See *Lyman v. Hampshire County*, 1 New Eng. Rep. 227, 140 Mass. 811; *Mahoney v. Metropolitan R. Co.* and *Lawless v. Connecticut River R. Co. supra.*

Risks incidental to a business are those risks which are incidental to a business when conducted with a due regard to the safety of employees. It is the duty of an employer to use due care about the condition of his machinery and his premises; and an employee has a right to assume that he will perform his duty in that respect, and consequently does not assume, by reason of his contract of service, risks arising from defective machinery or dangerous premises.

See *Snow v. Housatonic R. Co.* 8 Allen, 441; *Lawless v. Connecticut River R. Co.* 136 Mass. 1. See also *Huddleston v. Lowell Machine Shop*, 106 Mass. 282; *Cowen v. Sunderland*, 5 New Eng. Rep. 248, 145 Mass. 863.

Mr. Samuel Hoar, for defendant:

The evidence that it was not the custom, in erecting buildings, to protect, guard, or light up holes and openings in the floors, or to light up passages in such buildings, while in the process of construction; and that the usage was to leave such holes and openings unguarded,—is material; and it is proper for this court to consider this evidence as bearing on the question of the defendant's negligence, of the plaintiff's exercise of due care, and of the risks which the plaintiff assumed in entering into this employment.

Lane v. Boston & A. R. Co. 112 Mass. 455; *Westport v. Bristol County*, 9 Allen, 203.

If the relation of master and servant existed between defendant and plaintiff, and plaintiff was in the exercise of due care at the time of

the accident, he cannot recover; and the accident was one of the ordinary risks which he assumed in entering upon the employment.

Taylor v. Carey Mfg. Co. 1 New Eng. Rep. 210, 140 Mass. 150; *S. C.* 3 New Eng. Rep. 873, 148 Mass. 470; *Kenney v. Shaw*, 133 Mass. 501; *Yeaton v. Boston & L. R. Corp.* 135 Mass. 418.

Knowlton, J., delivered the opinion of the court:

To determine whether the defendant neglected his duty towards the plaintiff's intestate, we must first inquire, What were the relations out of which his duty grew? He had a contract with the owner to do all the carpenter work upon a large brick building, five stories high, then in process of erection. Its outer walls and inside brick partitions were all completed, and the openings for windows were filled with sashes of cotton cloth. The flooring on the first floor had been laid, but the wooden partitions there had not been erected, and the carpenter work in general was not far advanced. The plaintiff's intestate, James Sinnott, made a contract with him to do the furring of a room upon the first floor, at a certain price per square yard. The only duty which he owed said Sinnott grew out of this contract. The passageway to the place where the work was to be done extended from the main entrance, through the building, a considerable distance, to the rooms to be furled; and there was evidence that near the centre of the building the locality about the passageway was at times very dark; that at the time of the accident it was so dark that one could not see his hand before his face; and that said Sinnott, having stopped work about five o'clock on account of the darkness, it being winter, attempted to go out through this passageway, mistook his course, went through an opening in the wall which led to a room in the floor of which was an open space for a stairway to the basement, fell through the open space, and was injured. He testified that there was no other way than through this passageway to get to the room where the work was to be done, and it is to be presumed that he passed through it when he was shown the room at the time he took his contract. He entered by it in the morning on each of the two days that he worked. He was fifty-five years of age, a carpenter by trade, in full possession of all his faculties, and he had worked in the construction of buildings for more than twenty years.

In connection with such a contract, made under such circumstances, the law implied no contract on the part of the defendant, and imposed no duty upon him, to have the building in such a condition that persons could wander through it in the darkness, away from the regular passageway, without risk of falling. Nor was it his duty to maintain artificial lights for those who should choose to attempt to go through after nightfall. The burden was upon the plaintiff to show that the accident happened through the negligence of the defendant. The defendant was under no obligation to provide against the ordinary risks incident to the performance of the contract which the plaintiff's intestate entered into, nor against any special risks incident to the peculiar man-

ner in which he might perform it. If it can fairly be said, contemplating the probabilities from the situation of the parties when they made their contract, that there was any risk that said Sinnott would remain at his work until it was so dark in the passageway that he could not see his hand before his face, and then attempt to go through there, without a light, and meet with an accident, that must be deemed to have been an ordinary risk of the business which he contracted to do, or a risk growing out of the peculiar manner in which he chose to do it. We do not think there was any evidence of negligence on the part of the defendant. The testimony introduced in relation to the custom and usage of builders in reference to openings in the floors of buildings while in the process of construction, taken in connection with the testimony of the plaintiff's intestate as to his experience as a carpenter, tended to show what he had reason to expect, and what dangers he was called upon to guard against, and so was competent upon the question whether he was in the exercise of due care. Whether or not it was admissible for any other purpose, in the form in which it was presented, it is unnecessary to decide.

Exceptions overruled.

Rufus H. BRIGHAM, Exr.,

v.

William P. HOLDEN *et al.*

Where a note given in purchase of a mortgage on the maker's land is void for want of consideration, an offer on the part of the holder of the note, to show that the maker has subsequently sold the land for more than he gave for it and the mortgage, was properly rejected.

(Middlesex—Filed March 2, 1888.)

ON defendant's exceptions. *Overruled.*

This is an action of contract to recover on a promissory note given by the defendants to the plaintiff's testator, Francis Brigham. The making of the note was admitted, and the defense was want of consideration and failure of consideration. At the trial the plaintiff opened the case, put in the note, and rested.

The defendants, to show want of consideration and failure thereof, produced the record and papers in the case of *Tyler v. Brigham*, reported in 8 New Eng. Rep. 486, 148 Mass. 410, which were put in evidence without objection. One of the defendants testified, and his testimony was not contradicted, that soon after their purchase of the equity of redemption in real estate at the sheriff's sale, as hereinafter stated, Francis Brigham, the plaintiff's testator, came to them and said that, inasmuch as they held the real estate, they had better take his mortgage upon it; and that, after some conversation, he reckoned up the amount due upon a mortgage note given to him by Abraham Tyler, and secured by a mortgage on said real estate, which was the same referred to in said record; and told them that said amount was due thereon; and that they thereupon made and de-

livered to him the note in suit for the same amount, and received from him in consideration therefor said mortgage note and an assignment of the mortgage.

For the purposes of the trial it was admitted that said mortgage note of Tyler to Brigham had been fully paid before the making of the note now in suit.

In reply and rebuttal to this defense to the note in suit, the plaintiff proved that the defendants became the purchasers and owners of the real estate covered by the mortgage of Tyler to Brigham, by a deed from the deputy sheriff, in consideration of \$800, at a sale on execution against said Tyler, said sale, delivery of deed, and record thereof being prior to the purchase of the Tyler note and mortgage by the defendants and the giving of the note in suit; and that said Tyler never redeemed said real estate from said sheriff's sale.

The plaintiff then offered to prove, by competent witnesses, that on May 13, 1878, more than a year after the giving of the note in suit, the defendants sold and conveyed by quitclaim deed the same premises described in said sheriff's deed and in the mortgage deed from Tyler to Brigham, to said Abraham Tyler, and received from him therefor, in money and a note for \$500 and interest, secured by mortgage on said premises of same date as said quitclaim deed, full payment for all that said defendants paid at said sheriff's sale, and all that they agreed to pay said Francis Brigham by the note in suit; and that said quitclaim deed and mortgage were duly delivered and recorded.

The defendants objecting, the court excluded the evidence, and the plaintiff excepted.

The court submitted to the jury the question of consideration under instructions which were not excepted to, and they returned a verdict for defendants; and the plaintiff alleged exceptions.

Messrs. James T. Joslin and George A. King, for plaintiff:

The question in this case is whether the plaintiff should have been allowed to prove that the defendants, having given their note for the assignment of a note and mortgage, obtained from the mortgagor, conformably to the terms of the note and mortgage, the full amount for which their note was given.

The fact that Tyler, the mortgagor, in recognition and in consequence of this note and mortgage, paid to the defendants the amount claimed to be due, constituted a consideration for the defendants' note, and evidence of it was competent.

The consideration for a promise need not exist at the time the promise is made.

Train v. Gold, 5 Pick. 384.

The doctrine laid down in this case has been reaffirmed in the following cases:

Gardner v. Webber, 17 Pick. 413; *Burr v. Wilcox*, 13 Allen, 273; *Gouvard v. Waters*, 98 Mass. 598; *Bornstein v. Lano*, 104 Mass. 216.

It is manifest that this rule applies as well in case of advantage to the promisor as to detriment to the promisee.

The case of *Trask v. Vinson*, 20 Pick. 105, was certainly no stronger for the plaintiff than this. In that case there was (1) an assignment of a contract that was worthless; (2) a voluntary recognition and performance of it by a third party. And this voluntary recognition and

performance,—not by the promisee, but by a third party,—was held to constitute a consideration.

The contract was certainly as fully honored in this case as in *Trask v. Vinson, supra*.

In the case of a note void at its inception for want of a consideration, the slightest consideration subsequently arising will be sufficient.

Mansfield v. Corbin, 2 Cush. 151.

The rule seems to be settled, that when there is an assignment of an executory agreement, the fact that it is subsequently carried out according to its terms constitutes a consideration.

Messrs. W. B. Gale, J. W. McDonald, and J. P. Gale, for defendants:

The evidence was immaterial, as it raised no presumption or inference as to the principal fact in dispute. It was, moreover, a fair inference, from the evidence offered, that the money paid by Tyler was for the equity, enhanced in value; and there was no evidence that Tyler paid anything for the mortgaged note.

Morton, Ch. J., delivered the opinion of the court:

Abraham Tyler, being the owner of a lot of land, mortgaged it to Francis Brigham, the plaintiff's testator. The equity was afterwards seized on an execution against Tyler, and the defendants became the purchasers at a sheriff's sale. While they owned the equity, Brigham presented his mortgage note and represented that it was due and unpaid. Thereupon the defendants took an assignment of the mortgage and gave the note in suit. It is now admitted that nothing was due on the mortgage. This being so, it was the duty of Brigham to assign or discharge the mortgage, and therefore there was no consideration for the note in suit. To meet this defense, the plaintiff offered to

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prove that, more than a year after the giving of the note in suit, the defendants sold to Tyler the land in question, and received from him, in money and a note for \$500 secured by a mortgage upon the land, all that they paid at the sheriff's sale, and all that they agreed to pay Brigham by the note in suit. The court rightly rejected this evidence. When the conveyance was made to Tyler the defendant had a legal fee simple. If we assume that Tyler agreed to pay to them enough to indemnify them for what they had paid for the equity and for the Brigham mortgage, it is difficult to see how the plaintiff can derive any advantage from it. It does not supply a consideration for his note or furnish any reason why the estate of Francis Brigham should recover a sum of money to which it has no legal or equitable right. It might furnish to Tyler an equitable, or perhaps legal, defense against his mortgage note given to the defendants. But it appears in the record of the case of *Tyler v. Brigham*, reported in 3 New Eng. Rep. 486, 143 Mass. 410, which record is a part of the evidence in the case at bar, that in the purchase of the equity and of the mortgage the defendants were acting as the trustees or agents for Tyler. This being so, it is clear that the defendants have no claim against Tyler on their mortgage, unless there are other undisclosed equities between them, if he is not required to pay the note in suit. They receive no advantage from the assignment of the mortgage to them by Francis Brigham. Tyler, who has overpaid the Brigham mortgage, gets the benefit of such payment, and thus the real equities of all parties are worked out in this suit. The other exception taken by the plaintiff is not pressed, and we assume that it is waived.

Exceptions overruled.

3 MAR.

RHODE ISLAND.

SUPREME COURT.

Maria D. TAYLOR, by her Next Friend,
v.

John W. SLATER, Exr., et al.

1. The running of the **Statute of Limitations** upon a note is not **suspended** by reason of a transfer of the note to a **married woman**.
2. A **new promise** to pay a debt, before it is barred, does not create a new cause of action, but merely suspends the law of the statute for another period of limitation, dating from such new promise.
3. Where a note was given for interest accrued upon another note, and an indorsement upon the latter note, of the interest, was not of absolute payment, but only of payment by the second note, there was no merger or discharge of the claim for interest, and the second note was without consideration to sustain it.

(Providence—Decided January 23, 1888.)

DILL in equity for an account, and to enforce payment of a promissory note. On demurrer to bill. *Sustained*.

The facts are fully stated in the opinion of the court.

Messrs. C. P. Robinson and C. Hart, for J. W. Slater, Exr., respondent:

The complainant seeks by her bill to enforce by equity a mere money demand, easily calculated, requiring neither discovery, account, nor other complicated machinery of a court of equity. Her remedy is perfectly adequate and complete at law. She cannot, therefore, ask the aid of a court of equity for the purpose simply of collecting a debt, when the law furnishes her with an appropriate and adequate remedy.

Curtis v. Mansfield, 11 Cush. 154.

This is not a case where equity needs to take jurisdiction in order to enforce discovery or take an account, and, having taken jurisdiction for that purpose, will also give full relief in order to avoid a multiplicity of suits.

1 Story, Eq. Jur. 10th ed. §§ 76, 442-453, 456, note, 458, note.

The Statute of Limitations forms a bar to this suit. Plaintiff purchased a demand note already due, and upon which the Statute of Limitations had already begun to run, as well while the bank held it as when her trustee bought it and turned it over to her.

See 2 Pars. N. & B. p. 642; *Presbrey v. Williams*, 15 Mass. 194; *Little v. Blunt*, 9 Pick. 488; *Arnold v. United States*, 18 U. S. 9 Cranch, 104 (3 L. ed. 671).

The statute having begun to run, her coverture will not prevent its running.

Ang. Lim. 2d ed. chap. 19, § 5.

If the second note did constitute a valid contract, then its only office was further to extend validity of the old note six years, and that ran out in January, 1880.

Sigourney v. Drury, 14 Pick. 891.

Plaintiff could sue the note here alone or by a trustee. The General Statutes of Rhode
1 R. I.

Island in force at date of note, on such a contract, permit her to sue alone.

Gen. Stat. 1872, chap. 153, § 16.

In the State of New York she could even sue her husband. Why not here under our statutes?

See *Adams v. Curtis*, 4 Lans. 164; *Power v. Lester*, 23 N. Y. 527.

She could have done so in Illinois.

See Ill. Rev. Stat. 1874, chap. 68.

Since she could at any time come into equity and proceed against her husband, equity considers her under no disability.

2 Story, Eq. Jur. § 1368.

This complainant has been guilty of a laches and delay intolerable in the eye of a court of equity.

See 1 Story, Eq. Jur. § 529; 2 Story, Eq. Jur. 1, 552; *Phillips v. Rogers*, 12 Met. 405; *Plymouth v. Russell Mills*, 7 Allen, 488; *Merriam v. Boston, C. & F. R. Co.* 117 Mass. 241.

Messrs. Walter H. Barney and John F. Lonsdale, for complainant:

Equity is a proper tribunal for a cause of this nature.

A creditor of a copartnership may sue the representatives of a deceased partner in equity, since in equity the obligations of the partners are several as well as joint. Surviving partners are joined in such an action, as they are interested in the taking of the account.

Story, Partn. § 362; *Wilkinson v. Henderson*, 1 Mylne & K. 582; *Thorpe v. Jackson*, 2 Younge & C. 553; *Kimball v. Whitney*, 15 Ind. 280; *Nelson v. Hill*, 46 U. S. 5 How. 127 (12 L. ed. 81); *Pearce v. Cooke*, 18 R. I. 184.

The rule that the legal remedy should be first exhausted, if ever applicable, does not apply in this case. The surviving partners are insolvent, and the judgment would be worthless.

Hammersley v. Lambert, 2 Johns. Ch. 508; *Devaynes v. Noble*, 2 Russ. & M. 495; *Brown v. Douglas*, 11 Sim. 288; *Vance v. Cowing*, 13 Ind. 460; *Lawrence v. Leake & Watts Orphan House*, 2 Denio, 577.

The surviving partners are out of the jurisdiction.

Merchants Nat. Bank v. Paine, 18 R. I. 592; *Farrar v. Haselden*, 9 Rich. Eq. 836; *Scott v. M'Millen*, 1 Litt. 302.

The surviving partners could not be sued at law, since the wife cannot sue the husband at law, and at law the obligation is joint.

2 Bish. Mar. Wom. § 328; *Pearce v. Cooke*, *supra*.

The provisions of Pub. Stat. chap. 204, § 28, do not take away the remedy in equity.

Pearce v. Cooke, *supra*.

That the husband is a party defendant is a sufficient reason for equity jurisdiction attaching.

2 Bish. Mar. Wom. § 338; *Franklin Sav. Bank v. Greene*, 14 R. I. 1.

The Statute of Limitations does not bar the present case.

Acknowledgment of the debt constitutes a new promise on which an action will lie.

Ang. Lim. 6th ed. §§ 208, 231; Wood, Lim. § 64; *Jones v. Moore*, 5 Binn. 578; *Bateman v. Bateman*, 8 Q. B. 574; *Whitcomb v. Whiting*, 1 Smith, Lead. Cas. 708, 711, 718; *Burleigh v. Stott*, 8 Barn. & C. 36; *Young v. Mackall*, 3 Md. Ch. 398.

Part payment is a sufficient acknowledgment to take the case out of the statute; and payment of interest has the same effect in this respect as part payment of principal.

Ang. Lim. 6th ed. § 240; Wood, Lim. § 105; p. 150, note 1.

Part payment by one only of the partners, even if the partnership had been dissolved, would take a case out of the operation of the statute.

Burleigh v. Stott, *supra*; *Merritt v. Day*, 88 N. J. L. 32; *Turner v. Ross*, 1 R. I. 88; *Perkins v. Barstow*, 6 R. I. 505; *Goddard v. Ingraham*, 3 Q. B. 839.

The giving of a note in part payment of principal or interest has the same effect as part payment in cash, in taking a case out of the operation of the statute.

Ang. Lim. 6th ed. § 240; Wood, Lim. § 114; *Haley v. Jewett*, 2 Met. 168; *Wenman v. Mohawk Ins. Co.* 13 Wend. 267.

At the time of making the new promise by giving the note for interest to the plaintiff, a married woman, the principal note had been turned over to her by her trustee, was in her hands, and belonged to her, and the statute could not run on the new promise to pay the old note, or on the new note, because of her disability.

Pub. Stat. chap. 205, § 6.

Neither the provisions of Gen. Stat. 1872, chap. 152, § 16, nor those or any other enabling Act (if any there be), authorizing a wife to sue in her own name in a case like this, can deprive a married woman of the protection expressly given her by the statute, which excepts her rights from the operation of the Statute of Limitations.

Ashley v. Rockwell, 1 West. Rep. 833, 43 Ohio St. 386.

In all cases of a legal nature, wherever legal and equitable relief are concurrent, or where the case in equity is analogous to those at law, in which the Legislature has enacted a Statute of Limitations, equity will follow the law and will apply the rule of the statute.

2 Story, Eq. Jur. § 1520; 2 Perry, Tr. § 855; Ang. Lim. 6th ed. §§ 25, 26; *Manchester v. Mathewson*, 3 R. I. 237, 252. See *Kane v. Bloodgood*, 7 Johns. Ch. 90, 106, 122; *Collard v. Tuttle*, 4 Vt. 491; *McCrea v. Purmort*, 16 Wend. 460; *Crocker v. Clements*, 23 Ala. 296; *Borden v. Peay*, 20 Ark. 293; *Harris v. Mills*, 28 Ill. 44; *Mitchell v. Woodson*, 37 Miss. 567; *Taylor v. McMurray*, 5 Jones, Eq. 357; *Wanmaker v. Van Buskirk*, 1 N. J. Eq. 685; *Cumming v. Berry*, 1 Rich. Eq. 114; *Wood v. Wood*, 3 Ala. 756; *Hovenden v. Lord Annesley*, 2 Sch. & L. 630.

Where the rule of the statute is applied in equity, the exceptions provided in the statute are also admitted in equity.

Story, Eq. Pl. § 753; Ang. Lim. 6th ed. § 29; 2 Perry, Tr. pp. 489, 490, §§ 860, 864; *Kutz's App.* 40 Pa. 90; *Atty-Gen. v. Magdalen College*, 18 Beav. 223; *Belch v. Harney*, 3 P. Wms. 287, note; *Lytton v. Lytton*, 4 Bro. Ch. 441; *Demarest v. Wynkoop*, 3 Johns. Ch. 129; *Perkins v. Cartmell*, 4 Harr. (Del.) 270; *Reed v. Bullock*, Litt. Sel. Cas. 510; *Crocker v. Clements*, 23 Ala. 296; *Phares v. Walters*, 6 Iowa, 106; *Sloan v. Graham*, 85 Ill. 26; *Manchester v. Mathewson*,

3 R. I. 237; *Kane County v. Herrington*, 50 Ill. 232; *Knight v. Brawner*, 14 Md. 1.

Persons who are under disability, and therefore excepted from the provisions of the Statute of Limitations, cannot, so long as that disability continues, be guilty of laches so as to deprive themselves of the protection of the statute.

Kane County v. Herrington, 50 Ill. 232; *Knight v. Brawner* and *Sloan v. Graham*, *supra*.

The equitable doctrine of laches is applied independently of the Statute of Limitations in cases of a purely equitable nature, or where there is no Statute of Limitations to act as a guide or rule of action for the court.

2 Story, Eq. Jur. p. 753, § 1520; *Wood v. Wood*, 3 Ala. 756; *Bruen v. Hone*, 2 Barb. 586; *Perkins v. Cartmell*, 4 Harr. (Del.) 270; *Kimball v. Whitney*, 15 Ind. 280.

Matteson, J., delivered the opinion of the court:

This is a bill filed in behalf of a married woman by her next friend, to obtain payment of two promissory notes from the estate of William S. Slater, deceased, who in his lifetime was a member of the firm by whom the notes were made.

The bill alleges that August 3, 1872, the complainant's husband, Frank C. Taylor, John M. Wright, the said William S. Slater, deceased, and Earl P. Mason, also deceased, were engaged in business in Chicago as copartners under the name and style of Taylor & Wright; that on that date said firm made, indorsed, and negotiated at the Fourth National Bank of Chicago their negotiable promissory note, of that date, for \$25,000, payable to the order of themselves at said bank on demand, for value received, with interest at 10 per cent till paid; that the firm received the proceeds of said note, and that two days later the trustee of the complainant's separate estate, by her direction, purchased said note with funds belonging to her separate estate; that shortly after giving said note said firm failed in business; and the said Frank C. Taylor and the said John M. Wright became insolvent, and have ever since remained and now are insolvent and unable to pay said note, and without property on which process or execution could be levied; that on or about January 1, 1874, said firm gave her another note, of that date, by them signed as "Taylor & Wright in liquidation," in and by which they promised to pay to the order of themselves, on demand, \$3,569.45, with interest at 10 per cent per annum till paid, value received, which note was by said firm indorsed and delivered to the complainant as interest on said note for \$25,000, and was indorsed thereon, such indorsement being in the words and figures following, viz: "\$3,569.45 interest on the within to January 1, '74, paid by note dated January 1, '74, on demand;" that, except the giving of said last mentioned note, no portion of either of said notes, principal or interest, has been paid; but said notes, with interest thereon from their respective dates, according to the tenor thereof, are still outstanding and unpaid in the hands of the complainant; that the complainant married her present husband, said Frank C. Taylor.

June 9, 1864; that said Earl P. Mason deceased on September 21, 1876, and the said William S. Slater, May 28, 1882; that said Slater left a will in which the respondent, John W. Slater, was appointed executor, and which was probated on the — day of July, 1882; that an appeal was taken from the probate of said will, but the decree probating the same was confirmed by this court on the second day of the October Term, 1882; that said John W. Slater duly qualified himself as such executor; that demand was made upon said William S. Slater in his lifetime for the payment of said notes, and has been made, since his decease, upon said executor; but that each has neglected and refused to make such payment.

The bill was filed January 12, 1884. It was originally against the said John W. Slater, in his capacity as executor of said will, and the said Taylor and the said Wright. Subsequently it was amended by joining as respondents the legal representatives of the said Earl P. Mason. Said executor and said legal representatives have demurred generally to the bill, and, upon the hearing, orally assigned, among other grounds of demurrer, that the claim was barred by the Statute of Limitations.

It was conceded on the part of the complainant that, inasmuch as the statute had begun to run upon the original note before it came into her possession, its running would not be suspended by reason of her being a married woman; but it was contended that the giving of the second note in payment of the interest upon the first created a new cause of action, not only on the new note so given, but also upon the original note, and that, as such new cause of action accrued to her while under disability, the statute would not run against it so long as the disability continued; and hence, as she has remained a married woman down to the filing of the bill, the claim is not barred.

The question whether a new promise to pay a debt already barred by the statute creates a new cause of action, so that suit must be brought upon it instead of the original contract, has given rise to considerable diversity of opinion. On the one hand it has been held in a number of cases that such new promise is a new cause of action, and that suit must be brought upon it, and not upon the original promise. *Reigne v. Desportes*, Dudley (S. C. L.), 118, 128, 180; *Martin v. Brouch*, 6 Ga. 21, 81-85; *S. C. 50 Am. Dec. 306*, 811-815, but doubted in *Rich v. Dupree*, 14 Ga. 661, 664; *Bird v. Adams*, 7 Ga. 505, 508; *Van Buren v. Webster*, 12 Ga. 615, 617; *Coles v. Kelsey*, 2 Tex. 541, 546-550; *S. C. 47 Am. Dec. 661*, 666, 667; *Erskine v. Wilson*, 20 Tex. 77, 81; *Kampshall v. Goodman*, 6 McLean, 189, 192, 193; *Hopkins v. Stout*, 6 Bush, 875, 878; *Carr v. Robinson*, 8 Bush, 269, 274; *Trousdale v. Anderson*, 9 Bush, 276, 277. In these cases the courts proceed upon the theory that the debt is extinguished by the statute, but, inasmuch as it has been extinguished by operation of law instead of by the act of the parties, a moral obligation to pay it remains, and this moral obligation is a sufficient consideration for the new promise. On the other hand, it has been held in numerous cases that the statute does not extinguish the debt, but only bars the remedy; that the new promise simply removes the bar of the statute, 1 R. I.

thereby enabling the plaintiff to recover upon the original contract, and does not create a new cause of action which can be made the basis of a suit and judgment. *Leaper v. Tatton*, 16 East, 420; *Upton v. Elae*, 12 Moore, 303; *Lord v. Shaler*, 3 Conn. 181, 184; *Barney v. Smith*, 4 Harr. & J. 485, 495; *Oliver v. Gray*, 1 Harr. & G. 204, 215; *Kimmel v. Schwartz*, 1 Ill. 216; *Newlin v. Duncan*, 1 Harr. (Del.) 204, 207, 208; *Isley v. Jewett*, 8 Met. 439, 444, 445; *Philips v. Peters*, 21 Barb. 351, 357, 358; *Esselstyn v. Weeks*, 12 N. Y. 635, 637; *Yaw v. Kerr*, 47 Pa. 333, 334; *Biscoe v. Stone*, 11 Ark. 39; *Harlan v. Bernie*, 22 Ark. 217; *Frisbee v. Seaman*, 49 Iowa, 95, 98. And there are cases which hold that suit may be maintained either upon the original debt or upon the new promise. *Lonsdale v. Brown*, 4 Wash. C. Ct. 148, 150; *Little v. Blunt*, 9 Pick. 488, 491, 494.

But, whatever difference of opinion may exist with reference to the effect of a new promise in the case of a debt already barred, it is settled that a new promise made before the debt is barred does not create a new cause of action, but merely suspends the bar of the statute for another period of limitation, dating from such new promise. *Sigourney v. Drury*, 14 Pick. 887, 890, 891; *Foster v. Starkey*, 12 Cush. 824, 827; *Gilbert v. Collins*, 124 Mass. 174, 176; *Austin v. Bostwick*, 9 Conn. 496, 501; *Stearns v. Stearns*, 32 Vt. 678, 682; *Penley v. Waterhouse*, 3 Iowa, 418, 434; *Frisbee v. Seaman*, 49 Iowa, 95, 98; *Hopkins v. Stout*, 6 Bush, 875, 878; *Carr v. Robinson*, 8 Bush, 269, 274; *English v. Wathen*, 9 Bush, 387, 389; *Gilmore v. Green*, 14 Bush, 772, 774; *Green v. Greensboro*, *Female College*, 88 N. C. 449, 454; *S. C. 35 Am. Rep. 579*; *Rich v. Dupree*, 14 Ga. 661, 663, 664; *Biscoe v. Anketell*, 28 Miss. 361, 372; *S. C. 61 Am. Dec. 558*; *Shackelford v. Douglass*, 31 Miss. 95, 97; *Real Estate Bank v. Hartfield*, 5 Ark. 551, 555.

The allegation of the bill is that the second note, given in payment of the interest accrued upon the first, the giving of which is relied upon as creating a new cause of action to take the first out of the operation of the statute, was made and delivered to the complainant on or about the 1st day of January, 1874. This was within six years from the date of the first note, viz., the 5th day of August, 1872, and, consequently, before the first note had been barred by the statute. The effect of the giving of the second note, upon the first, therefore, was not to create a new cause of action, but merely to extend the running of the statute upon the first for the period of six years from the time that the second was given. This period of six years elapsed on or about the 1st day of January, 1880. As the bill was not filed till the 12th day of January, 1884, we think that the claim, so far as it rests upon the first note, must be held to be barred by the statute.

Nor do we think that the complainant can maintain her suit upon the second note; for, though it would not be barred by the statute, having been given to her while under coverture, and her coverture having continued down to the filing of the bill, we do not see that there was any consideration for it. The allegation of the bill is that it was given in payment of the interest which had accrued upon the first note. If it had been given in absolute payment

or satisfaction of the claim for interest, so that the claim for interest was merged in it and thereby discharged or extinguished, that, doubtless, would have been a sufficient consideration. *Ogden v. Redd*, 13 Bush, 581, 582; *Gilmore v. Green*, 14 Bush, 772, 774, 775. It appears, however, from the copy of the first note, annexed to and made a part of the bill, that the indorsement of the interest was not of absolute payment, but only a payment by the second note. The taking of a note for a pre-existing debt is not payment or discharge of the pre-existing debt, but amounts merely to conditional payment. *Sweet v. James*, 2 R. I. 270, 292, 298; *Wheeler v. Schroeder*, 4 R. I. 388, 388, 389. And where the note is taken payable on demand, as in the case at bar, the creditor is at liberty to sue immediately upon the original debt, being only required to deliver up the note before judgment, *Sweet v. James*, 2 R. I. 270, 292. The bill alleges no other consideration for the second note, and no facts from which a consideration can be inferred. We think, therefore, that the second note was of no validity as a note or cause of action, and affords the complainant no ground upon which to maintain her suit.

Having reached this conclusion, it is unnecessary to consider the other causes of demurrer assigned.

Demurrer sustained.

RHODE ISLAND NATIONAL BANK

v.

Franklin A. CHASE and John McAuslan.

1. In a voluntary general assignment for the benefit of creditors, conveying to the assignee all the assignor's property "except so much thereof as is by law exempt from attachment," the words "exempt by law from attachment" are, in the absence of anything to show the contrary, to be construed as meaning only property exempt from attachment by statutory exemption.
2. The statutory exemption from attachment of property which is exempt "by the policy of the law" (Pub. Stat. chap. 209, § 4, cl. 14) does not mean property which is, from its nature, beyond the reach of attachment, but only that which it is a matter of public policy to protect from attachment; hence, under a general assignment purporting to cover all the assignor's property except so much as is exempt from attachment by law, equitable interest or assignable contingent interests will pass to the assignee.

(Decided December 10, 1887.)

BILL of interpleader to determine whether a certain asset of a decedent's estate should be paid to his executor or his assignee for benefit of creditors. *Decree awarding fund to assignee.*

The facts are fully stated in the opinion of the court.

Mr. Rathbone Gardner, for complainant.

Mr. Richard B. Comstock, for respondent Chase.

The interest of Ashworth at the time of the assignment to Chase under the agreement with the bank was the right to the balance of the proceeds of the policies of insurance at their maturity, after the satisfaction of the bank for the amount of the premiums paid by it, and interest thereon, and the expenses of collecting the same. This interest, if it were assignable, passed under the assignment to Chase, unless it was exempt from attachment by law.

Burr. Assign. p. 142.

This interest was assignable (Burr. Assign. p. 149), and was not exempt from attachment by law, as it is not specifically exempt by the Public Statutes of Rhode Island (*Keach, Petitioner*, 14 R. I. 573).

Mr. Edwin C. Pierce, for respondent McAuslan:

By the assignments of Ashworth to the bank, the legal title in the policies passed, and the only interest remaining in Ashworth was an equitable one.

Equitable interests are not liable to attachment.

5 R. I. 525; Herm. Exec. p. 177.

The exception in the assignment for the benefit of creditors, by Ashworth to Chase, of such property as was by law exempt from attachment, being contained in a purely voluntary assignment, not constrained even by the attachment of the property of Ashworth, and it not appearing even that Ashworth was insolvent, should be construed as excepting all property not actually subject to attachment, whether exempt by statute or by the policy of the law.

The interest of Ashworth in the policies was exempt, under Pub. Stat. chap. 209, § 14.

Equitable interests in chattels are exempt from attachment, by the policy of the law.

Yeldell v. Stemmons, 15 Mo. 448.

Durfee, Ch. J., delivered the opinion of the court:

The following are the facts on which the questions in this suit arise, to wit: On October 11, 1886, the late Henry Ashworth,—being then the owner of two policies of insurance on his life, issued by the Mutual Life Insurance Company of New York, one for \$2,000 and the other for \$1,000, payable November 1, 1892, to him if then alive, or on his death, if he should die before November 1, 1892, to his executors, administrators, or assigns,—assigned said policy to the Rhode Island National Bank, as security to the bank for future premiums agreed to be paid by the bank to the insurance company, with interest and expenses. The policies contained no guaranty of any cash surrender value before maturity. On October 26, 1886, Ashworth made an assignment to Franklin A. Chase, one of the defendants, of all his estate and property of every name, nature, and description,—“except so much thereof, other than debts secured by bills of exchange or negotiable promissory notes, as is by law exempt from attachment,—for the equal benefit of all his creditors in proportion to their respective claims, except as is provided in Pub. Laws, chap. 23, § 14, of the State.” The assignment was purely

voluntary, no property of Ashworth having been attached. Ashworth died this year, some time before the institution of this suit, leaving a will, of which the defendant John McAuslan is executor. The bank collected the policies and satisfied its claims out of the proceeds. Thereupon, the balance being claimed by Chase as assignee, and by McAuslan as executor, it filed a bill of interpleader against him, bringing said balance into court. The question is, Which of the two defendants is entitled to it?

No question is made but that Ashworth's interest passed to Chase by the assignment, unless it was within the exception as being "exempt by law from attachment." The contention for McAuslan is that Ashworth's interest was not liable to attachment at the time of the assignment, because of its character,—his interest being equitable, uncertain, and contingent, and therefore within the exception.

In *Keach, Petitioner*, 14 R. I. 571, the court held that the phrase, "except so much as is exempt from attachment by law," there used in a decree appointing a receiver under Pub. Stat. 22, chap. 237, § 13, only excepts property which is protected from attachment by the statutory exemptions. See also *Tillinghast v. Bradford*, 5 R. I. 205. The defendant McAuslan contends that the case at bar is distinguishable from that case, because in the case at bar the phrase was not used in any such proceeding, nor even in any assignment made in pursuance of the statute for the purpose of dissolving an attachment, but was used in an assignment which was purely voluntary. We do not think the distinction can avail. The phrase, by its use in assignment, in proceedings in insolvency and for the relief of poor debtors, has acquired a meaning which we think must be presumed to attach to it in general assignments for the benefit of creditors, in the absence of anything to show the contrary, inasmuch as such assignments, though purely voluntary, partake of the nature and purpose of involuntary assignments under the statutes. Moreover the assignment here, though not made for the purpose of dissolving an attachment, uses the language or form of words prescribed for an assignment for that purpose; which is an additional reason for construing it as we would construe an assignment made for that purpose.

McAuslan also contends that Ashworth's interest in the policies did not pass, even if the exceptions be held to cover only property which is protected by the statutory exemptions, because the statutory exemptions extend to property which is exempt "by the policy of the law" (Pub. Stat. chap. 209, § 4, cl. 14), and said interest was not legally subject to attachment. We do not think this position is tenable. In our opinion the property which is meant to be protected by the exemption referred to is not property which is, from its nature, beyond the reach of attachment, but property which it is a matter of public policy to protect from attachment. Thus, property held by a municipal corporation for public uses, or to enable it to discharge its public duties, has been held to be exempt as a matter of public policy. *Freem. Exemp.* § 126. The exemption referred to has existed in our statute since 1857; and it has never been held, and, so far as we know, never been claimed until now, that by 1 R. I.

reason thereof equitable interests or assignable contingent interests do not pass by an assignment purporting to convey all the assignor's property except so much as is exempt from attachment by law. It cannot be supposed that any such result was ever intended by the General Assembly, or that the claims now advanced by McAuslan would not have been earlier advanced if there were any probable ground for it. And see the remarks of *Chief Justice Ames* in *Tillinghast v. Bradford*, 5 R. I. 205, 212.

Let a decree be entered awarding the fund in suit to the defendant Chase, as Ashworth's assignee.

Decree accordingly.

Gersham L. GARDINER

v.

Town Council of the TOWN OF JOHNSTON.

1. A deed without acknowledgment is good between the parties to it for the purposes of a conveyance.
2. Pub. Laws 1864, chap. 521, providing for the transfer of turnpike roads to towns, does not imply that the proceedings of a town accepting a road in pursuance thereof shall be subsequent to a conveyance of the road.
3. When a turnpike corporation has offered to convey, and the town to accept, the road, the minds of the parties have met. The conveyance, if subsequently made pursuant to the terms agreed upon, completes the transaction; and the road thereupon becomes a highway according to the statute.
4. The vote of a town council to receive the report of a committee, appointed to survey and report a grade for a street, in pursuance of Pub. Laws 1886, chap. 634, and that the grade be placed as stated in the report, was futile for the establishment of the grade of the street, because it gave no direction to the surveyor, which was the only power the council had under the statute.
5. Subsequently to such action, the establishment of a legal and actual grade does not entitle an abutting owner to damages for change of grade.

(Providence—Decided January 28, 1888.)

PETITION for alternative writ of mandamus. On the respondent's return to the writ. *Petition dismissed.*

The writ was issued in this case to require the town council to pass an order of notice in accordance with Pub. Stat. chap. 65, § 38, or to show cause why a peremptory writ should not issue.

Said § 38 is as follows:

"Whenever an abutting owner shall deem himself to be injured by any change in the grade of a highway, and such owner shall make claim for compensation for such injury to the town council within forty days after such change of grade shall have been completed, the town

council shall appoint three suitable and indifferent men, not interested in the lands bordering on the highway the grade of which has been changed, who shall be engaged to the faithful discharge of their duties, and who shall go upon the highway when the grade thereof has been changed, and examine the same and the estate alleged to have been injured by changing the grade of said highway, and endeavor to agree with the owner of such estate as to the amount of damage by him sustained by means of such change of grade; and if they agree with the owner, they shall reduce such agreement to writing and report the same to the town council, which report shall be binding upon such owner and upon the town; but if they fail to agree with the owner as to such damage, they shall report such failure to the town council; whereupon the council, after notice to such owner and offering him an opportunity to be heard, shall proceed to appraise the damage done to such owner by means of such change of grade."

The facts are stated in the opinion of the court.

Messrs. Van Slyck & Van Slyck, for respondent:

By § 1 of the "Act for Mending Highways and Bridges," the surveyors of highways had full power to grade or regrade any public street; and owners of lands adjoining highways are not entitled to compensation for damages caused by the establishment of a new grade in the streets which adjoin said lands.

Rounds v. Mumford, 2 R. I. 154.

The power and duty to grade and regrade highways remained in surveyors of highways, with no right to owners of lands adjoining for compensation for damages, until the enactment of Pub. Acts, chap. 310, at the January Session in 1859. After this Act the power and duty to grade and to change the grade of any street or highway remained in surveyors.

There was no change in the law on this subject until the passage of chapter 634 at the January Session, 1866, by which the town councils were authorized to direct the street commissioners or surveyors of highways to grade, or change the grade, of any street or highway, or part thereof, in their respective towns, but inhibiting the change of a grade except by town council and after notice.

See Pub. Laws 1866, chap. 634.

The first statute in which the word "grade" appears as applicable to streets and highways is said Pub. Laws, chap. 310.

Aldrich v. Providence, 12 R. I. 241.

The power given by chapter 634 to town councils was "to direct the street commissioner or surveyor of highways to grade, or change the grade, of any street or highway in their respective towns."

See chap. 634, § 1.

The meaning of chap. 310, § 1, is to give damages when the surveyor of highways shall have worked a change,—that is, an actual change in the surface of the road had been made; and no damages are to be recovered except in the event of a lawful change.

Mr. James C. Collins, for relator.

Stiness, J., delivered the opinion of the court: Plainfield Street, in the town of Johnston,

was formerly a turnpike road, maintained by the Providence & Warwick Turnpike Society. August 1, 1865, at a special town meeting, it was voted that the town council be requested to receive the part of said turnpike in the town of Johnston and to arrange with the corporation for its conveyance. A deed to the town was drawn, dated August 30, 1865, and, on the 9th of September following, the town council voted to receive the portions of said road referred to in the deed; notice having been given to abutting owners to appear and be heard for or against the reception of the same. The deed was acknowledged October 7, 1865, but no subsequent action was taken by the town council. In June, 1867, the town council appointed a committee to survey and report a grade for Plainfield Street. In July, 1867, the committee made a report, which the council voted to receive, and also voted that the grade be placed as stated in said report. The petitioner claims that this established the first grade of the street, and that subsequent proceedings made a change of grade, entitling him to damages. The first question, then, is whether this amounted to an establishment of grade, under the statute. The town contends that the notice to parties, and the action of the town council upon accepting a turnpike road, was under Pub. Laws, chap. 521, of March 23, 1864, must follow the conveyance, and, therefore, as there were no notices or proceedings after the execution of the deed, October 7, 1865, the road did not thereby become a public highway in which a grade could be established. Chapter 521 provided for the transfer of a turnpike road "upon such terms as may be agreed upon." From the date of the deed and the cancellation of the revenue stamp thereon by the treasurer who signed the deed, it appears that the conveyance by the corporation, in all but the acknowledgment, was made August 30, 1865. It was undoubtedly offered to the town council at its meeting September 9, 1865, because the vote then passed referred to the deed; and at that time, notice having been given, the council voted to accept it. A deed without acknowledgment was good between the parties to it. Rev. Stat. chap. 146, § 8. But if it was not executed until it was acknowledged, still we do not see that chapter 521 necessarily implies that the proceedings of the town shall be subsequent to the conveyance. It would be idle to require the corporation to execute a conveyance which the town was not to accept; and the council could not vote to accept until the reasons for and against it had been presented and considered. When the corporation has offered to convey and the town to accept, the minds of the parties have met. The conveyance, if subsequently made pursuant to the terms agreed upon, completes the transaction; and the road thereupon, if not from the date of the acceptance, becomes a highway according to the statute. In this case, we think the road became a highway from the date of the acceptance of the deed then made, September 9, 1865.

The next question is whether a grade was established in 1867. The first statute relating to the grade of highways was Pub. Laws, chap. 310, of January, 1859. But the grade there referred to is one made or established by a surveyor of highways according to the custom

then prevailing. *Aldrich v. Providence*, 12 R. I. 241; *Rounds v. Mumford*, 2 R. I. 154. This statute did not give the town council any authority to establish a grade by vote, nor to do anything about it except to take action to compensate persons who had been injured by a change of grade. March 9, 1866, another Act was passed,—Pub. Laws, chap. 634. This Act gave the town council power to direct surveyors of highways to grade or change the grade of any street or highway; and it also provided that no change of grade should be made except by direction of the town council after notice to abutting owners. This was the authority which the town council of Johnson had in 1867, when it is claimed the first grade was established. It was not an authority to establish a grade, or to make what is frequently called a paper grade, but simply an authority to direct the surveyors to grade or change a grade. The Act does not even state whether the council or the surveyor is to determine what the grade of change shall be; but, assuming that the right to direct a grade carried with it a right to define its character and extent, it is nevertheless clear that such a grade did not become an established grade by the mere vote of the council, nor until the direction had been complied with by the surveyor. It was then an actual, and, in that way, an established, grade. In the present case it does not appear that the so-called grade of 1867 was worked by the surveyor, or that the council ever ordered that or any grade to be worked on Plainfield Street prior to 1872. The appointment of a committee to report a grade was a preliminary act for the purpose of informing the council about a suitable grade. The vote "that the grade be placed as stated in said report" was indicative of approval of such a grade, but it was futile for its establishment, because it gave no direction to the surveyor, which was the only power the council possessed under the statute. In May, 1872, the town council directed the surveyor of said Plainfield Street "to grade or change the grade,"—following the words of the statute,—and to cause an exact profile of said street and grade to be made, and report to the council. The petitioner avers that, upon such report, the council ordered notice to the abutting owners, and on June 1, 1872, established the grade; but that no notice was served on him. The return sets out that the petitioner, with others, made written application for such establishment of grade; and the return of the town sergeant shows that he had notice of the meeting of the council when it was considered. The petition further sets out that on or about the — day of July, 1880, the surveyor, in accordance with the above order, proceeded to change the grade of Plainfield Street, and that within forty days after the completion thereof he presented his claim in writing for damages. It is upon this claim that he now asks for an order for action by the town council.

As no grade was made or established under the proceedings had in 1867, it follows that the grade made in 1880 was the first legal and actual grade. Hence, according to the opinion of this court in *Aldrich v. Providence*, *supra*, that "an abutter is not entitled to damages for the establishment of a grade where none has previously existed," the petitioner in this case is 1 R. I.

not entitled to damages and consequently not entitled to the order for which he prays.

Writ discharged and petition dismissed.

William P. MOULTON, Admr. of Charles H. West,

George L. SMITH, Admr. of Phebe A. West.

1. The estate of a woman dying under coverture is chargeable with funeral and probate expenses, together with reasonable compensation to her husband as administrator.
2. A bill for medical services in treating a married woman is a personal debt of her husband, and not chargeable upon her estate.
3. Pub. Stat. chap. 189, § 4, which allows as part of funeral expenses the erection of a suitable monument "with the permission of the court of probate," contemplates, where the estate is solvent, something more than a simple and inexpensive stone or tablet to mark the grave of the deceased.
4. Where bills are presented to an administrator, but not paid, his administrator has nothing to do with them.
5. Where an administrator has assets in his hands, with right to maintain the same in reimbursement of proper charges paid by him, which he was prevented from exercising by death, such charges, together with a reasonable claim for services as administrator, may be enforced in equity against a subsequent administrator, who has received assets, and the heirs.
6. Where an administrator had been neglectful in settling his account, but three years from his appointment had not elapsed when he died, his neglect will not bar a suit by his administrator, to have his claim for funeral and probate expenses paid by him, and reasonable compensation for services declared a lien upon the estate; nor is it necessary for his administrator to settle his intestate's account in probate court before commencing such suit.
7. This court has full chancery jurisdiction conferred upon it by statute; and another statute, which simply affords a remedy in some other tribunal or tribunals, does not oust it of its chancery jurisdiction to that extent.

(Decided February 4, 1888.)

BILL in equity to establish a lien. *Bill sustained.*

The facts are stated in the opinion of the court:

Mr. Joseph C. Ely, for complainant.

Mr. Benjamin M. Bosworth, for respondent.

Durfee, Ch. J., delivered the opinion of the court:

Phoebe A., wife of Charles H. West, died February 25, 1884, leaving a will by which she gave her whole estate, real and personal, to her husband for life, and after him to her brother and nieces. The will was duly proved, and West was appointed administrator with the will annexed. He filed an inventory, from which it appears that the personal estate left by his wife amounted to \$1,021.52, and consisted of bank stock valued at \$535, a savings-bank deposit of \$100, and \$193.20 in cash, besides household furniture. He paid \$248.60 for funeral expenses, and \$20.45 for probate charges. He also paid \$95 to the physician who attended his wife in her last sickness. He employed a stonemason to set up a marker at her grave, and to cut an inscription for her on his monument, who rendered a bill of \$42, which has not been paid. The bills rendered all make the charges, not against West individually, but against the estate. West died February 2, 1887, before rendering any account as administrator to the probate court, though, according to the evidence, he intended to do so. The complainant was appointed administrator on his estate. The defendant was appointed administrator *de bonis non* on his wife's estate.

The object of this suit is to have the court declare a lien on the stock and deposit for the amounts aforesaid, in favor of the complainant as administrator on West's estate, and for compensation for West's services as administrator on his wife's estate, and to have so much of said stock and deposit as is necessary sold for the payment thereof.

It is provided in Pub. Stat. chap. 189, § 1, that "the estate of every deceased person shall be chargeable with the expenses of administering the same, and the funeral charges of the deceased, and the payment of his just debts; and the same shall be paid by the executor or administrator of the estate out of the same, so far as the same shall be sufficient therefor." In *Buxton v. Barrett*, 14 R. I. 40, this court held that the estate of a woman dying under coverture is chargeable, by force of this provision, for her funeral expenses; and, if so, it is likewise chargeable for the expenses of administering it. We see no reasons, therefore, why the sums paid by Charles H. West for funeral and probate expenses, together with a reasonable compensation for his services as administrator, should not be paid out of his wife's estate. That he was her husband is not, in our opinion, enough to relieve her estate; for there is no reason why he should not have had the same right as any other administrator with the will annexed, if he wished; and the fact that he had the charges made against the estate in the receipts which he took shows that he did wish it.

The physician's bill and the stonemason's bill stand differently. There is nothing in the statute to make the estate chargeable with the physician's bill, unless it can be regarded as a debt due from the testatrix; but we do not see how it can, since, being covert, she was unable to contract such a debt. We think it is to be regarded as the personal debt of her husband, and that, having paid it, he was not entitled to charge it to the estate. In regard to the stonemason's bill, it seems to us that, where the estate

is solvent, some simple and inexpensive stone or tablet to mark the grave is demanded by the decencies of Christian burial, and may be properly regarded as a part of the funeral expenses. The statute (Pub. Stat. chap. 189, § 4), which allows the erection of a suitable monument "with the permission of the court of probate," in our opinion, contemplates something more pretentious. But in this case, the bill never having been paid by West, his administrator has nothing to do with it.

The complainant, therefore, can only have relief, if at all, in the matter of funeral and probate charges, and compensation. The defendant contends that he is not entitled to relief in equity, but that the proper course for him is to settle his intestate's account, as administrator, with the probate court, and then, if he makes out his claims, to prosecute his remedy at law. This view is supported by *Monroe v. Holmes*, 9 Allen, 244; *S. C.* 13 Allen, 109; *Prentice v. Dehon*, 10 Allen, 353,—the remedy at law, according to these cases, being, after settlement in the probate court, a suit on the second administrator's bond. That an administrator of an administrator may settle his intestate's account with the probate court is maintained in several American cases on English authority. *Novell v. Novell*, 2 Me. 75; *Hamaker's Estate*, 5 Watts, 204; *Ray v. Doughty*, 4 Blackf. 115; *Jones v. Irvine*, 23 Miss. 361; *Steen v. Steen*, 25 Miss. 518; *Jarnagin v. Frost*, 59 Miss. 898. No exception can be taken to this doctrine where the terms in which probate jurisdiction is conferred are such as warrant its application; but, of course, in this country the probate courts have only the jurisdiction given them by statute, and it does not follow that they have a power simply because such a power is exercised by the English probate, or ecclesiastical, courts. In California it has been held that the courts of probate of that State have no power under the statute to settle the account of a deceased administrator, presented by his administrator (*Wetzler v. Fitch*, 52 Cal. 688; *Bush v. Lindsey*, 44 Cal. 131); but that the representative of the deceased executor or administrator can be compelled to account in equity (*Chaquette v. Ortel*, 60 Cal. 504; *Curtiss's Estate*, 65 Cal. 572). And to a like effect, see *Re Ranney*, 66 How. Pr. 291, in New York, and *Schenck v. Schenck*, 3 N. J. L. 149, in New Jersey. In this State the jurisdiction is nowhere specifically granted, but, if it exist, exists under Pub. Stat. chap. 179, § 9, which provides that the probate courts "may and shall examine, allow, and settle the accounts of executors, administrators, and guardians by them appointed." The provision may, perhaps, be broad enough to authorize the settlement of the accounts of deceased executors, administrators, and guardians, when voluntarily presented by their representatives, though we know of no process by which their representatives could be compelled to account in the probate courts. But if this be so, does it follow that the complainant can have no relief in equity? The Massachusetts cases above cited are not conclusive on this point; for the equity jurisdiction in that State is limited, or was limited when these cases were decided, many controversies of equitable cognizance being then excluded when there was another remedy either at com-

mon law or by statute. Pom. Eq. Jur. 818. This court has full chancery jurisdiction conferred upon it by statute; and therefore a statute which simply affords a remedy in some other tribunal or tribunals does not oust it of its chancery jurisdiction to that extent, the remedy so afforded being concurrent or cumulative. And see Pom. Eq. Jur. §§ 279, 1158, note.

Chancery jurisdiction in matters of administration is very extensive. Mr. Pomeroy says that the jurisdiction, as administered in England, "includes everything pertaining to the settlement of decedents' estates except the probate of wills and the issue of letters testamentary and of administration." Pom. Eq. Jur. § 77. Doubtless this statement is too broad for this country, where so much depends on statute; but in the case at bar, if the jurisdiction would exist independently of statute, we can see nothing in the statute, if the statute applies, to exclude it. In our view, Mr. West, if he had lived, could have retained out of the estate so much as was necessary to reimburse him for the funeral and probate expenses paid by him, and to compensate him for his services as administrator. His right of retainer was equivalent to a special lien enforceable by himself for his own benefit. Having died, he cannot enforce it; and the question is whether equity will preserve the right and enforce it for the benefit of his estate. It seems to us that equity ought to interpose. *Actus dei nemini nocet*. If, as is sometimes maintained, the principal ground of equitable relief in matters of administration is trust, the administrator being regarded as trustee of the assets in his hands, the circumstances here impart a special character to the trust, making it specially amenable to equitable enforcement. In *Smith v. Hoskins*, 7 J. J. Marsh. 502, it was decided that an administrator who had paid debts of his intestate out of his own funds, expecting assets, and was removed before they came to hand, was entitled to maintain a suit in equity against the subsequent administrator, who had received assets, and the heirs, for reimbursement. The case is fully in point, save that the case at bar is stronger in this, that the administrator had assets in hand, with right of retainer, which he was prevented from exercising by death, and that the charges paid by him, together with the claim for compensation, are preferred claims. See also *Hays v. Cockrell*, 41 Ala. 78.

The defendant sets up, by way of further defense, that the complainant is not entitled to relief because his intestate allowed more than three years to pass without rendering an account, and because the complainant has not rendered any account for him, and consequently the charges paid by his intestate have not been allowed by the probate court. The record shows that the said intestate did not survive his wife by quite three years; and, though he was doubtless neglectful in not earlier settling his account, yet we do not think his laches were such as should bar this suit, though they may be a proper matter for consideration in the courts. Neither do we think it was necessary for the complainant to have his intestate's account settled in the probate court, before commencing suit here. If this court has jurisdiction in the matter, it has jurisdiction to settle the account as well as to enforce the payment

of any balance which may be found in favor of the former administrator.

We will therefore sustain the bill, and, unless the account of Charles H. West can be otherwise adjusted, will send the cause to a master to hear and report thereon.

Emma FEHLBERG *et al.*,

v.

Garret COSINE *et al.*

SAME v. William OHLY *et al*

1. An agreement will not be reformed in the absence of fraud or mutual mistake.
2. Equity will not enjoin the prosecution of actions at law wherein questions of fraud may properly be tried.
3. Statement, in a bill, of the evidence by which a case is to be maintained, is not a statement of the case itself.

(Providence—Decided February 18, 1888.)

BILLS in equity to reform a written contract and to enjoin actions at law. *Dismissed*.

The facts are sufficiently stated in the opinion of the court.

Messrs. Benjamin F. Thurston and Frederick Rueckert, for complainants.

Messrs. Edgar J. Phillips, Herbert B. Wood, and William Fitch, for respondents.

Stiness, J., delivered the opinion of the court:

In order to entitle a party to a decree to reform a written instrument, it must appear that there has been a mutual mistake in its execution. *Bradford v. Romney*, 80 Beav. 481; *Metropolitan Counties Ins. Soc. v. Brown*, 28 Beav. 434; *Newins v. Dunlap*, 33 N. Y. 676; *Lyman v. United Ins. Co.* 17 Johns. 373; *Ludington v. Ford*, 33 Mich. 123; *Paulison v. Van Iderstine*, 28 N. J. Eq. 306. The rule and the reasons upon which it rests are clearly stated by Ames, *Ch. J.*, in *Diman v. Providence, W. & B. R. Co.* 5 R. I. 130. "A court of equity has no power to alter or reform an agreement made between parties, since this would be in truth a power to contract for them; but merely to correct the writing executed as evidence of the agreement, so as to make it express what the parties actually agreed to. It follows that the mistake which it may correct in such a writing must be, as it is usually expressed, the mistake of both parties to it; that is, such a mistake in the draughting of the writing as makes it convey the intent or meaning of neither party to the contract. If the court were to reform the writing to make it accord with the intent of one party only to the agreement, who averred and proved that he signed it, as it was written, by mistake, when it exactly expressed the agreement as understood by the other party, the writing, when so altered, would be just as far from expressing the agreement of the parties as it was before: and the court would have been engaged in the singular office, for a court of equity, of doing right to one party at the expense of a precisely equal wrong to the other."

This case recognizes another rule of equity.

that, where there has been a material mistake upon one side, the court may rescind and cancel the agreement, when it can do so without injustice to the other party. There are two principal classes of cases in which this power of the court is exercised. One includes cases of executory contracts and the like, where the parties can be put *in statu quo*. In these cases the parties have not, in reality, agreed; their minds have not met; and if one, without fault on his part, has bound himself to something materially different from what he supposed it to be, which can be annulled without loss or injustice to the other side, it is deemed to be inequitable to enforce it. *Lawrence v. Staigg*, 8 R. I. 256; *S. C.* 10 R. I. 581; *Harris v. Pepperell*, L. R. 5 Eq. 1; *Garrard v. Frankel*, 30 Beav. 445; *Wright v. Goff*, 22 Beav. 207; *Spurr v. Benedict*, 99 Mass. 465; *Glass v. Hulbert*, 102 Mass. 24.

Another class includes cases where the mistake of the party complaining has arisen from the concealment or withholding of facts which the other party was bound to disclose; thus amounting to fraud, actual or constructive, which is one of the fundamental elements of jurisdiction in equity. This case does not come within any of these grounds of relief. The written instrument cannot be reformed, because there was no mutual mistake. The complainant Fehlberg formerly manufactured oleomargarine in New Haven, but his establishment was seized and closed upon a suit for the alleged infringement of a patent held by a rival manufacturer. He was then informed by the defendants Hoyt and Ohly that they had the only valid patent for the manufacture of oleomargarine, and that they should stop everybody who did not have their license. Negotiations followed which resulted in the execution of the agreement or license set forth in the bill. The defendants say the contract was written just as it was agreed upon, and just as they understood and intended it should be. The only evidence of a mutual mistake is the testimony of the complainants that, unable to comprehend the document, from their imperfect knowledge of the English language, they relied on the defendants,—especially on Ohly, who spoke German,—and were told it gave them the sole and exclusive right to make and sell oleomargarine in Rhode Island. The complainants also state that it was agreed that they were to pay nothing under the license until other manufacturers here had been stopped. But there could have

been no mistake about these things on the part of the defendants. They had bought the right to issue licenses under the Cosine patent; they were familiar with the form and effect of licenses, and knew perfectly well the terms of the paper they gave to the complainants. If they stated what it is said they did, it was not a mistake, but a lie—a fraud. There is no ground for reforming the instrument, for there was no mutual mistake. It might be annulled for fraud, but we do not understand that the bill charges fraud. Following a too-common practice, the bill goes on with a sort of affidavit or narrative of the transaction,—not setting out facts so much as the evidence of facts,—as though stating the evidence by which a case is to be maintained is the same thing as stating the case itself. The difficulty with such a practice is that the court is frequently at a loss to know what a complainant means to state or charge, and upon what ground he seeks relief. As there is no charge of fraud in this case, as we construe the bill, we do not pass upon that question, and, of course, cannot set the instrument aside on that ground.

Neither is the case one where the instrument can be annulled for the material mistake of one party. The contract has been partially executed. For several years the complainants have been manufacturing oleomargarine, if not according to the patent, at least under the license, which they do not offer to give up or seek to have annulled. The parties cannot be placed *in statu quo* without recompense to the defendants for the time the license has run. But this involves the whole question between the parties, viz.: what their agreement was, and whether anything was to be paid until after the other manufacturers had been stopped. The contract says nothing about this, but the complainants say this was a part of the agreement. If so, we do not think it was an innocent omission, or a misapprehension as to the effect of the paper, but simple deceit. If there was fraud, the contract cannot be enforced; if there was no fraud and there is no proof of mutual mistake, the complainants must abide by a contract improvidently made. The proper forum for trying the question of fraud, since it is not charged here, is in the actions at law brought to recover the money due under the contract; and for that reason the prosecution of the suits ought not to be enjoined.

Bill dismissed, with costs, but without prejudice to the suits at law.

CONNECTICUT.
SUPREME COURT OF ERRORS.

George TURNER
v.
Town of BRIDGEPORT.

1. **Persons dealing with towns**, through the medium of committees and other agents of towns, **must**, at their peril, **take notice** of the scope and measure of the powers of such committees and agents.
2. **When a town by legal vote limits** the amount of an **appropriation** for a specific purpose, and by the same vote appoints a committee to carry that purpose into effect, such **committee has no implied authority** to involve the town in any **additional expense**.
3. **A town cannot contract except by a vote passed at a legal town meeting or in strict accordance with the positive provisions of some statute.**
4. The mere **occupation and use, by a town, of a school building** erected on land belonging to the town at a cost in excess of the amount limited and appointed by the town for its erection, **will not render the town liable for such unauthorized excess in cost.**
5. A **ratification by a town of previously unauthorized acts of an agent**, must be made in a lawful manner, and, as a rule, directly and not by implication, and must be made with a full knowledge of all material facts.
6. No **estoppel in pais** can be created as **against a town**, except by conduct on the part of the town which the person claiming the estoppel has the right to and does in fact rely on.

(Fairfield—Filed December 5, 1887.)

CROSS-APPEALS from a judgment of the Superior Court of Fairfield County in favor of plaintiff in an action brought to recover for work done and materials furnished in the erection of a school building. *Affirmed.*

Argued before Park, Ch. J., Carpenter, Pardee, Loomis, and Stoddard, Jd.

The action was tried to a jury, before Fenn, J. The complaint claimed \$35,000 damages, but the jury returned a verdict in plaintiff's favor for only \$2,190, and he appealed to this court claiming error in the rulings and charge of the court. Defendant also appealed, claiming error in the rulings and charge, and alleging that the plaintiff had already been fully paid under the contract. Defendant's counsel agreed that, in case the court should find that the plaintiff was not entitled to have the verdict disturbed for the reasons assigned by him, then they would not ask for a new trial on behalf of defendant.

Further facts appear in the opinion.

Messrs. Goodwin Stoddard and D. Davenport, for plaintiff:

When a builder enters into a contract to erect a building according to a certain plan for

a specific sum, such contract becomes the law for the parties, and they are both bound by it; and if alterations, deviations, additions, and omissions, duly authorized, are made in the construction of such building, they form the subject-matter of a new contract, either express or implied, without affecting the original contract, and must be settled for agreeably to such new contract. But if such changes are so extensive that the building actually built is so different from that shown in the plan that it cannot be considered as built according to such plan, and said plan is so far departed from that it is impossible to trace it in order to properly determine what is extra work, the builder is permitted to charge for the whole work done by measure and value.

McCormick v. Connolly, 2 Bay, 401; *Hollinshead v. Mactier*, 18 Wend. 276; 1 Swift, Dig. p. 683; *Chitty*, Cont. p. 566; *Pepper v. Burland*, Peake, N. P. 108; *Dubois v. Delaware & H. C. Co.* 4 Wend. 280.

In order that a contract may exist between parties, whether acting in person or through the instrumentality of agents, either general or special, there must be a meeting of the minds of the parties; and where one party, acting through the instrumentality of an agent, either general or special, has sought to enter into a contract with another for the performance of work or the furnishing of materials, and has failed in so doing through the want of a meeting of minds between the agent and such other party, and the principal has received and accepted the benefit of the labor and materials of such other party, furnished to him under such misunderstanding, the law will imply a contract on the part of the principal to pay to the other party the reasonable and just value of such labor and materials, whether such value is or is not in excess of the amount for which the agent was authorized to contract.

Turner v. Webster, 24 Kan. 38; *S. C.* 36 Am. Rep. 253, 254.

An adoption of the agency in part adopts it in the whole, because a principal is not permitted to accept and confirm so much of a contract, made by one purporting to be his agent, as he shall think beneficial to himself, and reject the remainder.

1 Pars. Cont. p. 51.

If the plans and specifications were prepared by the defendant and handed to the plaintiff for his signature, they were to be construed most favorably to him; and if plaintiff built in accordance with his interpretation of said plans and specifications, which was acquiesced in or not dissented from by the building committee and architect, and under the immediate direction and control of the committee, and with its approval, both parties may be said to have adopted and acted on this construction, and are bound by it.

Omaha v. Hammond, 94 U. S. 99 (24 L. ed. 70); *Huidekoper v. Douglass*, 7 U. S. 3 Cranch, 71 (2 L. ed. 369); *Chicago v. Sheldon*, 76 U. S. 9 Wall. 54 (18 L. ed. 596); *Elting v. Sturtevant*, 41 Conn. 182.

Bringing a suit upon a contract made by an agent in excess of authority, or relying upon it as a defense, ratifies all of its provisions.

Fiedler v. Smith, 6 Cush. 339; 340; *West Boylston Mfg. Co. v. Searle*, 15 Pick. 230; 2

Greenl. Ev. § 66; *Widener v. Lane*, 14 Mich. 138.

If a party ratifies a contract made by another in his behalf, he must ratify it as the agent has made it.

Brigham v. Palmer, 3 Allen, 450.

Allegations in the pleading are admissions, as against the party making them; and, as such, are part of the evidence in the case.

Northern Pac. R. Co. v. Paine, 119 U. S. 561 (30 L. ed. 513).

A municipal corporation may ratify the unauthorized acts and contracts of its agents or officers, which are within its corporate powers.

The same principles are applicable in respect to corporations as to natural persons.

Where the relation of principal and agent has once existed, the principal is bound to give notice that he will not sanction the unauthorized act of the agent, performed in good faith and for his benefit, when information of it is conveyed to him. This is based, not on any principle of estoppel, but of election, as in other cases, and upon the inference as to the intention which may be drawn from the conduct.

Philadelphia, W. & B. R. Co. v. Cowell, 28 Pa. 335; *Foster v. Rockwell*, 104 Mass. 172; *Metcalf v. Williams*, 4 New Eng. Rep. 239, 144 Mass. 454; *Brigham v. Peters*, 1 Gray, 147; *Thayer v. White*, 12 Met. 345; *Remick v. Sandford*, 118 Mass. 107; *Dill. Mun. Corp.* § 385; *Laurence v. Lewis*, 133 Mass. 561; *Peterson v. Mayor*, 17 N. Y. 458, 457, 458; *Harrod v. Mc Daniels*, 126 Mass. 415.

A ratification by a corporation may be implied from its conduct.

Burlington v. New Haven & N. Co. 26 Conn. 51.

The Act of 1877 was not intended to invalidate expenditures and contracts made in excess of a specific appropriation, but to punish the officer or agent who exceeded it wilfully, and, even then, does not apply to the case of necessary expenditures for the schools after the specific appropriation has been exhausted.

Harris v. Runnels, 53 U. S. 12 How. 79 (13 L. ed. 901); *People's Bank v. Manufacturers Nat. Bank*, 101 U. S. 133 (25 L. ed. 907); *Chicago, R. I. & P. R. Co. v. Howard*, 74 U. S. 7 Wall. 413 (19 L. ed. 117).

The plaintiff did the work upon the promise of the defendant to pay him. If the promise of the town was void, then there was a failure of consideration, and the plaintiff can recover under the common counts.

Dill v. Wareham, 7 Met. 447.

The town has had the benefit of the plaintiff's labor, materials, and money, and cannot retain it and avoid payment on the plea that it had no authority to enter into the contract. Defendant in its answer did not claim that its agents exceeded their authority as agents, but expressly alleged that it entered into the contract of November 6, 1880, and then sets up the defense that it had not authority to enter into the contract.

Moss v. Rossie Min. Lead Co. 5 Hill, 187; *Dill v. Wareham*, 7 Met. 447; *Argenti v. San Francisco*, 16 Cal. 255; *McCracken v. San Francisco*, 16 Cal. 631; *Marsh v. Fulton County*, 77 U. S. 10 Wall. 684 (19 L. ed. 1042); *Louisiana v. Wood*, 102 U. S. 299 (26 L. ed. 153); *Gause v. Clarksville*, 5 Dill. C. Ct. 180.

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Where a corporation adopts the agreement of their agent and partially performs it, it becomes the contract of the corporation, independent of any prior authority of the agent, which cannot then be brought in question.

International S. S. & R. S. Co. v. United States, 13 Ct. Cl. 209.

When the act of the agent is brought to the knowledge of the principal, he must disavow promptly.

Indianapolis Roll. Mill Co. v. St. Louis Ft. S. & W. R. Co. 120 U. S. 239 (30 L. ed. 639).

The law provides that the school committee, in a town which has abolished all school districts, are made the agents who shall manage the property of the town pertaining to schools, and that the expenses of maintaining schools in such town, which are incurred with its approval, shall be paid by the town.

Sharon v. Salisbury, 29 Conn. 117; *Davidson v. Bridgeport*, 8 Conn. 476; *Fisher v. Inhabitants of School Dist. No. 17*, 4 Cush. 494; *Smith v. Scott's Ridge School Dist.* 20 Conn. 330; *Wilson v. School Dist. No. 4*, 32 N. H. 129.

Messrs. **Robert E. De Forest, A. B. Beers**, and **Joseph A. Joyce**, for defendant:

Plaintiff was estopped by his pleadings from taking or asking anything on the ground of any implied contract or on the ground of any other express contract than the one of November 6, 1880.

He, in certain of his counts, founds his case upon an open, unrescinded agreement, binding upon himself and the town.

The defendant, in his answer, admitted the contract. It stood, therefore, a fact admitted in the pleadings, by both parties, that such contract had been made and was still in force when the trial began.

A party cannot at the same time prosecute two demands, against the same person, that upon their very face, in the solemn form of pleading, are inconsistent with each other.

If the plaintiff would not elect upon which one of the two inconsistent theories he would stand, defendant had a right to elect which one it would admit, and which one it would deny; and when defendant admitted that the contract of November 6, 1880, had not been rescinded or merged in any parol agreement, but was still open, unrescinded, and of binding force, plaintiff was estopped to claim the contrary.

Collom v. Birby, 33 Minn. 50, and cases cited; *Randall v. Constans*, Id. 333; *Trimble v. Doty*, 76 Ohio St. 129; *Crow v. Hildreth*, 39 Cal. 618.

As to estoppel, see—

Krey v. Husemann, 4 West. Rep. 261, 21 Mo. App. 343; *Thrush v. Cameron*, 4 West. Rep. 770; Id. 394, 397; *Smith v. Hallock*, 8 How. Pr. 73; *Sweet v. Ingerson*, 12 How. Pr. 331; *Whitacre v. Culeter*, 8 Minn. 138; *Nichols v. Larkin*, 79 Mo. 264; *Leitensdorfer v. King*, 7 Col. 457.

The court could compel election.

Hepburn v. Babcock, 9 Abb. Pr. 159, note; *Berringer v. Cobb*, 58 Mich. 557; *Wetmore v. McDougall*, 32 Mich. 276; *Durant v. Gardner*, 19 How. Pr. 94; *Ehrlich v. Aina L. Ins. Co.* 4 West. Rep. 37, 88 Mo. 249; *Plummer v. Mold*, 22 Minn. 15; *Coates v. Sangston*, 5 Md. 132.

So the court may set aside complaint altogether, and compel pleading anew.

Sipperly v. Troy & B. R. Co. 9 How. Pr. 88.
In cases where opportunity to plead after the right accrued is not presented, the estoppel may be taken advantage of by way of objection to evidence.

1 Swift, Dig. p. 622; *Plummer v. Mold*, 22 Minn. 15; *Linden v. Hepburn*, 3 Sandf. 668; *Ehrlich v. Aetna L. Ins. Co.* 4 West. Rep. 37, 88 Mo. 249; *Roberts v. Leslie*, 14 Jones & S. 81; 1 Chitty, Pl. 7 Am. ed. 260-438; Gould, Pl. ed. 1882, chap. 4, p. 171, §§ 3, 4; *Smith v. Hallock*, 8 How. Pr. 73; *Gardiner v. Ogden*, 22 N. Y. 327; *Morris v. Rexford*, 18 N. Y. 552, 557; *Berringer v. Cobb*, 58 Mich. 557; *Wetmore v. McDougall*, 32 Mich. 276; *Hart v. Longfield*, 7 Mod. 148, 195; *Nevil v. Soper*, 1 Salk. 213; *Byass v. Wylie*, 5 Tyr. 877; *Neidefer v. Chastain*, 71 Ind. 363; *Indianapolis Nat. Bank v. Root*, 5 West. Rep. 236, 107 Ind. 224; *Leeds v. Richmond*, 102 Ind. 372-384; *Western U. Tel. Co. v. Young*, 93 Ind. 118; *Ferguson v. Gilbert*, 16 Ohio St. 88; *Fern v. Vanderbilt*, 13 Abb. Pr. 72; *Bigelow*, Estop. ed. 1872, 613, 617, 618, 584.

Plaintiff had no right to ask or take anything in the case aside from the contract of November 6, 1880, because upon well-settled principles of public policy, and from the limited powers of Connecticut towns, there was no foundation for any other contract, express or implied.

The particular form in which the business is done by such town is not material, but to give it any validity,—to make it an act of the corporation at all,—it must, in one form or another, be done by vote of a town meeting.

The Statutes of the State of Connecticut are the charter of Connecticut towns, and all their powers are derived therefrom.

Webster v. Harvinton, 32 Conn. 131-137; *State v. Fyler*, 48 Conn. 145; *Booth v. Woodbury*, 32 Conn. 137.

The vote authorizing a contract must be passed at a meeting expressly warned for that purpose; otherwise the vote is void, as *ultra vires*, and ineffectual as though the town had no corporate power to pass it at all.

Rev. Stat. 1875, p. 83, § 1; p. 136, § 14; *Hayden v. Noyes*, 5 Conn. 391; *Brooklyn Trust Co. v. Hebron*, 51 Conn. 29.

And the requisite warning of the meeting must be affirmatively shown by the party seeking to establish a right upon the action of the meeting.

Bloomfield v. Charter Oak Nat. Bank, 121 U. S. 121 (30 L. ed. 923).

And the contract can be proved in no way except by the town records, showing the warning and holding of the meeting and the corporate vote relied upon.

Gilbert v. New Haven, 40 Conn. 105.

Where a corporation has power to contract in relation to a certain subject in only one way, it cannot by any possibility obligate itself *ex contractu* in regard to that subject in any other way; the law never implies a promise where it prohibits an express one,—never implies a contract against its own policy and prohibitions.

Wilson v. School Dist. No. 4, 32 N. H. 126, 127; *Jordan v. School Dist. No. 3*, 38 Me. 164; *Harris v. School Dist. No. 10*, 28 N. H. 61-63; *Hayward v. School Dist. No. 13*, 2 Cush. 419; *Davis v. School Dist. No. 2*, 24 Me. 349; *Pratt v. Swanton*, 15 Vt. 150; *Zottman v. San Fran-*

cisco, 20 Cal. 96; 79 Am. Dec. 686; 18 Md. 284; *Donovan v. Mayor of N. Y.* 33 N. Y. 291; *Brady v. Mayor of N. Y.* 20 N. Y. 319; S. C. 2 Bosw. 173; *People v. Flagg*, 17 N. Y. 584-591; *Johnson v. Indianapolis*, 16 Ind. 227; *Durango v. Pennington*, 8 Col. 257; *Bonesteel v. Mayor of N. Y.* 22 N. Y. 162; *McSpedon v. Mayor of N. Y.* 7 Bosw. 601; *Ottawa v. Casey*, 108 U. S. 110, 121 (27 L. ed. 669).

Where a thing is directed to be done through certain means or in a particular manner, there is implied an inhibition upon doing it through other means or in a different manner.

Des Moines v. Gilchrist, 67 Iowa, 210-213; *Leavenworth v. Norton*, 1 Kan. 432; *Churchman v. Indianapolis*, 8 West. Rep. 917, 110 Ind. 259; *Roper v. McWhorter*, 77 Va. 214; *Kirkham v. Russell*, 76 Va. 956; *Charleston v. Reed*, 27 W. Va. 681; S. C. 55 Am. Rep. 836; *Birmingham etc. R. Co. v. Birmingham St. R. Co.* 79 Ala. 465; *Knox City v. Thompson*, 2 West. Rep. 166, 19 Mo. App. 523; *Ruggles v. Collier*, 43 Mo. 376; *Rumsey Mfg. Co. v. Schell City*, 4 West. Rep. 752, 21 Mo. App. 175; *Stewart v. Clinton*, 79 Mo. 603, 609, 610; *Mister v. Kansas City*, 18 Mo. App. 217.

Those who deal with the officers of a corporation must ascertain, at their peril, what they will be conclusively presumed to know,—that these public agents are acting strictly within the sphere limited and prescribed by law, and outside of which they are utterly powerless to act.

Cheaney v. Brookfield, 60 Mo. 54; *Saxton v. St. Joseph*, 60 Mo. 153; *Swift v. Williamsburgh*, 24 Barb. 427-432; *Bloomfield v. Charter Oak Nat. Bank*, 121 U. S. 121 (30 L. ed. 923); *Brooklyn Trust Co. v. Hebron*, 51 Conn. 22; *Reichard v. Warren County*, 31 Iowa, 381; *Starr v. Des Moines County*, 22 Iowa, 292; *Zottman v. San Francisco*, 20 Cal. 96; *Murphy v. Napa County*, Id. 502; *Butler v. Charlestown*, 7 Gray, 13; *McSpedon v. Mayor of N. Y.* 7 Bosw. 601; *Brady v. Mayor of N. Y.* 2 Bosw. 173; *Farmers L. & T. Co. v. Mayor of N. Y.* 4 Bosw. 80; *Johnson v. Indianapolis*, 16 Ind. 227; *Dennison v. St. Louis Co.* 33 Mo. 169; *Hull v. Marshall County*, 12 Iowa, 142; *Clark v. Des Moines*, 19 Iowa, 209; *Manning v. Van Buren Twp.* 28 Iowa, 332; *Wolcott v. Lawrence County*, 26 Mo. 273; *Taylor v. Wayne Twp.* 25 Iowa, 447; *Taylor v. Otter Creek Twp.* 26 Iowa, 281; *Durango v. Pennington*, 8 Col. 257; *Mister v. Kansas City*, 18 Mo. App. 217, 227; *Carron v. Martin*, 69 Am. Dec. 584, note, 589.

That construction will obtain which would make the contract valid and effectual; and to construe this contract to mean that plaintiff could recover for extras, a sum in excess of the amount known by him to remain of the appropriation would defeat the whole agreement, since such construction would make said contract illegal and void.

Chitty, Cont. p. 80; 1 Swift, Dig. p. 222, Rule 1; 225, Rule 7; 226, Rules 9, 15; Shep. Touch. 85; Cro. Eliz. 705; 2 Pars. Cont. 500, 506; *Clark v. Pinney*, 7 Cow. 681; *Doyle v. Teas*, 5 Ill. 202, 254 et seq.; *Redman v. Hartford F. Ins. Co.* 47 Wis. 89; *Harrington v. Klopogge*, 4 Doug. 5; *Riley v. Vanhouten*, 4 How. (Miss.) 428; Co. Litt. 42, 183; *Archibald v. Thomas*, 3 Cow. 284; *Many v. Beekman Iron Co.* 9 Paige, 188; *Shore v. Wilson*, 9 Cl. & F. 397;

Hudson v. Whiting, 17 Conn. 490; *Brown v. Slater*, 16 Conn. 192; *Morris & E. R. Co. v. Sussez R. Co.* 20 N. J. Eq. 542-568, 568; *Atty-Gen. v. Clapham*, 4 De G. M. & G. 591; 81 Eng. L. & Eq. 142; *Moss v. Bainbrigge*, 18 Beav. 478; 81 Eng. L. & Eq. 565; *Bailey v. Close*, 87 Conn. 408; *Altwood v. Munnings*, 7 Barn. & C. 278; 14 Eng. C. L. 42; *Lampon v. Corke*, 5 Barn. & Ald. 606; 7 Eng. C. L. 205; *Lyman v. Clark*, 9 Mass. 235; *Rich v. Lord*, 18 Pick. 322; *Jackson v. Stackhouse*, 1 Cow. 123; *McIntyre v. Williamson*, 1 Edw. Ch. 34.

As to power of the committee to make a new contract, see—

Keyes v. Westford, 17 Pick. 273; *Barker v. Chesterfield*, 102 Mass. 181; *Haliburton v. Frankfort*, 14 Mass. 214; *Tainter v. Worcester*, 123 Mass. 811, 817; *Palmer v. Haverhill*, 98 Mass. 487, 489; *Lowell Sav. Bank v. Winchester*, 8 Allen, 109; *Boynston v. Lynn Gaslight Co.* 124 Mass. 197; *Wells v. People*, 71 Ill. 532; *School Directors v. Fogleman*, 76 Ill. 189; *Peers v. Board of Education*, 73 Ill. 508.

As the committee had no authority to contract beyond the amount specified, and as the resolution limiting their authority is recited in the contract, and as any attempt upon their part to contract for a greater expenditure would have been criminal as in violation of the express statute of the State, Pub. Acts 1877, chap. 120, § 2, p. 218, the parties must be held to have contracted with reference to that law and that authority and to have understood and intended to make a legal and valid, and not an illegal and invalid, agreement.

1 Swift, Dig. p. 222, Rule 1; p. 225, Rule 7; p. 226, Rules 9, 15; *Shep. Touch.* 85; *Cro. Eliz.* 705; 2 Pars. Cont. p. 500, 506; *Harrington v. Klopogge*, 4 Doug. 5; *Clark v. Pinney*, 7 Cow. 681; *Co. Litt.* 42, 188; *Archibald v. Thomas*, 3 Cow. 284; *Many v. Beekman Iron Co.* 9 Paige, 188; *Shore v. Wilson*, 9 Cl. & F. 397; *Hudson v. Whiting*, 17 Conn. 490; *Brown v. Slater*, 16 Conn. 192; *Morris & E. R. Co. v. Sussez R. Co.* 20 N. J. Eq. 542, 568, 568; *Atty-Gen. v. Clapham*, 4 De G. M. & G. 591; 81 Eng. L. & Eq. 142, 565.

The statute is one of public policy, and the town will not be permitted upon any principle of acceptance, or waiver, or estoppel, or ratification, to nullify and break down, or in the slightest degree impair, this wise, salutary, and necessary safeguard against unauthorized expenditure of public money.

Norton v. Mansfield, 16 Mass. 51; *People v. Blackman*, 14 Mich. 336; *Thomas v. Richmond*, 79 U. S. 12 Wall. 349, 358 (20 L. ed. 453); *Congress & E. S. Co. v. Knowlton*, 103 U. S. 49 (26 L. ed. 347), and cases cited; *Chapman v. Douglas County*, 107 U. S. (27 L. ed. 878); *Mitchell v. Smith*, 4 U. S. 4 Dall. 269 (1 L. ed. 828); *U. S. Bank v. Owens*, 27 U. S. 2 Pet. 527 (7 L. ed. 508); *Gray v. Hook*, 4 N. Y. 449; *Bensley v. Bignold*, 5 Barn. & Ald. 385; *Philadelphia Loan Co. v. Townner*, 13 Conn. 262.

Where an instruction is erroneous, the court will refuse to reverse judgment if the instruction did not prejudice the party claiming error.

Rogers v. Hillhouse, 3 Conn. 405; *House v. Metcalf*, 27 Conn. 639; *Nicholson v. New York & N. H. R. Co.* 22 Conn. 74; *Hattin v. Chapman*, 46 Conn. 607; *Winch v. Baldwin*, 68 Iowa,

764; *Tuck v. Singer Mfg. Co.* 67 Iowa, 576; *Cline v. Lindsey*, 9 West. Rep. 218, 110 Ind. 837; *Gas Co. v. Wheeling*, 8 W. Va. 320; *Andis v. Personett*, 6 West. Rep. 564, 108 Ind. 202; *Porter v. Waltz*, 6 West. Rep. 239, 108 Ind. 40; *Bright-hope R. Co. v. Rogers*, 76 Va. 443; *Deer v. Akin*, 40 Ga. 423; *McKay v. Leonard*, 17 Iowa, 569; *Gardner v. Clark*, 17 Barb. 538; *Hook v. Craghead*, 85 Mo. 380; *Brown v. State*, 9 West. Rep. 205, 110 Ind. 486; *American Bible Soc. v. Price*, 3 West. Rep. 66, 115 Ill. 623; *Cannon v. Grigsby*, 3 West. Rep. 87, 116 Ill. 151; *Woodbury v. Larned*, 5 Minn. 389, 346; *Drantley v. Carter*, 26 Miss. 283; *Shaffner v. Leahy*, 3 West. Rep. 397, 21 Mo. App. 110; *Ryan v. Donnelly*, 71 Ill. 101; *English v. Caldwell*, 30 Mich. 362; *Greenleaf v. Birth*, 30 U. S. 5 Pet. 182 (8 L. ed. 72); *Cummings v. Stone*, 13 Mich. 70; *Hanna v. Renfro*, 32 Miss. 125; *Hanks v. Neal*, 44 Miss. 213; *Boswell v. Collins* (Pa.) 7 Cent. Rep. 487.

The record must show, affirmatively, that charges asked for and refused have application to the facts in evidence, or the presumption arises that they were properly refused for irrelevancy.

Wilson v. Lawrence, 139 Mass. 318; *Humphreys v. Woodstown*, 7 Cent. Rep. 109, 48 N. J. L. 588, 595; *Horsfield v. Adams*, 10 Ala. 9, 16; *Brazier v. Burt*, 18 Ala. 201; *People v. McKinney*, 10 Mich. 54, 102, citing 2 Phill. Ev. Cow. & Hill Notes, 1008, 1004, and cases cited.

Nor is a charge objectionable upon the ground that it was misleading, unless it appears that it had that effect.

Hattin v. Chapman, 46 Conn. 607, 609.

Instead of giving isolated instructions for each of the parties, the court may give the jury in one charge all the law which the facts of the case demand.

Hanchett v. Kimbark, 3 West. Rep. 566, 118 Ill. 121; *State v. Morris*, 3 Hawks, 390.

Instructions must be interpreted in connection with the evidence.

Wood v. Pennell, 51 Me. 52.

Where the charge, as a whole, is correct and fair, no error, even if one charge is inaccurate or erroneous.

Brown v. Illius, 25 Conn. 589, 590; *Munson v. Derby*, 37 Conn. 298, 309; *Noble v. Blount*, 77 Mo. 235; *Henschen v. O'Bannon*, 56 Mo. 291; *Louisville, N. A. & O. R. Co. v. Grantham*, 3 West. Rep. 280, 104 Ind. 353; *Lytton v. Baird*, 95 Ind. 349; *Stout v. State*, 96 Ind. 407; *Union Mut. L. Ins. Co. v. Buchanan*, 100 Ind. 63; *Gas v. Moss*, 68 Iowa, 318; *Walker v. Collier*, 37 Ill. 362. And see *Evanston v. Gunn*, 99 U. S. 660, 667, 668 (25 L. ed. 306); *Andes Ins. Co. v. Fish*, 71 Ill. 620; *Rice v. Brown*, 77 Ill. 549; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 295 (23 L. ed. 898); *Reiter v. Starin*, 73 N. Y. 601; *State v. Mahan*, 6 Iowa, 304; *Cline v. Lindsey*, 9 West. Rep. 218, 110 Ind. 837; *McClelland v. Burns*, 5 Col. 390; *Yocum v. Trenton*, 3 West. Rep. 778, 20 Mo. App. 489; *Reeves v. Delaware, L. & W. R. Co.* 30 Pa. 460; *Lehigh Valley R. Co. v. Brandtmaier*, 5 Cent. Rep. 144, 113 Pa. 619; *Hawkins v. Hudson*, 45 Ala. 482; *Ladd v. Piggott*, 1 West. Rep. 347, 114 Ill. 647.

The omission to refer to all the evidence is not a sufficient cause for reversing the judgment.

Payn v. Noon (Pa.), 6 Cent. Rep. 898; *Pena*.

Mut. Ins. Co. v. Snyder, 3 W. N. C. 269; *Mershon v. Hood*, 2 Pittsburgh, 207.

And it is no error to omit to charge on a particular point, when not requested.

Waters v. Bristol, 26 Conn. 398; *Woodruff v. Noyes*, 15 Conn. 340; *Chamberlain v. Porter*, 9 Minn. 260; *Carter v. Bennett*, 4 Fla. 284; *Linn v. Wright*, 18 Tex. 317; *Chicago v. Keefe*, 1 West. Rep. 350, 114 Ill. 222; *Rozar v. Burns*, 18 Ga. 34; *State v. O'Neal*, 7 Ired. L. 251; *Cato v. State*, 9 Fla. 176; *Seigle v. Louderbaugh*, 5 Pa. 490; *Parsons v. Brown*, 15 Barb. 590; *United States v. Fourteen Packages*, Gilpin, 252; *Seabury v. Field*, 1 McAll. 60, 67; *Martin v. Great Northern R. Co.* 16 C. B. 179.

An erroneous instruction may be qualified by others, and, if this is done, it is no ground for reversal of judgment.

Vinegar Hill v. Buseon, 42 Ill. 45.

Stoddard, J., delivered the opinion of the court:

The town of Bridgeport, at a special town meeting held February 16, 1880, voted—

“That J. S. Hanover, Nathaniel Wheeler, E. W. Marsh, and George C. Waldo, be, and they are hereby, appointed agents of the town to obtain plans, specifications, and estimates for the building of a public schoolhouse, and, when the same shall have been approved by the school and building committee, to contract for the erection thereof on the site selected by the town, at a cost not to exceed the sum of \$55,000, and that the town appropriate said sum to defray the expenses of erecting the same.”

By this resolution of the town, the appropriation to build the schoolhouse was restricted to the sum of \$55,000, and the power of the committee to expend money was limited to that sum named in the vote.

In Connecticut, towns are territorial subdivisions of the State, created at the will of the Legislature for the more convenient administration of local, public, and governmental affairs. They have no powers except those conferred by express enactment, or necessarily implied, to carry into effect the object and purposes of their being. Agents of towns have no general authority; their powers are measured and limited by the express language in which authority is given, or by the implication necessary to enable them to perform some duty cast upon them by express language. Persons dealing with towns through the medium of committees and other agents of towns must, at their peril, take notice of the scope and measure of the powers of such committees and agents. Towns are *quasi* corporations, and in their characteristic qualities radically differ from trading and commercial corporations as to liability arising from acts of agents. And, in some essentials, towns differ from ordinary municipal corporations, whose chartered powers are conferred at the request of the inhabitants and to effectuate in some degree and to some extent purposes not public or governmental. Public duties and obligations are cast upon towns by the legislative power, without reference to the will of the inhabitants of the town. Every inhabitant of the town is a member of the *quasi* corporation, and his individual property may be levied upon to satisfy executions against the town. *Webster v. Harwinton*, 32 Conn. 181; *White v. Stamford*, 1 Conn.

37 Conn. 586; *Ladd v. Franklin*, Id. 65, 66; *State v. Fyler*, 48 Conn. 158; *East Hartford v. American Nat. Bank*, 49 Conn. 558.

The plaintiff contracted with the committee named by a written contract, wherein the resolution of the town was recited in full, and he contracted to build and finish the schoolhouse according to certain plans and specifications, except the heating, ventilation, and plumbing, for the sum of \$42,250.

The plaintiff either knew, as matter of fact, the amount of the contract price for the part of the work excepted in his bid, or at least was put upon inquiry, and could easily have ascertained the amount, and must be treated as contracting with reference to the actual contract expense of such excepted parts of the work.

The plaintiff has recovered a verdict for substantially all the difference between the contract prices and the amount appropriated, and is in no wise damaged by the claimed erroneous rulings, unless he has a right to recover of the town beyond the amount so appropriated. He places his right to recover a sum above the sum appropriated, upon two general theories: (1) that the committee in question, or the board of education, or both bodies acting in reference to the matter, have made another and different contract with him, by which they promised, and bound the town, to pay a sum above the \$55,000 for the construction of the schoolhouse, and that, acting under that new and different contract, he has expended about \$26,500 above his original contract price; and (2) that the town, by its action, has ratified and confirmed the acts of its agents in thus attempting to create such additional obligation.

We think it clear, beyond discussion, that when a town, by legal vote, limits the amount of an appropriation for a particular and specified purpose, and by the same vote appoints a committee to carry that purpose into effect, such committee has no implied authority to involve the town in any additional expense whatever.

This result must follow from the political and peculiar character of the town corporation, and the fact that the property rights and interests of each inhabitant are involved in every contract made by or in behalf of the town. The town cannot contract except by vote passed at a legal town meeting or in strict accordance with the positive provisions of some statute.

Precedents in relation to the liabilities of trading and commercial companies, and even relating to many municipal corporations, have no real bearing. The action of the town in thus acting specifically upon the subject-matter, devested the committee and the board of education of all power and authority except to contract in precise conformity to the vote of the town.

The claims of the plaintiff in this particular would, if upheld, subvert the whole system of town supervision of school matters, and leave the individual inhabitants of the town at the mercy of combinations between contractors and committees of towns.

Assuming that the plaintiff made an agreement with some persons or committee claiming to represent the town in that particular, under which agreement he expended some \$26,000 or \$27,000 more than the contract price, the plain-

tiff says that the defendant town accepted the results of that agreement, accepted and retained the fruits of the bargain, and the benefits of the plaintiff's labor and property expended under such attempted contract, and ratified and confirmed the acts of the committee in various ways.

In the first place, the plaintiff claimed that the town, on the 22d day of February, 1881, made an additional appropriation of \$23,252 for the payment of any sums that the plaintiff might be entitled to receive for constructing the building. To prove this, he offered in evidence a resolution of the town to the effect that a tax of 2 mills be laid, to be applied to high school building account. But there is absolutely nothing in the resolution, or in the facts claimed or proved, to indicate that the town meant thereby to involve itself beyond the amount already appropriated, or to appropriate any additional sum to the erection of the building. There is no pretense that at this time the town, in its corporate capacity, had received any notice that the plaintiff claimed beyond his original contract price.

Again, it is said that the committee on building, and the school committee, on behalf of the town, took possession of the building after it was finished, furnished it, and used it for school purposes, and that the town has in this way the benefit of the plaintiff's labor and materials,—to the amount claimed in the complaint,—wholly unpaid for.

It is admitted that the building was erected upon a lot owned by the town. The plaintiff knew this fact when he built the structure. The plaintiff made no sort of claim upon the town for any payment beyond the amount appropriated until long after the building was accepted and in use as a school building and the town had paid the plaintiff his contract price and something for extras. There is nothing to show that the committee recognized the plaintiff's right to recover beyond that sum.

Even if the town had received notice that the plaintiff claimed beyond the appropriation before the building was used as a school building, we think it plain that the town had a right to take and continue the possession of the building without incurring liability by that act. The town had no election in the premises. The building had been erected upon a lot owned by the town, for the specific purposes of a school-house lot and building. The town had instructed its committee to make a contract, with a certain definite limitation as to the amount of the cost of the building; and the plaintiff knew perfectly well that the committee, neither directly nor indirectly, had any power to contract beyond the letter of that vote.

The town had paid a large sum for the lot and a large sum to the plaintiff. Under the circumstances, it is impossible for us to say that this public political corporation could not use this building for a public schoolhouse because the plaintiff claimed that he had entered into an agreement with the building committee in conscious disregard of the restraints and limitations of their power. There is no authority for the plaintiff's position.

The plaintiff further claims that there was such a physical impossibility of constructing the building according to the plans and speci-

fications that there was no meeting of the minds of the contracting parties, and that therefore the plaintiff was entitled to recover what his work and labor were reasonably worth.

Whatever uncertainty or incongruity or mistake may be said to exist in reference to other parts of the arrangement, it is conceded that the plaintiff well knew that no larger sum than \$55,000 could, under the vote of the town, be lawfully expended on that building. The law will not justify him in attempting to get more out of the town than such lawful amount, even though he may allege that some agent or agents of the town have joined him in making such attempt.

We have touched only generally upon one controlling feature of this case. The rules of law, declaring that an agent of a town must pursue his authority strictly; that if he goes beyond his written authority his act is not valid; that persons dealing with such agents must look to the corporate act of the town as the source and limit of the powers of the agent; that any claimed ratification of previously unauthorized acts of such agent must be done by the town in a lawful manner, and, as a rule, directly, and not by implication, and must be made with full knowledge of all material facts; and that no estoppel *in pais* can be created except by conduct on the part of the town which the person claiming the estoppel has the right to and does in fact rely on,—these are essential to the due and orderly administration of our local public affairs, and should be applied in a spirit of fair respect to the rights of the individual taxpayer.

We think it is impossible to so construe the law as to allow the plaintiff to recover as he claims.

There is no error in the judgment appealed from.

In this opinion the other Judges concurred.

George B. LEWIS

v.

Marcia H. HINMAN *et al.*

1. A second mortgagee may redeem the first mortgage and hold it against parties subsequent in interest. But subsequent parties cannot generally redeem a first mortgage and hold it against a second mortgagee; equity will regard it as a payment.
2. Where the owner of an equity of redemption in one of several parcels of land covered by a mortgage makes a payment thereon, and receives a release of the mortgage from his parcel, it is a discharge, and not a purchase; and one purchasing a second mortgage covering the same parcels, relying upon the record of such release, cannot be prejudiced by the claim of the owner of the released parcel, or his grantee, that such transaction was a purchase, and not a discharge.
3. Where the owner of an equity of redemption in some of several parcels of land covered by a mortgage makes

a payment thereon, intending a merger as to a part of his parcels, the presumption is raised that a merger was intended as to all of his parcels; which must prevail in the absence of proof to the contrary.

4. Where the description in the record of a mortgage is such as to suggest a mistake, it is sufficient to put the owner or purchaser of the property, interested in knowing the extent of the incumbrances thereon, upon inquiry, and charges them with full notice of what the mortgage contains.

5. A prior mortgagee, without knowledge of subsequent incumbrances, may release his security without applying the value of the equity released in reduction of his debt.

6. A third mortgagee may not require the holder of a second mortgage, covering the same and other property, to redeem a first mortgage upon the same parcel covered by the third mortgage; but it is his privilege to redeem from the second mortgagee, and be subrogated to his right of redemption, with its risk and inconvenience.

(New Haven—Filed March 3, 1888.)

APPEAL by defendant from a judgment of the Superior Court of New Haven County in favor of plaintiff in an action brought to foreclose a mortgage. *Affirmed.*

The facts are fully stated in the opinion of the court.

Messrs. Bennett & Wheeler, for defendant, appellant:

The Naugatuck Savings Bank mortgage, so far as it covered lot B, did not merge in the hands of Mrs. Benham, when she paid it, and it was conveyed to her in June, 1888.

1. Because the legal and equitable estates never coincided in her hands without intermediate estates. Both the Bull and Wheeler mortgages always intervened.

1 Jones, Mort. § 848, and cases cited.

2. Because it was not for her interest that it should merge, and would be greatly to her disadvantage if the two estates were not kept distinct, in order to protect her against these two subsequent mortgages. Under such circumstances it is presumed, as a matter of law, that no merger takes place.

1 Jones, Mort. §§ 848, 868-878; *Stantons v. Thompson*, 49 N. H. 272; *Duffy v. McGuiness*, 13 R. I. 597; *Grover v. Thatcher*, 4 Gray, 526; *New England Jewelry Co. v. Merriam*, 2 Allen, 390; *Bell v. Woodward*, 34 N. H. 90; *Bacon v. Goodnow*, 59 N. H. 415; *Baldwin v. Norton*, 2 Conn. 161; *Lockwood v. Sturdevant*, 6 Conn. 373; *Donalds v. Plumb*, 8 Conn. 447; *Bassett v. Mason*, 18 Conn. 181; *Mallory v. Hitchcock*, 29 Conn. 135; *Goodwin v. Keney*, 47 Conn. 486; *Boardman v. Larrabee*, 51 Conn. 89.

The deed from the bank to her, conveying this mortgage, says that it is "paid in full, and the object of this deed is to release the security therefor."

This is not her deed, nor her language, nor can it be imputed to her. She was not releas-

ing the mortgage. On the contrary, she was acquiring title to it, and got it by this deed.

Jones, Mort. 858, 869; *Green v. Currier*, 1 New Eng. Rep. 854, 68 N. H. 568; *Duffy v. McGuiness*, 13 R. I. 597; *Grover v. Thatcher*, *supra*.

8. Because she paid the mortgage and accepted the deed from the bank in ignorance of the true state of the title, under a mistake of fact, and through inadvertence.

Stanton v. Thompson, 49 N. H. 272; *Rumpp v. Gerkens*, 59 Cal. 496.

4. Because she never intended it to merge.

1 Jones, Mort. § 856.

Since her intention that it should merge does not appear, the question will be determined by the interest of the party and the demands of substantial justice.

1 Jones, Mort. 857-873; *Decorah Nat. Bank v. Elmore*, 52 Iowa, 541; *Woodward v. Davis*, 53 Iowa, 694; *Bell v. Tenny*, 29 Ohio St. 240.

If the interest of the party and substantial justice demands it, and no rights of third persons have intervened, equity will uphold it against an intervening title or interest, even though the parties had formally undertaken to discharge it and had surrendered the notes.

Jones, Mort. 856-858, 878; *Stantons v. Thompson*, 49 N. H. 272; *Duffy v. McGuiness*, 13 R. I. 597; *Kinsley v. Davis*, 74 Me. 498; *Cobb v. Dyer*, 69 Me. 494; *Bean v. Boothby*, 57 Me. 295; *Bacon v. Goodnow*, 59 N. H. 415; *Bell v. Woodward*, 34 N. H. 90; *Wilson v. Kimball*, 27 N. H. 800; *Rigney v. Lovejoy*, 18 N. H. 252; *Wheeler v. Willard*, 44 Vt. 640; *Crosby v. Taylor*, 15 Gray, 64; *Grover v. Thatcher*, 4 Gray, 526; *New England Jewelry Co. v. Merriam*, 2 Allen, 390; *Guckian v. Riley*, 135 Mass. 71; *Stimpson v. Pease*, 53 Iowa, 572; *Baldwin v. Norton*, 2 Conn. 161; *Goodwin v. Keney*, 47 Conn. 486.

Defendant [Wheeler possesses all the rights of Mrs. Benham in reference to said mortgage, by virtue of her conveyances to him of November 30, 1883, and January 11, 1887; and he will be protected against the intervening title, and a merger prevented, as he would be the person injured thereby; and the rule is the same when the purchaser pays a mortgage debt or takes a deed of release or quitclaim of all the right, title, and interest of the mortgagee in the estate.

Jones, Mort. 858, 869; *Grover v. Thatcher*, 4 Gray, 526; *Duffy v. McGuiness*, 13 R. I. 597.

With knowledge of subsequent incumbrances, a prior mortgagee cannot release the security to the injury of a subsequent mortgagee having a lien on portions of his security, without applying the value of the equity released to reduce his debt.

1 Jones, Mort. 722-728, and cases cited; *Hawhe v. Snyderaker*, 86 Ill. 197.

Neither can a prior mortgagee release security without applying the value of it on his debt, when he has knowledge of a conveyance by the mortgagor to third parties.

1 Jones, Mort. 722.

Messrs. Clark, Swan, & Rogers, for plaintiff, appellee:

A subsequent and first-recorded deed will prevail over a prior one subsequently recorded, unless the prior grantee can show knowledge

in the other, and that the taking of the subsequent deed with knowledge of the prior conveyance is a fraud upon the first purchaser; but this fraud will not be presumed, and it must be shown by the party seeking to avail himself of it.

Bush v. Golden, 17 Conn. 804; 1 Jones, Mort. § 549.

The Bull mortgage was executed and delivered August 29, 1882, and was recorded September 1, 1882; whereas the mortgage to Wheeler, which was executed and delivered August 3, 1882, was not recorded till October 12, 1882, a delay which was *prima facie* unreasonable.

Pond v. Skidmore, 40 Conn. 222.

When a deed is lodged for record, and has entered upon it by the town clerk "received for record," it is constructive notice to all the world; and the grantee's title is perfected, even if the deed is taken from the office without the consent of the grantee, or destroyed before it is recorded, or if it remain unrecorded through no fault of the grantee.

Booth v. Barnum, 9 Conn. 289; *Hine v. Robbins*, 8 Conn. 346; *Franklin v. Cannon*, 1 Root, 500; *Hartmyer v. Gates*, Id. 61; *Judd v. Woodruff*, 2 Root, 298; *McDonald v. Leach*, Kirby, 72.

The same rule is extended to errors in the record.

Ames v. Phelps, 18 Pick. 814; *Mangold v. Barlow*, 61 Miss. 598; *S. C.* 48 Am. Rep. 84; *Brooke's App.* 64 Pa. 127; *Wood's App.* 82 Pa. 116; *Dubose v. Young*, 10 Ala. 365; *Mims v. Mims*, 35 Ala. 28; *Tousley v. Tousley*, 5 Ohio St. 78; *Sinclair v. Slawson*, 44 Mich. 123; *Nichols v. Reynolds*, 1 R. I. 80; *Payne v. Pavey*, 29 La. Ann. 116; 1 Jones, Mort. § 552.

The Bull mortgage, having gained priority, has not lost it by its transfer to the plaintiff, although the latter purchased it when he had actual knowledge of Wheeler's mortgage. The plaintiff succeeds to all the rights of Bull, and has the right to shelter himself under the protection which Bull had.

1 Jones, Mort. §§ 558, 560, 582; *Harrington v. Allen*, 48 Miss. 492; *Chance v. McWhorter*, 26 Ga. 824; *Bull v. Twilight*, 18 N. H. 159; *Boyn-ton v. Rees*, 8 Pick. 329; *Trull v. Bigelow*, 16 Mass. 406; *Varick v. Briggs*, 6 Paige, 328, 329; *Wood v. Chapin*, 18 N. Y. 509; *Cook v. Travis*, 20 N. Y. 400; *S. C.* 23 Barb. 338; *Louther v. Carlton*, 2 Atk. 139.

If the mortgage debt be paid by the debtor, or from his property, or in his behalf, the payment will be treated as a satisfaction and discharge of the debt; and the payment is held to be made in behalf of the debtor, when there is an obligation, either legal or equitable, imposed upon the purchaser, to assume and pay the debt as his own; in which event the owner of the equity, even if he take an assignment of the mortgage to himself, will not be allowed to set it up, but the legal title thus acquired will be held to merge in the equity.

Sheld. Subr. § 52; *Thompson v. Heywood*, 129 Mass. 404; *Putnam v. Collamore*, 120 Mass. 454; *McCabe v. Swap*, 14 Allen, 188, 190; *Bol-ton v. Ballard*, 13 Mass. 227; *Snow v. Stevens*, 15 Mass. 278; *Wade v. Howard*, 6 Pick. 492; *Brown v. Lapham*, 3 Cush. 555; 1 Jones, Mort. §§ 874, 876, 877.

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If the debt is paid by a third person without any assignment of the mortgage, or any agreement for any, the mortgage is extinguished, and the right of subrogation cannot be invoked.

1 Jones, Mort. § 877; *Com. v. Chesapeake & Ohio Canal Co.* 32 Md. 546; *Swann v. Patterson*, 7 Md. 164; *Collins v. Adams*, 58 Vt. 433.

The question whether a mortgage is discharged or assigned is a question of intention, to be determined by the acts of the parties; and, in the absence of contrary evidence, a quitclaim deed by the holder of the mortgage to the owner of the equity presumably operates as a discharge of the mortgage; and a merger of the estates occurs much more frequently in the owner of the equity than in the mortgagee.

1 Jones, Mort. §§ 859, 870; *Quinebaug Bank v. French*, 17 Conn. 136; *Bassett v. Mason*, 18 Conn. 131; *Gregory v. Savage*, 32 Conn. 264; *Simpson v. Hall*, 47 Conn. 417; *Bassett v. Hathaway*, 9 Mich. 28.

Under the provisions of our recording system, a mortgage which has been released and discharged upon the land records cannot be enforced against a *bona fide* purchaser, without notice, who has acquired title subsequent to the release of the mortgage.

Quinebaug Bank v. French; *Bassett v. Mason*; and *Gregory v. Savage*, *supra*; *Orvis v. Newell*, 17 Conn. 97.

If there was no intention on the part of the person making the payment, either actual or to be implied from the condition of things then existing, to keep the mortgage alive, it cannot afterwards, upon a change of his intention, or upon a change in the surrounding circumstances, be regarded as a subsisting security.

1 Jones, Mort. § 855; *Champney v. Coope*, 34 Barb. 589; *Loomer v. Wheelwright*, 3 Sandf. Ch. 148; *Gardner v. Astor*, 3 Johns. Ch. 53; *Clark v. Moore*, 76 Va. 262; *Wedge v. Moore*, 6 Cush. 10. See *Sheld. Subr.* § 56; 1 Jones, Mort. § 736; 3 Pom. Eq. Jur. p. 190, § 1205, note 3; *Ather-ton v. Toney*, 43 Ind. 213; *Shuler v. Hardin*, 25 Ind. 886; *Wolbert v. Lucas*, 10 Pa. 78; *Spengler v. Snapp*, 5 Leigh, 478; *East Saginaw Soc. Bank v. Grant*, 41 Mich. 101; *Gayle v. Wilson*, 80 Gratt. 166; 4 Wait, Act. & Def. 580.

According to the facts shown in this case, Mrs. Hinman reaped the benefit of the equities by having them applied towards the payment of her indebtedness to Mrs. Benham, the same as though the latter had obtained title as a judgment creditor; in which event the latter would have been liable in equity for the payment of the incumbrances, and neither she nor her assignee could have invoked the doctrine of subrogation.

Jumel v. Jumel, 7 Paige, 594; *Cox v. Wheeler*, Id. 250; *Heyer v. Pruyn*, Id. 465; *Tice v. Anna*, 2 Johns. Ch. 128; *Russell v. Allen*, 10 Paige, 249; *McKinstry v. Curtis*, Id. 503; *Vanderkemp v. Shelton*, 11 Paige, 28; *Lovelace v. Webb*, 6 Ala. 271; *Booker v. Anderson*, 35 Ill. 66; *Webb v. Howard*, 6 Pick. 492; *Hansell v. Lutz*, 20 Pa. 284; *Shermer v. Merrill*, 33 Mich. 284; *Perrin v. Crawford*, 2 Denio, 598; *Johnson v. Zink*, 51 N. Y. 333; 1 Jones, Mort. § 736; 2 White & T. Lead. Cas. pt. 1, 285.

In *James v. Brown*, 11 Mich. 25, the court said: "It is the duty of a subsequent mortgagee, if he intends to claim any rights through the first mortgage, or that may affect the rights

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of the mortgagee under it, to give the holder thereof notice of his mortgage, that the first mortgagee may act with his own understanding. If he does not, and the first mortgagee does with his mortgage what it was lawful for him to do before the second mortgage was given, without knowledge of its existence, the injury is the result of the second mortgagee's negligence in not giving notice.

See also 1 Jones, Mort. §§ 562, 722; 2 Jones, Mort. §§ 982, 1624; *George v. Wood*, 9 Allen, 80; *Blair v. Ward*, 10 N. J. Eq. 119; *Vanorden v. Johnson*, 14 N. J. Eq. 376; *Ward v. Hague*, 25 N. J. Eq. 897; *McDaniels v. Colvin*, 16 Vt. 300; *Cheesebrough v. Millard*, 1 Johns. Ch. 409; *King v. McVickar*, 3 Sandf. Ch. 192; *Gutson v. Knapp*, 6 Paige, 48; *Patty v. Pease*, 8 Paige, 277; *Wheeler v. Loomer*, 4 Edw. Ch. 232; *Cheever v. Fair*, 5 Cal. 337; *Taylor v. Maris*, 5 Rawle, 51; 2 White & T. Lead. Cas. pt. 1, 810.

The holder of a mortgage given to secure a pre-existing debt is not regarded as a purchaser for a valuable consideration, so as to entitle him to protection against existing equities, although he had no notice of them when he took the mortgage.

Pancoast v. Duval, 26 N. J. Eq. 445; *Mingus v. Condit*, 23 N. J. Eq. 813; *Morse v. Cohannet Bank*, 3 Story, 864; *Dickerson v. Tillinghast*, 4 Paige, 215; *De Lancey v. Stearns*, 66 N. Y. 157; *Metropolitan Bank v. Godfrey*, 23 Ill. 579; *Withers v. Little*, 56 Cal. 372; *Spurlock v. Sullivan*, 86 Tex. 511; *Thurman v. Stoddard*, 63 Ala. 386; *People's Sav. Bank v. Bates*, 120 U. S. 556 (30 L. ed. 754); *Stone v. Welling*, 14 Mich. 525; *Kohl v. Lynn*, 84 Mich. 360; 1 Jones, Mort. § 458.

Carpenter, J., delivered the opinion of the court:

On the 1st day of September, 1882, the defendant Mrs. Hinman was the owner of four adjoining lots of land, which are designated in the finding as lots B, C, D, and E. Said lots were subject to mortgages as follows: Lots B and E were mortgaged to the Naugatuck Savings Bank, and lot D to the Middletown Savings Bank, each being a first incumbrance. Lot B was subject to a second mortgage to one Bull, which mortgage is now owned by the plaintiff, and to foreclose which this suit is brought; all said lots were mortgaged to the defendant Wheeler, which mortgage is a third mortgage on lot B, a first mortgage on C, and a second mortgage on lots D and E.

On the 29th day of March, 1883, Mrs. Hinman sold and conveyed the equity of redemption in all said lots, and also in several other lots mortgaged to said Bull, to Harriet L. Benham.

June 19, 1883, said Benham sold lots D and E to one Rausch, the consideration of which was used to pay the mortgages to the two savings banks, and to pay Wheeler \$900 on his mortgage. Wheeler thereupon released his mortgage on lots D and E, the Middletown Savings Bank released its mortgage on lot D, and the Naugatuck Savings Bank released its mortgage on lots B and E, and the several release deeds were put on record. The Bull mortgage also covered lot A, which was also subject to the Naugatuck Savings Bank mortgage, and also to a prior mortgage to one

Bishop, which mortgage was foreclosed; neither the savings bank nor Bull redeeming, the title becoming absolute March 6, 1883. Lots A and B were described in the Bull mortgage as one lot, and is the second piece therein described. That mortgage also embraces several other pieces of land in other parts of New Haven. The first piece is called the Elm Street property, and was subject to a prior mortgage to the Union Savings Bank of Danbury. That mortgage was foreclosed at the October Term of the Superior Court, 1885; and it is found that the value of the property foreclosed exceeded the amount of the debt and charges by some \$1,800.

The fourth and fifth lots mortgaged to Bull were released by Bull in his lifetime, and the eighth was released by his administrators after his decease. It is found that the total value of the equities of redemption in the lots so released was \$1,000, over and above the prior mortgages.

February 4, 1886, the plaintiff became the owner of the Bull mortgage and the debt thereby secured.

On the trial in the court below, the defendant Wheeler claimed: (1) that he was the owner of the Naugatuck Savings Bank mortgage, and that it is still outstanding in his hands upon lot B; (2) that it did not merge in the hands of Harriett L. Benham, so far as it covers lot B; (3) that it was still a lien on lot B, as against the plaintiff, to an amount proportionate to the whole amount of the mortgage debt, as the value of lot B is to the value of the whole security originally included in said mortgage; (4) that the plaintiff's mortgage debt should be reduced by the amount of the value of the equities of which he had been foreclosed, and which had been released; (5) that it should be so reduced, especially, by the amount of the value of the equity in the Elm Street property.

The court overruled these several claims, and rendered judgment for the plaintiff.

The defendants, Wheeler and Hinman, appealed. The reasons of appeal are as follows:

1. The court erred in holding that said Wheeler was not the owner of the Naugatuck Savings Bank mortgage, and also in that it was not still outstanding in his hands upon lot B.

2. The court erred in holding that said Naugatuck Savings Bank mortgage merged in the hands of said Harriett L. Benham, so far as it covered lot B.

3. The court erred in holding that said Naugatuck Savings Bank mortgage was not still a lien on lot B, in the hands of the defendant Wheeler, as against the plaintiff, to an amount proportionate to the whole amount of the mortgage debt, as the value of lot B is to the value of the whole security originally included in said mortgage.

4. The court erred in holding that the plaintiff's mortgage debt should not be reduced by the amount of the value of the equities in the lots which had been foreclosed and which had been released.

5. The court erred in holding that the plaintiff's said mortgage debt should not be so reduced by the amount of the value of the equity in the Elm Street property.

The first three reasons of appeal may be considered together. They are in effect but one,

and that is that the Naugatuck Savings Bank mortgage is a subsisting incumbrance on lot B in favor of the defendant Wheeler. This claim assumes that the mortgage was not paid, but purchased, by Benham; and that she, by her quitclaim deed of lots B and C, or her conveyance of January 11, 1887, transferred said mortgage to Wheeler. Suppose that he is right in this claim, how does it benefit him? His interest in the premises is subject to that of the plaintiff. As between them, Wheeler is primarily liable to pay the first mortgage. In a suit to foreclose that, his right to redeem would be first extinguished. Should he redeem, as between himself and the plaintiff, it will be deemed a payment; although, as to subsequent incumbrancers and the owner of the equity of redemption, it will be regarded as a purchase.

A second mortgagee may redeem the first mortgage, and hold it against parties subsequent in interest; but subsequent parties cannot, except under peculiar or unusual circumstances (which circumstances do not exist in this case), redeem a first mortgage and hold it against a second mortgagee; equity will regard it as a payment. It follows that Lewis might redeem the first mortgage and hold it against Wheeler; but Wheeler, so long as he sustains the relation of a subsequent incumbrancer, cannot purchase it and hold it against Lewis. If, then, Wheeler is now the owner of that mortgage by purchase, by gift, or otherwise, the result is the same; it is a payment so far as Lewis is concerned.

The existence of the first mortgage, in whosoever hands it may be, can be no defense to this suit. The savings bank, or any stranger who may have purchased the mortgage, may compel Lewis to redeem; but neither the owner of the equity of redemption nor any subsequent mortgagee can do so.

Again, if Lewis had paid the first mortgage, either voluntarily or by compulsion, the amount so paid would be added to his demand, and Wheeler would be compelled to reimburse him before he could avail himself of his security. And that would be so if by any possibility he should be compelled to pay the first mortgage to Wheeler. If the defendants claim is allowed, therefore, the practical result is this: In the same suit the plaintiff is required to redeem the first mortgage by paying the amount thereof to the defendant, and the defendant in turn is required to pay the same amount to the plaintiff. The law tolerates, much less requires, no such absurdity.

But the defendant is not right in his assumption. The mortgage to the Savings Bank cannot be regarded as subsisting to any extent or for any purpose as against this plaintiff. When Harriet L. Benham caused the debt to be paid to the bank, she received from that institution, and put on record, a quitclaim deed containing this clause: "Being the same premises mortgaged to said Savings Bank on the 14th day of August, 1879, *** by Marcia M. Hinman, to secure payment of a note of \$1,600, which is now paid in full; and the object of this deed is to release the security therefor." The grantee was then the owner of the equity of redemption. As such it was her duty, so far as intervening incumbrances were concerned, to pay this mortgage. She did pay

it on the 9th day of June, 1883, accepted a deed containing this significant declaration, and on the 7th day of July following caused that deed to be put on record. She then and thereby proclaimed to all the world that that mortgage was paid, not purchased, and the security therefor discharged and not transferred. On the 4th day of February, 1886, the plaintiff purchased the Bull note and mortgage, relying upon that declaration as true as against him. Harriet L. Benham, and all persons claiming under her, are effectually precluded from claiming to the contrary.

For the purposes of this case the first mortgage debt is paid, and the security therefor discharged. Consequently the defendant cannot avail himself of that mortgage for any purpose.

If necessary, it would not be difficult to show, from the record, that the defendants did not purchase, and did not at the time intend to hold, this mortgage against the plaintiff.

The deed from the savings bank to which we have referred is potent, if not conclusive, evidence that Benham then intended a merger. She clearly intended payment, and therefrom a merger, so far as lots D and E are concerned; for the object of the transaction was to clear those lots so that she could give Rausch a clear title; and it is almost as certain that she did not intend to hold said mortgage against B and C, for she immediately gave a quitclaim deed thereof to Wheeler; and there is no evidence that he paid her anything for it, and the finding is clear that he furnished no portion of the funds with which the debt was paid. Intending a merger as to a part of the property raises a presumption that it was intended as to all; and that presumption must prevail, unless there is something in the case which rebuts the presumption, or shows the existence of a contrary intent. We may add to this the significant fact that Mrs. Benham, after she had paid the debt to the bank, surrendered the note to the maker, Mrs. Hinman.

Thus the record seems to afford overwhelming evidence that she did not in fact intend to preserve the mortgage in force. If it be objected that we have been considering matters of fact, our reply is that this is the defendants' appeal. They fail to show us, affirmatively and in terms, that they intended at the time to keep the mortgage alive. But they do ask us to say, from the record as it stands, that the mortgage still exists. We have examined the record and have come, as the court below did, to a contrary conclusion.

We are asked to distinguish lot B from the other property described in the bank mortgage. for the reason that the defendants did not in fact know that said lot was embraced in the plaintiff's mortgage. The finding is that Wheeler had no actual knowledge that the Bull mortgage covered lot B, and he supposed it did not, until March 17, 1885. But for said supposition he would not have released his interest in lots D and E to Mrs. Benham, and would not have accepted from her the release deed of her interest in lots B and C. It is also found that it did not appear that Mrs. Benham had any knowledge of the Bull mortgage, save what she obtained from the record.

On that ground it is claimed that the actual intention to pay the debt and have the mortgage discharged should be disregarded; and, on the assumption that it was for Mrs. Benham's interest to have the mortgage transferred, and that it would have been had they known the facts, that the mortgage should now be regarded as still in force.

To this claim there are two objections. In the first place, for reasons already suggested, we are unable to see how Mrs. Benham could purchase the mortgage and thereby defeat or impair a subsequent mortgage. But it is not Mrs. Benham that is now attempting to make use of it. It is a third mortgagee, who has received whatever right he has in the first mortgage as a gratuity, who is attempting to use it to the prejudice of the second mortgagee. There is nothing in Mrs. Benham's position that calls for such an unusual interposition of the court. Her rights are not in peril; no one is attempting inequitably to take anything from her. On the other hand, it is just and equitable that the plaintiff should have the full benefit of his security.

Neither can we discover that Wheeler's equities are superior to the plaintiff's. He stands precisely where he placed himself. The plaintiff has done nothing to his prejudice. If, through his ignorance of certain facts, he is in a worse condition than he otherwise would have been in, the plaintiff is in no wise responsible for it; and there is no reason for transferring the consequences thereof to him, unless he thereby obtains some undue advantage. If it is true, as we suppose it is, that nothing that Mrs. Benham or Wheeler could have done in respect to the first mortgage could impair the plaintiff's security, then there can be no reason for the interference of the court in the manner proposed.

In the second place, Mrs. Benham can hardly be said, in a legal sense, to have been ignorant of the facts. She had constructive notice of the plaintiff's mortgage, unless such notice is defeated by the mistake of the clerk in recording it. The consequences of that mistake should not be visited upon the mortgagee. He did all he could do, and all that the law required of him. He left his deed for record; and the record, by the statute, is to be as of that date. From that time, which necessarily antedates the actual recording, his title is secure. He cannot be prejudiced by any subsequent action without his fault. But if this is stating it more strongly than the case requires, we would call attention to the actual facts of the case. The mistake consists in giving the westerly line of lots A and B, described as one piece, as 35 feet on Cedar Street, instead of 65 feet, as it is in the original. The other three lines are correctly recorded, and the length of each is given. The piece is rectangular, being 106 feet long by 65 feet in width. Lot A is 40 feet wide and lot B is 25 feet wide on Cedar Street. The record gives that line as 35 feet, but that line is not defined or located. If we locate it at the northerly end of the boundary on Cedar Street, then it does not extend the whole width of lot A; consequently does not reach lot B; but the description requires the southerly line of the piece to run from the southerly end of the 35 feet diagonally through lot B to the

southeast corner of the whole lot. That embraces within the description nearly half of lot B. The record as it stands, therefore, is constructive notice to that extent of the mortgage on that lot. But we think it is more than that. To those familiar with the premises, and interested in knowing the extent of the incumbrances thereon, as Mrs. Benham must be presumed to have been, the record could hardly fail to suggest a mistake; and that would have put her upon inquiry, and charges her with full notice of what the deed contains.

As to Wheeler, although his mortgage antedates the plaintiff's, yet the record thereof bears a subsequent date. We are not aware that the point has been directly decided, but we are inclined to think that he is legally chargeable with notice of all that the record contained at the time he left his own deed to be recorded. But we do not rely on this point, for it is conceded that whatever interest he has in the first mortgage he derived from Mrs. Benham. If he is a mere volunteer, clearly the plaintiff's equities are superior to his. If not, then he is chargeable with constructive notice to the same extent and for the same reasons that Mrs. Benham is, for he took his deeds from her with knowledge of all that the record contains.

The fourth error assigned is that the court refused to reduce the plaintiff's debt by the amount of the value of the equities in the lots released and foreclosed.

Bull in his lifetime released to Mrs. Benham the mortgage on the fourth and fifth lots described in said mortgage, and after his death his administrators released said mortgage on the eighth lot. These equities were of the value of \$1,000, over and above the prior mortgages then outstanding. When said releases were given, neither said Bull nor his administrators had actual knowledge of Wheeler's mortgage.

They did not have constructive knowledge, because Wheeler's mortgage was recorded subsequently to Bull's. *Rowan v. Sharp's Rifle Mfg. Co.* 29 Conn. 325; 1 Jones, Mort. § 728; *McLvoain v. Mutual Assur. Co.* 98 Pa. 34. In order to charge the plaintiff with the value of these equities it is essential that Bull and his administrators, when executing said releases, respectively, should have had knowledge of Wheeler's mortgage. This is conceded in the defendant's brief. The sixth and seventh tracts and a part of the second tract described in the plaintiff's mortgage, were foreclosed by the prior mortgagees. The equity of redemption in said tracts was of no value.

The first, known as the Elm Street property, was subject to a prior mortgage for \$5,000 to the Union Savings Bank of Danbury. On March 17, 1885, Wheeler, after informing Lewis of his mortgage, requested Lewis to take the equity of redemption in said first piece, or to redeem the savings bank mortgage. Subsequently said mortgage was foreclosed, none of the defendants redeeming. Said tract was then worth nearly \$2,000 over and above the prior mortgage. That excess, it is now claimed, is chargeable to the plaintiff.

The amount due the savings bank then amounted to over \$6,000, a large sum in proportion to the plaintiff's debt. It was hardly reasonable to require Lewis to raise so large a

sum and take property for that as well as his own claim. As the debt covered over three quarters of the estimated value of the property, there was some risk and inconvenience attending the transaction. That risk and inconvenience Wheeler could not require Lewis to assume; especially as he had a right to redeem the plaintiff's mortgage, when he would have

been subrogated to the plaintiff's rights, and could himself have redeemed the bank mortgage and saved the equity. As between the two, that duty seems to have devolved upon Wheeler rather than Lewis.

We find no error in the judgment complained of.

In this opinion the other Judges concurred.

NOTE.—Mortgage; estates created by. The mortgagor is regarded, even at law, as retaining the legal estate with all its incidents and qualities, while the mortgagee is the legal owner as between himself and the mortgagor, clothed with the legal title only so far as considered necessary to preserve the mortgage as a valid security. See Glass v. Ellison, 9 N. H. 69; Barnard v. Eaton, 2 Cuah. 294; Conard v. Atlantic Ins. Co. 26 U. S. 1 Pet. 386 (7 L. ed. 189); Evans v. Merriken, 8 Gill & J. 39; Clarke v. Reyburn, 1 Kan. 281; Timms v. Shannon, 19 Md. 296. Cited in 3 Pom. Eq. Jur. 159.

The mortgage creates a lien on the land as a security for the debt, and does not convey any legal title or estate to the mortgagee, the mortgagor retaining the full legal estate, subject to the lien, until devested by foreclosure sale. See McMillan v. Richards, 9 Cal. 385; Haffey v. Maier, 13 Cal. 13; Goodenow v. Ewer, 16 Cal. 461; Boggs v. Fowler, Id. 559; Fogarty v. Sawyer, 17 Cal. 539; Dutton v. Warschauer, 21 Cal. 609; Kidd v. Teesle, 22 Cal. 255; Skinner v. Buck, 30 Cal. 263; Bludworth v. Lake, 33 Cal. 256; Jackson v. Lodge, 35 Cal. 36; Mack v. Wetzel, 36 Cal. 247; Carpenter v. Brenham, 40 Cal. 221; Harp v. Calahan, 45 Cal. 223; Frink v. LeRoy, 49 Cal. 314. No estate in the mortgaged premises passes to the mortgagee either before or after condition broken. See McGurran v. Garrity, 63 Cal. 566. The same principles generally obtain throughout the States of the Union. See Drake v. Root, 2 Cal. 685; Burnside v. Terry, 45 Ga. 621; Vason v. Ball, 56 Ga. 268; Elfe v. Cole, 36 Ga. 197; Jackson v. Carswell, 34 Ga. 279; United States v. Athens Armory, 35 Ga. 344; Fletcher v. Holmes, 32 Ind. 457; Grable v. McCulloch, 27 Ind. 472; Morton v. Noble, 22 Ind. 160; White v. Rittenmeyer, 30 Iowa, 268; Courtney v. Carr, 6 Iowa, 238; Life Assn. v. Cook, 20 Kan. 19; Chick v. Willets, 2 Kan. 384; Duclaud v. Rousseau, 2 La. Ann. 106; Gorham v. Arnold, 23 Mich. 247; Caruthers v. Humphrey, 12 Mich. 250; Wager v. Stone, 36 Mich. 364; Rice v. St. Paul & P. R. Co. 24 Minn. 464; Parsons v. Noggle, 33 Minn. 328; Adams v. Corriston, 7 Minn. 456; Berthold v. Fox, 13 Minn. 561; Berthold v. Holman, 12 Minn. 336; Davidson v. Cox, 11 Neb. 250; Hurley v. Estes, 6 Neb. 386; Kyger v. Ryley, 2 Neb. 20; Hyman v. Kelly, 1 Nev. 179; Whitmore v. Shiverick, 3 Nev. 288; Astor v. Hoyt, 5 Wend. 606; Pryfe v. Riley, 15 Wend. 243; Astor v. Miller, 2 Paige, 68; Bell v. Mayor of N. Y. 10 Paige, 49; Waring v. Smyth, 2 Barb. Ch. 119; Packer v. Rochester & S. R. Co. 17 N. Y. 289; Power v. Leeter, 23 N. Y. 527; Merritt v. Barthollock, 36 N. Y. 44; Trimm v. Marsh, 64 N. Y. 599; Bryan v. Butts, 27 Barb. 503; Hubbell v. Moulson, 53 N. Y. 226; Mickles v. Townsend, 18 N. Y. 575; Besser v. Hawthorn, 3 Oreg. 129; Thayer v. Cramer, 1 McCord, Ch. 396; Nixon v. Bynum, 1 Bailey, 148; Annelly v. DeSausure, 12 S. C. 488; Wright v. Henderson, 12 Tex. 43; Mann v. Falcon, 25 Tex. 271; Walker v. Johnson, 37 Tex. 127; Wood v. Trask, 7 Wis. 566.

Assignment of mortgage. An assignment of a mortgage is a mere transfer of a thing in action. The assignee can acquire no higher rights as against the mortgagor than those possessed by the original mortgagee. See Wanzar v. Cary, 76 N. Y. 528. The doctrine of *bona fide* purchase for a valuable consideration does not apply to mere equitable interests; hence the assignment of a mortgage, whether direct or a mere incident to the transfer of a note, is wholly equitable, and gives only an equitable title to the assignee, subject to all subsisting equities. See Kleeman v. Frisbie, 63 Ill. 482; Bryant v. Vix, 83 Ill. 11; Bally v. Smith, 14 Ohio St. 306. *Contra*, Taylor v. Page, 6 Allen 86; Reeves v. Scully, Walk. Ch. (Mich.) 243; Croft v. Bunster, 9 Wis. 504; Cornell v. Hichens, 11 Wis. 363; Fisher v. Otis, 3

Chand. 83; Martineau v. McCollum, 4 Chand. 133; Potts v. Blackwell, 4 Jones Eq. 58; Bloomer v. Henderson, 8 Mich. 395; Cloutte v. Gagnier, 2 Mich. 261; Pierce v. Faunce, 47 Me. 507. Cited in 2 Pom. Eq. Jur. 153.

When a mortgage is assigned, and the assignment is not recorded, and the mortgagee afterwards satisfies the mortgage of record, the lien is thereby destroyed as against a *bona fide* purchaser or incumbrancer without notice. See Bowling v. Cook, 30 Iowa, 200; Henderson v. Pilgrim, 22 Tex. 464; Warner v. Winalow, 1 Sandf. Ch. 430; St. John v. Spalding, 1 Thomp. & C. 483. If a second mortgagee, with notice of a prior unrecorded mortgage, assigns to a *bona fide* purchaser without notice, but the prior mortgage is recorded before the assignment, the assignee would fail to secure a precedence. See Westbrook v. Gleason, 79 N. Y. 23; Fort v. Burch, 5 Denio, 137.

Keeping mortgage alive. A mortgage fraudulently assigned may be ordered delivered up and canceled. The jurisdiction of equity to grant the remedy of cancellation exists and will always be exercised when it is necessary to protect or maintain equitable primary estates, interests, or rights. The following are illustrations: Spurgin v. Traub, 65 Ill. 170; Burlington Twp. v. Cross, 15 Kan. 74; Dolan v. Kehr, 9 Mo. App. 351; Connolly v. Fisher, 3 Tenn. Ch. 332; Schenck v. O'Neill, 25 Hun. 229; Foote v. Beecher, 78 N. Y. 155; Shaper v. Shaper, 34 Ill. 608.

Keeping mortgage alive after payment. Equity will treat the mortgage either as canceled or outstanding, as shall best promote the ends of justice and the actual and just intention of the parties. Cited, Hall v. Lambert, 7 N. J. Eq. 658; S. C. 51 Am. Dec. 714; Atherton v. Toney, 43 Ind. 213. See Neville v. Demeritt, 2 N. J. Eq. 333. The judgment of mortgage is kept alive after the payment by the surety, for his benefit. Cited, Zook v. Clemmer, 44 Ind. 27. See Howe v. Woodruff, 12 Ind. 214; Barlow v. Deibert, 39 Ind. 16; Gardner v. Astor, 3 Johns. Ch. 53; Hatch v. Kimball, 18 Me. 146; Holden v. Pike, 24 Me. 427; Clift v. White, 12 N. Y. 519.

Doctrine of merger. The general rule is that the union of the legal and equitable estates will create a merger of the two (cited, Atherton v. Toney, 43 Ind. 213), unless there be some beneficial purpose or some declared intent to prevent it (cited, Closs v. Boppe, 23 N. J. Eq. 271). Questioned, Goodwin v. Keney, 47 Conn. 496. While a merger at law follows inevitably upon the union of a greater and lesser estate in the same ownership, it does not so follow in equity, where estates will be kept separate if such is the intention of the parties, and justice requires it. Cited, Smith v. Roberts, 91 N. Y. 473. See Gardner v. Astor, 3 Johns. Ch. 53; James v. Morey, 2 Cow. 246; Champney v. Coope, 32 N. Y. 543; Sheldon v. Edwards, 36 N. Y. 279. A merger will take place in equity where no intention to prevent it has been expressed, and none is implied from the circumstances and the interests of the party; and a presumption in such a case arises in favor of the merger. Cited, 2 Pom. Eq. Jur. 244. See Baldwin v. Sager, 70 Ill. 508; Robins v. Swain, 63 Ill. 187; Lily v. Palmer, 51 Ill. 331; Gardner v. Astor, 3 Johns. Ch. 53; James v. Johnson, 6 Johns. Ch. 47; James v. Morey, 2 Cow. 246, 286, 300, 313; Gregory v. Savage, 32 Conn. 250, 264; Bassett v. Mason, 15 Conn. 181; Wilhelm v. Leonard, 18 Iowa, 330; Forbes v. Moffett, 18 Ves. 384; Lord Compton v. Oxenden, 2 Ves. 261, 264; Swinfen v. Swinfen, 29 Beav. 199; Byam v. Sutton, 19 Beav. 556; Swabey v. Swabey, 15 Sim. 106; Tyler v. Lake, 4 Sim. 351, 358; Brown v. Stead, 5 Sim. 535; Grice v. Shaw, 10 Hare, 76; Smith v. Phillips, 1 Keen, 694.

RHODE ISLAND.

SUPREME COURT.

NATIONAL EAGLE BANK

v.

Horatio A. HUNT, Admr.

1. A guaranty to secure a running account at a bank, where the consideration is separable and passes at different times, is terminated by the death of the guarantor and notice to the bank, as to all subsequent transactions.
2. Where a note is discounted under a continuing guaranty prior to the death of the guarantor, and, after notice of his death, the time of payment is extended, by taking a new note from the principal debtor, with interest thereon in advance, without consent of the guarantor's administrator, and without any reservation of his right, assented to by the principal, to insist upon immediate payment by the principal, and, in default thereof, to pay such debt himself and proceed at once against the principal, — the estate of the guarantor is released from liability under the guaranty.
3. An agreement in a continuing guaranty that no extensions on any trade or business paper therein mentioned should affect the liability of the guarantor thereunder, contemplates only extensions made while the guaranty is in force.

(Providence—Decided February 11, 1888.)

ACTION of covenant to recover upon two sealed instruments. On demurrer to the pleas. *Overruled.*

The facts of the case are fully stated in the opinion of the court.

Mr. James Tillinghast, for plaintiff:

The estate of a deceased person is bound by all the agreements and obligations of the deceased, except those of a personal nature.

3 Wms. Exrs. 6th Am. ed. 1877, pp. 1721, 1741, 1750, 1751, 1765; Schoul. Exrs. §§ 253, 266, 267, and cases. Compare *Janin v. Browne*, 59 Cal. 87; *Hunt's App.* 105 Pa. 128; *Hess v. Rau*, 17 Jones & S. 824.

It may be that such continuing guaranties as were by express stipulation revocable by the deceased at any time, at his election, in his life, are revoked by his death as to all subsequently accruing liabilities. And this is the utmost extent to which the cases cited by the defendant go; but as to this, even, the law cannot be considered by any means settled.

Compare *De Colyar*, Guar. 345, 348, 349; *Bradbury v. Morgan*, 1 Hurlst. & C. 249; *Calvert v. Gordon*, 7 Barn. & C. 809, affirmed 3 Man. & R. 124; *Gordon v. Calvert*, 2 Sim. 253, affirmed 4 Russ. 581; *Rapp v. Phoenix Ins. Co.* 113 Ill. 390.

But here there was no right reserved to terminate the agreement. The right reserved was only to terminate the guaranty itself as to future accruing advances or liabilities. That such an agreement is certainly good and binds the estate, see—

1 R. I.

2 Dan. Neg. Inst. § 1090 *et seq.* and cases cited; *Farmers Bank v. Waples*, 4 Harr. (Del.) 429; *Carpenter v. Reynolds*, 42 Miss. 807; *Darling v. March*, 22 Me. 184; *Parshley v. Heath*, 69 Me. 90.

The agreement became a part of the contract upon the faith of which the note was discounted. If it be said that to hold it so would be to enable the bank to renew the note indefinitely, the answer is that the remedy of the surety or his estate was to take the note up, which could be done at any time, and thus control it.

Compare *Smith v. Freyler*, 47 Am. Rep. 358; *S. C.* 4 Mont. 389.

It is not nearly so strong as an agreement or assent by a surety to the absolute discharge of the principal; and yet even this is good, and the surety remains liable notwithstanding such discharge.

De Colyar, Guar. 365; *Couper v. Smith*, 4 Mees. & W. 519; *Union Bank v. Beech*, 34 L. J. Exch. 133; *S. C.* 12 L. T. U. S. 499; *Burke's Case*, cited in *English v. Darley*, 2 Bos. & P. 62; *Ex parte Gifford*, 6 Ves. Jr. 809; *Boulthos v. Stubbs*, 18 Ves. Jr. 20; *Howell v. Jones*, 1 C. M. & R. 97.

This case is fairly within the principle of those cases which hold that if the act of the creditor cannot injuriously affect the surety, the surety is not discharged.

De Colyar, Guar. 374, 380. Compare *Carter v. White*, L. R. 25 Ch. Div. 666; *Belfast Banking Co. v. Stanley*, 15 Week. Rep. 989; *S. C.* 1 Ir. C. L. 693.

The administrator might himself have made the waiver, for it is clearly within his authority in the management of the estate, particularly under the circumstances, as it was not only not prejudicial, but, to the extent of the interest paid, actually beneficial, to the estate. The bank had the right, therefore, to assume that he assented until he dissented.

Schoul. Exrs. § 251; *Coulthart v. Clementson*, L. R. 5 Q. B. Div. 42; *Rapp v. Phoenix Ins. Co.* 113 Ill. 390; *Bradbury v. Morgan*, 1 Hurlst. & C. 249; *Offord v. Davis*, 12 C. B. N. S. (104 E. C. L.) 748.

Mr. Joseph C. Ely, for defendant:

By taking the new note and the receipt of interest in advance from the maker of said original note, said bank discharged the estate of Carpenter under the guaranty as to the note concerning which breach is alleged.

Dixon v. Spencer, 59 Md. 246; *S. C.* 16 Cent. L. J. 454; *De Colyar*, Guar. 370.

As this guaranty was one which the surety could himself have determined by notice, notice of his death, brought home to plaintiff, operated as a revocation as to all future transactions or acts of the bank, and after that date the waiver was no longer in force.

De Colyar, Guar. 348; *Dan. Neg. Inst.* 8d ed. § 1789; *Harris v. Fawcett*, L. R. 15 Eq. 311; *S. C.* L. R. 8 Ch. App. Cas. 866; *London & C. Banking Co. v. Terry*, L. R. 25 Ch. Div. 692. See *Menard v. Scudder*, 56 Am. Dec. 618; *S. C.* 7 La. Ann. 385; *Jordan v. Dobbins*, 122 Mass. 168; *Coulthart v. Clementson*, L. R. 5 Q. B. Div. 42.

Such waiver as the plaintiff relies on in this case should be strictly construed.

Dan. Neg. Inst. 8d ed. § 1091.

Matteson, J., delivered the opinion of the court:

This is an action of covenant upon two sealed instruments made, executed, and delivered to the plaintiff by Sturgis P. Carpenter, the defendant's intestate.

The first count in the declaration sets forth that on the 25th day of November, 1882, the said Sturgis P. Carpenter, by his certain deed poll, or agreement in writing, of that date, made and signed by him and sealed with his seal,—after reciting therein that said plaintiff had theretofore, at his request, discounted trade or business paper for his son Clarence H. Carpenter, and might, from time to time thereafter, discount trade or business paper for said Clarence or for his son Frank F. Carpenter,—guaranteed to said plaintiff the payment, as and when it matured, of all such trade or business paper of said Clarence, or of said Frank, that had been or might be discounted by the plaintiff, until such times as he, said Sturgis, should notify the plaintiff of his intention to terminate said guaranty, and thereby waived demand and notice of nonpayment thereof; that said Sturgis never notified the plaintiff of his intention to terminate said guaranty, and that afterwards, on the 31st day of March, 1884, the plaintiff, upon the faith of, and relying upon, said guaranty, discounted for said Clarence his, said Clarence's, note of that date, for \$2,500, payable four months after date at bank, to the order of said Sturgis,—which note had theretofore been indorsed by said Sturgis,—and paid over to said Clarence the net proceeds of the discount of said note; that afterwards, when said note became due and payable, to wit, on the 2d day of August, 1884, payment of it was demanded at bank, but the said Clarence did not pay and never has paid it, or any part of it; of all which the defendant had due notice, and thereby became liable to pay the plaintiff the amount of said note on demand.

The second count in the declaration is substantially the same as the first, except that there is inserted in it, between the averment of the payment of the net proceeds of the discount of said note to said Clarence and the averment respecting the demand and nonpayment of said note, the averment following, to wit: that the said Sturgis P. Carpenter, then in full life, thereafterwards, to wit, on the 2d day of June, 1884, by his certain other deed poll, or agreement in writing, by him made and signed, and sealed with his seal, and written upon the back of his former and other agreement aforesaid, after reciting that he had, by his former and other agreement, referred to as the within agreement, guaranteed to the plaintiff payment of all trade or business paper of his two sons, Clarence H. and Frank F., discounted by said bank, and that his son Clarence had formed a copartnership with Edmund Carpenter, under the firm name of C. H. & E. Carpenter, ratified and continued in force his said former agreement, and, in further consideration that said plaintiff had discounted and might thereafter discount trade or business paper of said new firm of C. H. & E. Carpenter at his request, further guaranteed to said plaintiff punctual payment of all said trade or business paper of said firm theretofore or there-

after discounted by the plaintiff, as and when the same became due, and thereby waived demand and notice of nonpayment of the same; and that, in consideration of said former agreement, called the within instrument, and of the premises, further agreed that no extension on any such trade or business paper of said Clarence H., and said Frank F., or said firm, should affect his liability under said agreement, dated the 2d day of June, 1884, or under this said former agreement, dated the 25th day of November, 1882, and that said guaranty dated the 2d day of June, 1884, should continue in force until he notified said plaintiff of his intention to terminate the same; that the said Sturgis never notified the plaintiff of his intention to terminate the same.

The defendant's third, fourth, and fifth pleas set forth, in varying terms, in substance, that prior to the maturity of said note the said Sturgis P. Carpenter died; that the plaintiff had full notice of his death at the time of his decease, and that both of said guaranties were thereby terminated and revoked as to all subsequent transactions; and that after the death of the said Sturgis the plaintiff, with full knowledge of his decease, for a valuable consideration, gave definite time, to wit, four months, to, and took a new note from, said Clarence H. Carpenter, the maker of said note mentioned in the declaration, and received interest on said new note so taken, in advance, without the consent or knowledge of the defendant, and without any express reservation, assented to by said Clarence, of the right of the defendant to insist upon the immediate payment of said note by said Clarence, and, in default of such payment by said Clarence, to pay the same himself and to sue thereon.

To these pleas the plaintiff has demurred.

Guaranties have been divided into two classes: one where the consideration is entire,—that is, where it passes wholly at one time; the other where it passes at different times, and is therefore separable or divisible. The former are not revocable by the guarantor, and are not terminated by his death and notice of that fact. *Calvert v. Gordon*, 3 Man. & R. 124, 128; *Green v. Young*, 8 Me. 14-16; *Moore v. Wallis*, 18 Ala. 458, 463; *Royal Ins. Co. v. Davies*, 40 Iowa. 469, 471; *Lloyd's v. Harper*, L. R. 16 Ch. Div. 290, 305-307, 813, 814, 317-331; *Rapp v. Phoenix Ins. Co.* 113 Ill. 390, 394, 395. The latter, on the contrary, may be revoked as to subsequent transactions by the guarantor upon notice to that effect, and are determined by his death and notice of that event. *Offord v. Davis*, 12 C. B. N. S. 748, 756, 757; *Jordan v. Dobbins*, 122 Mass. 168, 170, 171; *Coulthart v. Clementson*, L. R. 5 Q. B. Div. 42, 46, 47; *Rapp v. Phoenix Ins. Co.* 113 Ill. 390, 395, 396; *Menard v. Scudder*, 7 La. Ann. 385, 391, 392. The distinction between these two classes of guaranties is well illustrated by *Lush, L. J.*, in *Lloyd's v. Harper*, L. R. 16 Ch. Div. 290, 319. "An instance of the first," he remarks, "is where a person enters into a guaranty that, in consideration of the lessor granting a lease to a third person, he will be answerable for the performance of the covenants. The moment the lease is granted there is nothing more for the lessor to do, and such a guaranty as that, of necessity, runs on throughout

the duration of the lease. The lease was intended to be a guaranteed lease, and it is impossible to say that the guarantor could put an end to the guaranty at his pleasure, or that it could be put an end to by his death, contrary to the manifest intention of the parties. Another illustration is found in *Calvert v. Gordon*, 3 Man. & R. 124, which is one of a precisely similar kind. There the defendant, in consideration that the plaintiff would take into his service a given individual as collector and clerk in a responsible position, guaranteed that he would be answerable for his fidelity as long as he continued in that service. It was held, and, as I think, rightly, by the Court of Queen's Bench, that that guaranty could not be put an end to as long as the service continued. The consideration there was admitting the young man into the service of the plaintiff in that capacity, and, that being done, it was to be a guaranteed service as long as he remained there. The guaranty, therefore, necessarily continued until the service ended.

"Instances of the second class are more familiar. They are where a guaranty is given to secure the balance of a running account at a banker's, or a balance of a running account for goods supplied. There the consideration is supplied from time to time, and it is reasonable to hold, unless the guaranty stipulates to the contrary, that the guarantor may at any time terminate the guaranty. He remains answerable for all the advances made or all the goods supplied upon his guaranty before the notice to determine it is given; but at any time he may say: 'I put a stop to this; I do not intend to be answerable any further; therefore do not make any more advances or supply any more goods upon my guaranty.' As at present advised, I think it quite competent for a person to do that where, as I have said, the guaranty is for advances to be made or goods to be supplied, and where nothing is said in the guaranty about how long it is to endure. In that case, as at present advised, I cannot entertain a doubt that the judgment of *Mr. Justice Bowen* in *Coulthart v. Clementson*, L. R. 5 Q. B. Div. 42, is perfectly right,—that notice of the death of the guarantor is a notice to terminate the guaranty, and has the same effect as a notice, given in the lifetime of the guarantor, that he would put an end to it."

The only case in which a different doctrine from that above expressed with reference to the second class of guaranties has been held, is *Bradbury v. Morgan*, 1 Hurlst. & C. 249. In that case, however, as remarked by *Lord Romilly* in *Harris v. Fawcett*, L. R. 15 Eq. 811, 818, the plea did not aver that the plaintiffs had notice of the death of the guarantor before they supplied the goods, although the court did not base its decision upon the want of such notice.

The authority of *Bradbury v. Morgan* has, however, been questioned (*Harris v. Fawcett*, L. R. 15 Eq. 811, 818), and was not regarded in *Coulthart v. Clementson*, L. R. 5 Q. B. Div. 42, a later case, in which a contrary decision was made.

The guaranties in the case at bar come within the second class above considered. They were therefore, upon the authorities cited, terminated by the death of the guarantor and notice of it to the plaintiff, as to all subsequent trans-

actions. As, however, the note described in the declaration had been discounted, and the net proceeds had been paid to the maker prior to the death of the guarantor, the plaintiff would have been entitled to recover but for the fact, set up in the pleas, that, after notice of the death of the guarantor, it extended the time of payment for a further period by taking a new note from the principal debtor and receiving the interest thereon in advance, without the consent of the defendant, and without any reservation of his right, assented to by the principal, to insist upon immediate payment by the principal, and, in default of such payment, to pay the debt himself and proceed at once against the principal. That such action on the part of the plaintiff was sufficient to release the estate of the guarantor, and the defendant as his representative, from liability, is too well established to need the citation of authority.

The plaintiff, however, contends that it is entitled to maintain its action by reason of the agreement of the deceased, contained in the instrument of June 2, 1884, that no extension on the trade or business paper mentioned should affect his liability. It insists that this agreement, though contained in the same paper as the second guaranty, was entirely distinct from the guaranty itself, and binds the defendant under the general rule that the personal representative of an intestate or testator is bound by all the contracts of the deceased, except those of a personal nature or those requiring the exercise of personal skill or taste. If the agreement was, as the plaintiff seems to suppose, an agreement that no extension upon such trade or business paper should affect his liability generally; or, in other words, had been that he should continue liable at all events, whenever the extension was given,—there would be force in the plaintiff's claim. But the agreement is not of that character. It restricts the liability of the deceased to a liability under the two guaranties. The language is: "Agreeing that no extension on any such trade or business paper * * * shall affect my liability thereunder (i. e., under the instrument of June 2, 1884), or under the within agreement" (the instrument of November 25, 1882). Of necessity, therefore, the extension contemplated in the agreement, which was not to affect his liability under those instruments, must have been an extension while those instruments were in force; not one granted after they had been terminated. Those instruments, as we have seen, were both terminated by the death of the guarantor and notice of that fact to the plaintiff, the death and notice being equivalent to a notice given by the guarantor in his lifetime for that purpose. The extension upon which the defendant relies as releasing the estate from liability is alleged in the pleas to have been granted after the instruments had been so terminated. We think the demurrer should be overruled and the pleas sustained.

Demurrer overruled.

William K. RANDALL

v.

John H. LAUTENBERGER.

If, without the knowledge of the seller, an

auctioneer acts as agent for a buyer, and bids off property which he is employed to sell, the seller may, upon learning the facts, disavow the sale. In such case, the fact that no one increased the bid is not sufficient to entitle the purchaser to specific performance.

(Providence—Decided February 18, 1888.)

BILL in equity for specific performance. *Dismissed.*

The facts are sufficiently stated in the opinion of the court.

Messrs. Ziba O. Slocum and Clarke H. Johnson, for complainant.

Messrs. Charles H. Page and Franklin P. Owen, for respondent.

Stiness, J., delivered the opinion of the court:

The defendant offered his estate in the city of Providence for sale by auction. The broker whom he employed for this purpose engaged an auctioneer of Providence, named Goff, under whose authority and office the sale was to be made, the broker crying the bids. The complainant then authorized Goff to buy the property for him if it did not go above \$3,400. Goff accepted this agency for the complainant, making one or more bids in his behalf, and the property was struck off to the complainant for the sum of \$3,825. The complainant now brings his bill for specific performance. The defendant claims that he made a limitation of the price for which the estate might be sold,—viz.: \$5,000,—with the broker, and that he did not understand, although he was present at the sale, that the place was to be sold unless it brought that price; also that he supposed that the broker was the auctioneer, and that he knew nothing of the employment of Goff. The first question, however, that meets us, is whether the sale was valid, inasmuch as Goff, being the auctioneer, acted as agent for the purchaser in bidding. An auctioneer is the agent of the seller in making the sale. When, however, the property is struck off, he becomes also the agent of the purchaser, to the extent of binding both parties by his memorandum of sale. Up to this point his duty is to the vendor. Bateman, Auctions, pp. 20, 126, note z.

It is a well-settled rule that a trustee or agent cannot buy the property of his principal, because of the inconsistent relations that he would thus hold as purchaser and seller. Story, Ag. § 211; Bateman, Auctions, p. 125. The Supreme Court of the United States, in *Michoud v. Girod*, 45 U. S. 4 How. 508, 554 (11 L. ed. 1076, 1099), quoted with approval the following statement from Sugden on Vendors (vol. 2, 14th Am. ed. p. 687): "It may be laid down as a general proposition that trustees, * * * agents, commissioners of bankrupts, assignees of bankrupts or insolvents, * * * or their partners in business, solicitors to the commission, auctioneers, creditors who have been consulted as to the mode of sale, counsel, or any persons who, by being employed or concerned in the affairs of another, have acquired a knowledge of his property, are incapable [of purchasing] such property themselves, except under the restric-

tions which will shortly be mentioned. For, if persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying on their integrity. The characters are inconsistent." Sugden also states (vol. 2, p. 690, § 11): "Where a person cannot purchase the estate himself, he cannot buy it as agent for another."

These rules were most carefully examined on principle and authority by *Chancellor Kent in Davoue v. Fanning*, 2 Johns. Ch. 252. In this case, sale by a trustee at public auction, *bona fide* and for a fair price, to a third person as agent for the trustee's wife, was set aside, although the wife was a *cestui que trust* and had an interest in the estate sold. Among the cases cited was *Ex parte Bennett*, 10 Ves. Jr. 381, where a solicitor to a commission in bankruptcy made bids for a third party. The sale was set aside, upon the ground that, if a trustee or agent cannot bid for himself, upon the same principle he cannot bid for another. *Lord Eldon* held that, although the temptation in the latter case is weaker, "that distinction is too thin to form a safe rule of justice."

In *Trining v. Morrice*, 2 Bro. Ch. 326, specific performance was denied where the seller's agent, at an auction sale, bid for the plaintiff.

In *Veasie v. Williams*, 49 U. S. 8 How. 134-152 (12 L. ed. 1018-1026), *Judge Woodbury* expresses the opinion that to allow an auctioneer to bid for another would tend to weaken his fidelity in the execution of his duties to the owner.

In *Brock v. Rice*, 27 Gratt. 812, the following rule is laid down: "No person employed or concerned in selling at a judicial sale is permitted to become a purchaser, or even to act as agent of a purchaser. It is impossible, with good faith, to combine the inconsistent capacities of seller and buyer, cryer and bidder, in one and the same transaction. If the commissioner or auctioneer faithfully discharges his duties, he will, of course, honestly obtain the best price he can for the property. On the other hand, if he undertakes to become the purchaser for himself or for another, his interest and his duty alike prompt him to obtain the property upon the most advantageous terms. There is an irreconcilable conflict between the two positions; and so the courts have always held."

In respect to the duty of the auctioneer, there is no distinction between a judicial and an ordinary auction sale. In this State an auctioneer is an officer, elected especially for the purpose of securing fair dealing at such sales. The only case that has come to our attention which holds that an auctioneer may bid for another is *Scott v. Mann*, 36 Tex. 157.

The report of this case is not clear upon this point, and it is quite possible that the auctioneer took only one bid from the purchaser, and made that bid at the sale,—which would be very different from bidding *gradatim* in his behalf. Taking the case, however, as it stands, we think it is overborne both by reason and authority. The reason for the rule of the cases we have cited is well illustrated in the one before us. The complainant employed the auctioneer to act as his agent at the sale, telling him, if

the estate did not go over \$3,400, to buy it for him. Here, then, the auctioneer knew that a person was ready and willing to give that sum. He did not make a bid for that amount, but, identifying himself with the interest of the purchaser, and against the seller for whom he was conducting the sale, he bid below that limit, and bought the estate for the complainant at the sum of \$3,325. His duty was to the seller; but, having undertaken to represent the purchaser, he yielded to an adverse interest and struck off the property, through his crier, at a less price than he knew the purchaser was willing to give,—he having the control of the purchaser's bid himself. He would not have done differently had he been bidding on his own account. It makes no difference that another was acting as crier, since Goff was the legal and responsible auctioneer for the sale. Confessedly, he did not perform his duty to the seller, and it was not, therefore, a fair sale. No doubt many auction sales have been conducted in this same way. Where due notice was given and the sale is otherwise unobjectionable, we do not mean to decide whether or not a party might be estopped from objecting to it on this account. But where the vendor, as in this case, does not know that his agent is acting for another, there seems to be no room for doubt that, upon learning the fact, he may disavow the sale when it is sought to be enforced. But it may be urged that, as no one increased the bid of the purchaser, no harm was done to the defendant. This is not a sufficient answer. The conduct of an auction sale is so completely in the hands of an auctioneer that it is an easy thing for him to strike off property according to his interest, even though, by further urging, other bids might be made. It is not enough to say to the seller: "You cannot prove that I could get more." There must be no room for temptation and the hazard of abuse. Upon this ground the sales for a fair price have been set aside in some of the foregoing cases. See also *Sugden on Vendors*, 14th Am. ed. p. 689, § 5, note 1. The burden is on the complainant, who seeks to compel a performance, to show that he fairly bought the property at a fair sale. By the unlawful conduct of the agent whom he selected, whose duty, he should have known, was to the defendant, he did not fairly purchase at a fair sale, and consequently he is not entitled to the relief he asks. It is unnecessary to pass upon the other questions,—as to the limitation of the price, the ignorance of the defendant as to what took place, etc. The bill must be dismissed.

Bill dismissed, with costs.

Re Halsey J. BOARDMAN *et al.*, for Construction of the WILL OF George F. WILSON.

1. An estate should be administered, consistently with the law, in such a manner as to carry out, if possible, the **purposes of the testator** as they appear from the **will, interpreted as a whole**, in the light of the circumstances in which it was made.
2. Where a will provides [that, after the 1 R. I.

payment of certain legacies, bequests, and annuities, and an annual sum to each of testator's sons until the legacies thereafter provided for are satisfied, the trustees are to divide the dividends upon certain stock therein mentioned, one half to be held in trust until the aggregate reaches \$100,000, when the same is to be paid to a certain corporation, and the other half to be held in trust until the aggregate shall reach the sum of \$50,000, when the same is to be paid to a certain other corporation,—the implication is unmistakable that the payments of annuities, bequests, and also annual sums to the sons, are to come out of the dividends, so far as necessary, before the division.

3. Where a will directs the **immediate payment of legacies**, and also allows the **executors two years for payment** thereunder, the principal effect of the direction is to entitle the legatees to interest from the death of the testator, in case of delay.
4. Where a will does not expressly provide for **payment of debts**, as it does of legacies, **out of dividends from stock**, but it is apparent that testator expected the stock to go intact to the trustees, and that it would not be broken into for payment of debts; where, at the time of making the will the stock was pledged to the company as security for a debt, and the dividends to be retained in payment,—which dividends three months thereafter had paid off the indebtedness for which the stock was held; and where it is apparent that the testator relied almost exclusively on the stock to yield the funds for his large benefactions, as well as to make provision for his children,—the debts, so far as the other available assets fall short, are properly paid out of the dividends instead of the *corpus* of the stock.

(Providence—Decided February 11, 1888.)

CASE stated for an opinion of the court, under Pub. Stat. chap. 192, § 23.

The last will of George F. Wilson, late of East Providence, as presented for proof before the probate court of that town, after providing for payment of debts and making several specific bequests and legacies, provides as follows:

Item 19. I give and devise all the rest and residue of my property and estate, of every nature and kind, to Halsey J. Boardman, of Boston, in the State of Massachusetts, and Ellery H. Wilson, of said East Providence,—and in the event of a vacancy, occasioned either by death or otherwise, I nominate and appoint my son, George F. Wilson, Jr., as successor or substitute to fill such vacancy,—in special trust and confidence, nevertheless, that the said Boardman and Wilson, as trustees, will use and apply the same to the best advantage for carrying out and accomplishing the objects set forth in this my last will and testament; that is to say, that the said trustees shall sell, at such

time and in such manner as they deem most advantageous, all real estate to which I hold title, and all stocks or interests in any and all corporations, companies, or partnerships, in which I have any stock or interest of any kind,—except my interest or stock in the Rumford Chemical Works,—which sales, and all necessary and legal transfers and conveyances of any and all property so sold, the said trustees are hereby authorized and empowered to make. It being, however, my will and direction that the interest and rights of said trustees as aforesaid shall be subordinate to the payment of all my debts, the legacies herein provided for, and the annuities given for the period occupied in the administration of my estate by said executors.

Item 20. At the expiration whereof, I will and direct my said trustees to continue the payment to each of my daughters, Clara Francis, Mary Augusta, and Alice Louise, the income accruing from 50 shares of stock of said Rumford Chemical Works during their respective natural lives, which income I hereby give and bequeath to them severally.

Item 21. After the payments of the foregoing legacies, bequests, and annuities, and the payment annually to each of my said sons, Ellery H. and George F., Jr., the sum of \$5,000, which I direct to be paid to them until the legacies hereinafter provided for are satisfied, I direct my said trustees to divide the dividends accruing upon my said stock in the Rumford Chemical Works; one half of said dividends to be held by said Ellery H. Wilson in trust until the aggregate reaches the sum of \$100,000, when the same shall be paid over to the Corporation of Brown University, of Providence, in the State of Rhode Island aforesaid, for the purpose of endowing a professorship, or erecting a building for use in connection with said university, as to my said trustees shall seem most desirable, the same to be known and called the Wilson Professorship or the Wilson Hall. And the other half of said dividends shall be held by said Halsey J. Boardman in trust until the aggregate shall reach the sum of \$50,000, when the same shall be paid over by him to the Corporation of Dartmouth College, of Hanover, in the State of New Hampshire, for the like purposes, with like discretion to my said trustees, and subject to the like provision as to the connection of my name therewith. And it is my wish that in the event of a building being decided upon, in either or both of the two last-named legacies, by my said trustees in the application thereof, that in the erection thereof there shall be built into said building, over its principal entrance, a block of Cumberland granite, bearing in plain letters the word "Wilson."

Item 22. After the payment of the foregoing legacies, bequests, and annuities, and all the expenses of said executorship and trusteeships, including a suitable compensation to said executors and trustees, I direct my said trustees to pay over annually, in equal proportions, to my said sons, or, in the event of the death of either, to the survivor and the heirs of the deceased by right of representation, the balance of the income from said stock; and, upon the death of the survivor, said trustees shall divide said stock into as many equal parts as may be necessary, and convey one part to each

of my said daughters then living, and one to the children of each of my deceased children, by right of representation, or to their lawful guardians in the event of their minority.

From the decree of the probate court allowing this will an appeal was taken to this court, and the will was finally allowed and approved in this court, with a modification in accordance with an agreement of the parties, sanctioned by a decree entered April 28, 1883, in the equity case, Providence County, No. 2123, *Penney v. Boardman*, as provided by Pub. Laws, chap. 204, of April 19, 1882, §§ 1, 4.*

The agreement between the parties was as follows:

Whereas the parties in interest under said will deem it for the best interests of all parties concerned, and hereby agree, to make the following compromise and modification of the provisions of said will, namely: That each of said George F. Wilson's daughters, namely, Clara Francis, Mary Augusta, and Alice Louise, shall have the income of an additional 100 shares of the Rumford Chemical Works stock, making 150 shares, instead of 50 shares as provided in said will, during their respective natural lives; the dividends from said additional 100 shares of stock to be paid over to them from time to time as they shall be declared, not commencing, however, until after the legacies and bequests contained and provided for in said will, to Brown University and Dartmouth College, are first paid and adjusted. And also that the income on said 50 shares of stock to each of his daughters, provided in Item 20 of said Wilson's will, shall be paid over to said daughters from time to time as they shall be declared, commencing from the decease of said George F. Wilson.

The facts of the case and the questions presented are stated in the opinion of the court.

Messrs. John F. Lonsdale and James M. Ripley, for the executors and trustees and for Ellery H. Wilson and George F. Wilson:

In the construction of a will the "paramount object" of the testator is to be considered.

Baker v. Baker, 6 H. L. Cas. 622; *Pell v. Mercer*, 14 R. I. 430.

*These sections are as follows:

§ 1. The supreme court, sitting in equity, may authorize the persons named as executors in any instrument purporting to be the last will and testament of any person deceased, at any time before a final decree approving said instrument as the will of such deceased person shall have been entered, to adjust by arbitration or compromise any controversy that may exist or may arise thereon between the persons claiming as devisees or legatees under such will and those persons entitled to the estate of the deceased under the statutes regulating the descent and distribution of intestate estates; to which arbitration or compromise the persons named as executors, those claiming as devisees or legatees, and those claiming the estate as intestate, shall be parties; and such arbitration or compromise shall not affect the rights of persons who were not parties thereto.

§ 4. Any award or compromise made in writing in such cases shall, if found by the court, under the circumstances, to be just and reasonable, in relation to the parties in being, and to its effects upon any future contingent interest that might arise under such will and any gifts to charity made in the same, be valid and binding upon such contingent interest and gifts, as well as upon the interests of all persons in being.

Effect is to be given to the whole will.

Walcott v. Pitcher, 7 R. I. 561. See *Goddard v. Brown*, 12 R. I. 81; *Smith v. Smith*, 17 Gratt. 286.

Legacies are none the less specific because included in the residuary devise, if the intention of the testator be clear to mark them off and separate them from the other portions of his estate.

Hince v. Hince, 3 Hare, 611; *Goddard v. Brown*, 12 R. I. 81.

It is a well-recognized limitation of the principle by which a specific legatee of a chattel, incumbered by a testator in his lifetime for the payment of his own debt, has a right to the exoneration of said chattel from said indebtedness, that it can never operate to the detriment of another specific legatee.

Gould v. Winthrop, 5 R. I. 819.

While annuities are primarily payable from income (*Walcott v. Pitcher*, 7 R. I. 560), debts and legacies of gross sums are primarily payable from the estate or corpus (*Stephens v. Milnor*, 24 N. J. Eq. 368, 872). But this rule is not an inflexible one, and is always subject to be overruled by the intention of the testator, as expressed in, or implied from, the provisions of the will, unless such intention when carried out will defeat the rights of creditors.

See *Wheeler v. Ruthven*, 74 N. Y. 428.

So it is a well-recognized general rule that personal estate is primarily liable for debts, but the courts hold, in the language of *Lord Chancellor Macclesfield* in *Tipping v. Tipping*, 1 P. Wms. 729, "it should not be so applied if thereby the payment of any legacy shall be prevented," or, in the language of the Court of Appeals of New York, that plan of distribution should be followed which "would comport with the evident intention of the testator, which should govern in such a case."

Rice v. Harbeson, 68 N. Y. 498.

Mr. Thomas H. Russell, for Alice Louise Wilson, Clara Francis Penny, and Mary Augusta Wilson:

Debts and legacies and costs of administration are all to be paid out of the principal of the estate.

Walcott v. Pitcher, 7 R. I. 555; *Lovering v. Minot*, 9 Cush. 151.

The daughters are entitled to have their specific legacy of 150 shares each exonerated from any burden placed upon it by the testator during his life, even if the effect of doing so would reduce the income of the sons during their lifetime; because, although all are to derive their income during their lives from a specific source, to wit, the income of the shares of Rumford Chemical Works stock, yet the provisions for the daughters are that they shall have the income of a specific, limited number, while the sons are to receive the balance of the income of the shares, after general charges and administration, legacies, etc., are first satisfied.

Gould v. Winthrop, 5 R. I. 819.

Durfee, Ch.'J., delivered the opinion of the court:

The case stated shows that the testator, George F. Wilson, died January 19, 1888, leaving a will which was admitted to probate after modification, under the statute, by compromise between the parties in interest. Halsey J. 1 R. I.

Boardman, of Boston, and Ellery H. Wilson, son of the testator, were appointed executors by the will and have accepted the appointment. The will bears date of January 12, 1888, seven days before the testator died. It contains 22 items. The first item directs the executors, as soon as practicable, to pay the debts and funeral expenses and to erect a monument to the testator. Then follow items bequeathing specific chattels to different persons, giving two legacies of \$5,000 each and one of \$1,000, making \$11,000; giving annuities for life of \$8,500 to one person and \$1,000 to another, and appropriating the sum of \$1,500 for the erecting of a monument to the testator's grandparents and aunt. The seventeenth item directs that the said bequests shall take effect immediately,—that the articles specifically bequeathed shall be delivered immediately, that the pecuniary legacies shall be paid as soon as practicable, and the annuities shall be promptly paid as they become due. The eighteenth item directs the sale of the testator's household effects not bequeathed, together with his horses and carriages and all personal property appurtenant to his horses and stables, by his executors, within two years, and the application of the proceeds, together with all moneys on hand or in bank at the testator's decease, to the payment of the debts and legacies before mentioned, the excess, if any, to be added to the trust estate provided for and disposed of in the remaining items of the will.

The case also shows that, for some years before his death, the testator was peculiarly embarrassed, and that, on September 14, 1880, being largely indebted to the Rumford Chemical Works, and desiring further advances from it, he transferred all his stock, amounting to 1,248 shares, in said works, to trustees as security for said indebtedness and for any further advances made by the works to him or to Newton D. Arnold, trustee under another deed of the same date, for the settlement of his debts. By virtue of said transfer and deed, the testator conveyed nearly all his property to trustees, who, at the time of his death, held it under said transfer and deed, subject to the trusts therein created. The testator was still largely indebted to the Rumford Chemical Works at the time of his death, and the dividends accruing on his 1,248 shares of stock therein continued to be received and applied, under said transfer and deed, up to and including dividends payable April 30, 1888. On September 15, 1888, said trustees transferred said 1,248 shares to Halsey J. Boardman and Ellery H. Wilson, as trustees under the will, and said Arnold conveyed to them the remainder of the trust estate in his hands, and paid over to them, as trustees and executors, the sum of — dollars, being the residue of dividends accruing after the testator's death, after paying the remaining indebtedness to said works.

The case further shows that the entire estate left by the testator, exclusive of his 1,248 shares of Rumford Chemical Works stock, was insufficient to pay simply his debts, but that, including those shares, it was sufficient to pay the debts and satisfy all the provisions of the will.

The first question put, on the case stated, is whether it was the duty of the executors and trustees to apply at once all the dividends and

income of the 1,248 shares which accrued or became payable after the testator's decease, less the income of 150 shares payable to his daughters, towards the payment of the legacies to Brown University and Dartmouth College. The question is raised by the daughters, who are interested to have those legacies paid as soon as possible, since, the sooner those legacies are paid, the sooner they will become entitled to the dividends on the additional shares under the compromise. The question, however, is not, so far as we see, affected by the compromise, and should be decided precisely as it would have been decided, for the colleges, if no compromise had been made.

The contention for the daughters is that it is or was the duty of the executors to sell all the real and personal estate not specifically bequeathed, except the 1,248 shares, and then, if the proceeds are insufficient, to sell so many of said shares as are required to make up the deficiency, in order to carry out the following course of administration, to wit: (1) to pay the costs and charges of administration; (2) to pay the expenses of the last sickness, funeral, and monument; (3) to pay all lawful debts; (4) to distribute the articles specially bequeathed, and pay the pecuniary legacies; (5) to pay not over \$1,500 for monument to the testator's grandparents; (6) to provide for and pay the amounts of \$3,500 and \$1,000; and (7) to turn over the residue to the trustees. Such a course of administration is proper if it best comports with the provisions of the will; otherwise not. There is no stereotyped rule for administering testate estates. Every such estate should be so administered, if possible consistently with the law, as to carry out the purposes of the testator as those purposes appear from the will, interpreted as a whole, in the light of the circumstances in which it was made.

The same persons are executors of the will and trustees under it, and it seems to us that its obscurity arises in part from the fact that the draughtsman of the will has not always observed the distinction between their capacities, but has sometimes confused and intermixed them, so that it is impossible to discern clearly when the functions of the executors were intended to end and those of the trustees to begin. The will nowhere empowers the executors, as such, to sell the real estate, but empowers and directs the trustees to sell it for the accomplishment of the objects of the will, so that, even for the payment of debts, the executors could only sell it under the will as trustees. It is the trustees, also, who are empowered and directed to sell "all stocks or interest in any and all corporations, companies, or partnerships," except the Rumford Chemical Works, not simply for the purposes of the special trust, but "for carrying out and accomplishing the objects in this my last will,"—though these "stocks or interests" are plainly personal assets, and the executors, as such, would ordinarily be expected to administer them for all purposes except those of the special residuary trust. At this point it seems to have occurred to the testator or his draughtsman that there might be some confusion, and the testator adds that it is his will that the interests and rights of the trustees shall be subordinate to the payment of debts and legacies and the annuities, "for the period

occupied in the administration of my estate by said executors,"—manifestly implying that, at least after said "period," the annuities, if paid at all, were to be paid by the trustees. It seems clear to us, therefore, that there is a looseness and lack of order in the structure of the will which should be constantly taken into account in construing its provisions.

The counsel for the daughters does not include the sums of \$5,000, which are payable to each of the sons annually under the twenty-first item of the will, among the sums which are to be paid by the executors, according to his final scheme of administration, stated above; but that the trustees, after paying the income of 50 shares to each daughter, are to pay said annual sums, while the college legacies are accumulating, either from the principal or the income of the stock. We have just seen, too, that the closing sentence of the nineteenth item implies that the annuities previously given are to be paid out of the income after the period of administration. If we pass to the twenty-first item it seems to us that both of these points are clear. The twenty-first item begins: "After the payments of the foregoing legacies, bequests, and annuities, and the payment annually to each of my said sons, Ellery H. and George F., Jr., the sum of \$5,000, which I direct to be paid to them until the legacies hereinafter provided for are satisfied, I direct my said trustees to divide the dividends accruing upon my said stock in the Rumford Chemical Works," etc.,—proceeding to prescribe accumulations for the colleges. In other words, to turn the phrases about in order to bring their meaning out the more clearly, the item directs the trustees to divide the dividends between the funds for the colleges after paying the legacies, bequests, and annuities given in prior items, and the annual sums for the sons,—the implication being unmistakable that the payments are to come out of the dividends, so far as necessary, before division. The answer of the counsel for the daughters is that no such payments ever can be necessary, because, in the regular course of administration, the legacies, bequests, and annuities will be paid by the executors, so many shares of the Rumford Chemical Works stock as are necessary to make good the deficiency of the other assets being sold for that purpose, and only the residue will go to the trustees.

The trouble with this answer is that it takes no account of the unmethodical structure of the will, and instead of making the administration subservient to the will, subordinates the will to a preconceived course of administration. It is patent that the testator did contemplate an exigency in which the dividends should be used to pay legacies and annuities, and did explicitly provide for it in the twenty-first item. What was that exigency? Evidently an insufficiency of assets, exclusive of chattels specifically bequeathed and of the Rumford Chemical Works stock. If it be asked, Why exclusive of said stock? the answer is obvious, namely, Because, if the stock was intended to be resorted to at all, it must have been intended to be resorted to to the full extent of the need, and the provisions for making any use of the dividends would be nonsensical. Accordingly, since the exigency has occurred, why should it not be met as the

testator provided for having it met, and his will thus be carried out? It seems to us that it should be so met, and, consequently, that the legacies and annuities, as well as the annual sums for the sons, are payable out of the dividends, and that they should be so paid, the annuities and annual sums of course being paid as they fall due. We may add that the twenty-second item, also, will be found, if examined, to lead to the same conclusion.

The counsel for the daughters urges, against this conclusion, that it is inconsistent with Item 17, which directs the immediate payment of the legacies. Item 18, however, allows the executors two years for payment thereunder; and probably the principal effect intended by Item 17 was to entitle the legatees to interest from the death, instead of a year after the death, of the testator, in case of delay. He also urges that the testator could not have intended to postpone his children's enjoyment of the income by such payment. The answer to this is that,—under the will simply,—the daughters are not affected by the postponement, being entitled to the income of 50 shares each from the testator's death, and the sons are provided for by the annual sums.

Are the dividends likewise applicable to the payments of the debts, in so far as the other assets not specifically bequeathed, except the 1,248 shares, fall short of paying them? The will does not expressly provide for the payment of the debts, as it does of the legacies, out of the dividends, and it therefore seems to us that this is a more difficult question than that which we have just answered. We have, however, after a careful consideration, come to the conclusion that the dividends are to be used in exoneration of the shares, as well for the payment of debts as of legacies and annuities. We will state the reasons which have led us to this conclusion. We think it is apparent that the testator expected that the Rumford Chemical Works stock would go intact to the trustees. Item 19, as we have seen, directs the trustees to sell all other corporate stocks except that, which of course imports such an expectation. Item 21 directs the manner in which the dividends "accruing upon my said stock in the Rumford Chemical Works" shall be temporarily disposed of. The language is "my said stock," not "my remaining stock," and again imports an expectation that the stock would go and continue intact. The same expectation reappears in the twenty-second item, which directs the disposition of the income after the payment of the legacies to the colleges, during the lives of the sons, and the division of the stock itself after the death of the survivor of them,—the stock there being called "said stock" meaning the stock previously mentioned. It would evidently disappoint the expectation and purpose of the testator if the stock were broken in to for the payment of his debts. The question is whether the expression of this expectation and purpose is determinate enough to be accepted as the will of the testator; for, if it is, there appears to be nothing to prevent its controlling the usual course of administration.

It is the duty of a court, in construing a will, to bear in mind the circumstances under which it was made; so as to look at it, as far as possible, from the testator's point of view. The

observance of this duty is particularly important in this case, since the circumstances, as they concern the stock in the Rumford Chemical Works, were very peculiar.

The case stated shows that, at the time the testator made the will, his stock in the Rumford Chemical Works was, and for more than two years had been, in the hands of trustees, under a deed which stipulated an extension of credit to the testator on a prior indebtedness to the Rumford Chemical Works and further loans to him from said works, in consideration that said stock should be held as security, and that said works, which was a party to the deed, should be entitled to retain the dividends on the stock, as they accrued, by way of payment.

The stock was also complicated and entangled in the trusts of another trust deed of the same date, so that, at the death of the testator, it would have been hardly practicable for the executors, if they had then been qualified, to sell the stock, unless the trustees would have consented to join in the sale, for the purpose of paying the indebtedness to the works. The case likewise shows that, within a little more than three months after the execution of the will, dividends had accrued to an amount sufficient to pay off the entire residue of indebtedness for which the stock was held, and to leave a large balance to be paid over to the executors. It must be assumed that the testator knew, when he made his will, how much his indebtedness was and how profitable a business the works was doing, and consequently how soon the indebtedness was likely to be paid out of the accruing dividends. Can it be supposed that, with this knowledge, he intended that the process of payment which he had found so successful during his life should cease at his death? The will shows that he relied almost exclusively on this stock to yield the funds for his large and monumental benefactions to Brown University and Dartmouth College, and to make provision for his children and their posterity. Can it be supposed that he intended to expose this productive stock to the hazards of a sale, in circumstances in which some sacrifice, and probably a heavy sacrifice, must ensue, for the purpose of paying a debt which the stock was itself paying, rapidly and without risk, as he had agreed to have it paid? It is strange, if he did so intend, that the will should indicate the contrary. It is not to be supposed that in making the will, which was made only seven days before his death, he did not contemplate the contingency of his dying before his indebtedness to the works was paid. But if his idea was that, whether he lived or died, the indebtedness would disappear under the deed of trust, without the intervention of the executors, and and if such was his design, then the suggestion of the eighteenth item, that the debts and legacies might be more than paid by the property there directed to be sold, would become intelligible, and the apparent purposes of the will are all satisfied. In this view, the testator did not provide in his will in express terms that his debts, after the exhaustion of other assets, should be paid out of the dividends instead of the capital of the stock in the Rumford Chemical Works, because he had already so provided in regard to the bulk of his indebtedness, before the will was made, and because he sup-

posed that, in such circumstances, he made his intention not to have the capital so used sufficiently clear by directing it to be used in a different manner; and in this view, also, the probability is that, when he ordered in Item 18 the effects there specified to be sold, and the proceeds used to pay debts and legacies, and the excess, if any, to be turned over to the trustees, he had chiefly in mind his personal and family debts, not embraced in ante-testamentary provision.

It seems to us, therefore, that the indications from the circumstances concur completely with the indications of the will, and add such strength to the latter indications that the latter are to be regarded as a determinate part of the will, and, accordingly, that the debts, so far as the other available assets fall short, are properly paid out of the dividends instead of the *corpus* of the Rumford Chemical stock.

The counsel for the daughters contends that this view is inconsistent with the direction of Item 1, that the debts 'shall be paid as soon as practicable'. The phrase "as soon as practicable" is rather indefinite; but, however taken, the debts were paid, as the testator probably foresaw they would be, a good deal quicker out of the dividends than they would have been by selling the stock. The record shows that the will was finally proved April 28, only two days before the dividend of April 30, so that in fact it would have been impossible for the executors to hasten the payment by sale.

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We wish to add that, in coming to our conclusion, we do not mean to derogate from the authority of the ordinary precedents, or of the general rules educed from them, namely: that when a legacy is given which is subject to a charge, it is ordinarily entitled to exoneration out of the general assets; and that, when a residue is given, the income to go one way and the capital another, the legatee of the income takes it from the death, unless there be something in the will to show a contrary intent. Both these rules are recognized in Rhode Island cases. *Gould v. Winthrop*, 5 R. I. 319; *Bailey's Petition*, 13 R. I. 543. We know of no precedent which covers a case having the peculiarities of the case at bar. Nor do we acknowledge any conflict between our decision in this case and the decision of this court in *Walcott v. Pitcher*, 7 R. I. 555, largely relied on by the counsel for the daughters; for in that case the will was supposed to indicate an intent to have the capital of the residue used, and it does not appear that there was anything to the contrary in the circumstances; whereas, in the case at bar, the will implies an intent to have the capital preserved and only the dividends used, and the circumstances under which the will was made corroborate the implication.

Other questions have been put in the case stated, but the answers to them are mere corollaries to the answers above given, and we leave the parties to draw them.

1 R. I.

MAINE.
SUPREME JUDICIAL COURT.

Seward DILL

v.

Daniel WILBUR *et al.*

1. The **allegations** of the principal defendant in a trustee process must be **filed**, if at all, **before the adjudication** upon the disclosure.
2. Whether such allegations may be **filed afterwards** and the case reopened, rests in the **discretion of the court**.

(Franklin—Decided December 22, 1887.)

ON defendant's exceptions. *Overruled.*

The opinion states the facts.

Mr. B. Emery Pratt, for defendants:

Rev. Stat. chap. 86, § 80, provides that "the answers and statements sworn to by a trustee shall be deemed true, in deciding how far he is chargeable, until the contrary is proved; but the plaintiff, defendant, and trustee may allege and prove any facts material in deciding that question."

At the time *Tunks v. Grover*, 57 Me. 588, was decided, defendant did not have this right; but by the Laws of 1862, chap. 120, he acquired it.

Compare Rev. Stat. 1857, chap. 86, § 29, with Rev. Stat. 1883, chap. 86, § 80. The decision in 57 Me. was under the Statute of 1857, § 29.

Mr. F. E. Timberlake, for plaintiff:

To the rulings of the court in this case the principal defendant has no right to except.

Tunks v. Grover, 57 Me. 588; *Dalton v. Dalton*, 48 Me. 48.

The question of the trustee's liability is to be settled between the plaintiff and trustee. "The defendant is no party to the disclosure." The statute itself clearly shows this.

Rev. Stat. chap. 86, §§ 10, 11.

When it appears by the answer of the trustee that there may be a claimant, by reason of an assignment from the principal debtor "or in some other way" (*Parker v. Wright*, 66 Me. 394), the claimant may appear, or may be compelled to appear, and show the foundation for his claim, and the trustee will be charged or discharged accordingly.

Rev. Stat. chap. 86, § 82; *Jordan v. Harmon*, 73 Me. 259.

The trustee had been charged before the defendant filed his motion, and it was too late then for even the claimant to come in and object.

Larrabee v. Knight, 69 Me. 320.

Foster, J., delivered the opinion of the court:

In this case the trustee disclosed that he owed the principal defendant \$19.50 for lumber purchased of him. Upon this disclosure the court adjudged the trustee chargeable for said amount.

After such adjudication, the principal defendant, by his attorney, appeared and filed allegations (Rev. Stat. chap. 86, § 80), therein claiming that the lumber when sold was the 1 Me.

property of another person; and that in the sale of it to the trustee he was acting as agent of such person; that the facts alleged should be heard in connection with the disclosure of the trustee; and that the entry of such adjudication charging the trustee should be stricken from the docket.

The court refused to entertain the allegations or change the entry upon the docket.

To this refusal the defendant filed exceptions. The exceptions cannot be sustained. The allegations were not filed till after the court had passed upon the disclosure and adjudged the trustee chargeable for the amount in his hands. They were made too late. The trustee had already been charged. *Larrabee v. Knight*, 69 Me. 322.

It was in the discretion of the court whether it would allow the entry charging the trustee to be stricken off, and open the case anew for examination and consideration. It did not see fit so to do. Exceptions will not lie to the proper exercise of such discretion.

A party invoking the right of alleging and proving facts material in deciding how far a trustee is chargeable, aside from the answers and statements sworn to by the trustee, must move before the adjudication of the court upon the trustee's disclosure, or submit to the discretion of the court in allowing or denying a reopening of the case, if no movement is made in that direction till after such adjudication. *Vigilantibus, non dormientibus, jura subveniunt.*

Exceptions overruled.

Peters, Ch. J., Walton, Virgin, Libbey, and Haskell, JJ., concurred.

Eliphaz B. CHAPMAN.

v.

Herman WIGHT.

W promised in writing to pay C a certain sum of money, upon condition that if W paid B the same sum within a time specified "then this note is to be given up." *Held*, that it was **not a promissory note**, and that it would be **barred by the Statute of Limitations** in six years from the date when due, although it was witnessed.

(Oxford—Decided December 24, 1887.)

ON report. *Judgment for defendant.*

Mr. Alvah Black, for plaintiff.

Mr. C. A. Chaplin, for defendant:

Mr. Chitty, in his treatise on Bills of Exchange, Promissory Notes, etc., p. 152, says: "The essential qualities of a promissory note are that they be for the payment of money only, and that such payment be absolute, and not contingent either as to the amount, event, fund, or person."

The note in *Dennett v. Goodwin*, 32 Me. 44, contained an absolute promise to pay money and interest in one year, contained negotiable words, and was witnessed, but contained an additional provision that it might be considered on demand if called for in blacksmith's work, and the court says: "This instrument,

although denominated a note in common parlance, does not contain a promise to pay money absolutely and unconditionally."

In *Bunker v. Athearn*, 85 Me. 364, the court says: "By the statute of 3 & 4 Anne, chap. 9, one of the qualities of a promissory note is that it must be payable in money; and it has been held uniformly that it must be payable in money absolutely and unconditionally. Story, Prom. Notes, § 22."

Judge Bouvier, in his Law Dictionary, vol. 2, page 892, says of a promissory note that it is "a written promise to pay a certain sum of money at a future time, unconditionally."

Blackenhagen v. Blundell, 2 Barn. & Ald. 417; *Walrad v. Petrie*, 4 Wend. 575.

A stipulation or condition, therefore, is inconsistent with its unlimited negotiability, and takes away from it the essential feature of a promissory note.

Chitty, Bills, 12th Am. ed. 184 et seq.; *Hubbard v. Mosely*, 11 Gray, 170.

Virgin, J., delivered the opinion of the court:

Assumpsit on a certain written instrument dated April 9, 1853, and signed by the defendant in the presence of an attesting witness, wherein the signer promised to pay the plaintiff \$480.02 "due to Charles Bellows." The declaration alleges this instrument to be a promissory note.

To constitute a promissory note, the instrument must necessarily be certain as to the fact of payment, and not be dependent on a contingency. For such "paper is intended, if negotiable, to circulate in business as money; and this on the ground that on a certain day it will become money." 1 Pars. N. & B. 42.

No time of payment is specified in this instrument otherwise than by the following terms: "Now, if Hermon Wight shall pay the said Bellows, or cause to be paid, the above sum in three years from next January, then this note is to be given up, otherwise to remain in full force." This contingency as to payment destroys the quality of the instrument as a promissory note. *Dennett v. Goodwin*, 32 Me. 44; Chitty, Bills, 162; *Cook v. Satterlee*, 6 Cow. 108; Pars. N. & B. 42.

Not being a promissory note, the fact of its having been signed in the presence of an attesting witness does not prevent its being barred by the Statute of Limitations pleaded. Rev. Stat. chap. 81, § 86.

Judgment for defendant.

Peters, Ch. J., Walton, Libbey, Foster, and Haskell, JJ., concurred.

Ebenezer CLEAVES

Peleg WASHBURN

1. The title to personal property sold does not pass until the parties intend it shall.
2. When the price of property bought is to be paid in labor, and the purchaser is to have no ownership in the property until he has fully performed his contract, he can not maintain trover for the value of the property, against the

seller, until he can show a complete performance of the contract of labor on his part.

(Piscataquis—Decided January 11, 1888.)

ON exceptions by the plaintiff to a nonsuit ordered at the close of his evidence. *Overruled.* The opinion states the facts.

Mr. Henry Hudson, for plaintiff:

No price was agreed upon as to the stumpage, and the stumpage was not paid.

Benj. Sales, p. 3, note 8.

The principle of law is well settled that the facts proven constitute a sale, and thus the title to the boards is in the plaintiff.

Banton v. Shorey, 77 Me. 48.

"The price is an essential ingredient in the contract of sale, and it must be real and not merely nominal, and fixed, or be susceptible of being ascertained in the mode prescribed by the contract, without further negotiation between the parties."

2 Kent, Com. p. 476.

"Mutual consent is requisite to the creation of the contract, and it becomes binding when a proposition is made on one side and accepted on the other."

2 Kent, Com. p. 477; 1 Cooley, Bl. Com. p. 445.

"When the terms of sale are agreed on, and the bargain is struck, and everything that seller has to do with the goods is complete, the contract of sale becomes absolute, as between the parties, without actual payment or delivery, and the property and the risk of accident to the goods vest in the buyer."

2 Kent, Com. p. 491; *Wing v. Clark*, 24 Me. 866; *Waldron v. Chase*, 37 Me. 418; *Phillips v. Moor*, 71 Me. 81.

Does defendant exercise a dominion over it in exclusion or in defiance of the plaintiff's rights? If he does, that is in law a conversion, be it for his own or other persons' use."

Cooley, Torts, p. 448, and cases cited.

In *Webber v. Davis*, 44 Me. 152, the court says: "It is sufficient if he exercises an authority over the goods, against the will and to the exclusion of the owner, by an unlawful intermeddling with them."

Gibbs v. Chase, 10 Mass. 128; *Miller v. Baker*, 1 Met. 31; *Bowlin v. Nye*, 10 Cush. 418; *Fernald v. Chase*, 37 Me. 290; *Porter v. Foster*, 20 Me. 393; *Dickey v. Franklin Bank*, 32 Me. 572; *Moody v. Whitney*, 34 Me. 565.

In *Fifield v. Maine Cent. R. Co.* 62 Me. 82, the court says that to constitute conversion there must have been a wrongful taking, or a wrongful detainer, or an illegal using, or a misusing, or an illegal assumption of ownership.

On the question of conversion I cite the following authorities:

Galvin v. Bacon, 11 Me. 28; *Porter v. Foster*, 20 Me. 393; *Dickey v. Franklin Bank*, 32 Me. 572; *Moody v. Whitney*, 34 Me. 565; *Fernald v. Chase*, 37 Me. 290; *Webber v. Davis*, 44 Me. 152; *Fifield v. Maine Cent. R. Co.* 62 Me. 82; *Freeman v. Underwood*, 66 Me. 232; *Gibbs v. Chase*, 10 Mass. 128; *Miller v. Baker*, 1 Met. 31; *Bowlin v. Nye*, 10 Cush. 418; *Hinckley v. Barter*, 13 Allen, 139; *Guthrie v. Jones*, 108 Me. 194; Cooley, Torts, p. 448, and cases cited.

News. A. G. Lebroke, W. E. Parsons, and A. M. Robinson, for defendant:

To maintain trover two points are essential: (1) property in the plaintiff and the right to immediate possession; (2) a conversion by defendant.

Every element of Rev. Stat. chap. 111, § 4, in relation to the sale of personal property of the value of \$30 or more, called the Statute of Frauds, may exist, and still the title to property may not pass. Each of the several elements of § 4 may be sufficient to lay the foundation for a special action of assumpsit for nonperformance, but all combined may fall short of proving title to the property.

Ateood v. Lucas, 53 Me. 508; *Morrison v. Dingley*, 68 Me. 553; *Evans v. Harris*, 19 Barb. 416; *Bailey v. Ogden*, 3 Johns. 899.

Although a contract may be in writing, and the price fully paid, and a part of the property delivered, still the title to the property embraced in the contract does not pass unless that is proved to have been the intention of the parties.

Pratt v. Chase, 40 Me. 269; *Kelley v. Upton*, 5 Duer, 386; *Head v. Goodwin*, 87 Me. 181; *Pratt v. Chase*, 40 Me. 269.

Having no property, either general or special, in any of the articles claimed under the contract, plaintiff had no right of possession.

Lamb v. Clark, 80 Vt. 347; *Boobier v. Boobier*, 39 Me. 409; *Kelsey v. Griswold*, 6 Barb. 436.

A mere declaration of ownership, without any taking of any possession or the exercise of any dominion, does not constitute a conversion.

Fernald v. Chase, 37 Me. 289, 294 et seq.; *Rand v. Sargent*, 23 Me. 326; *Boynton v. Wilbard*, 10 Pick. 169.

Benjamin, in his work on Sales, says that where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the conditions be fulfilled, even though the goods may have been actually delivered.

1 Benj. Sales, p. 357, citing numerous American authorities; *Brown v. Haynes*, 52 Me. 578; *Everett v. Hall*, 67 Me. 497, and cases cited; *Angier v. Taunton Paper Mfg. Co.* 1 Gray, 621; *Comstock v. Smart*, 23 Me. 202; *Rogers v. Whitehouse*, 71 Me. 222.

Per Curiam:

The plaintiff's story is substantially as follows: The defendant was the owner of a farm, with its stock and other plant. In the spring of 1884, as he stated to plaintiff, he had made a contract with one Hunt in relation to this property. By the terms of this contract Hunt was to take his family on the farm; operate and care for the farm, stock, and crops; and board the defendant in his family,—all till May 1, 1885. He was also to cut wood for the defendant to the amount of \$25, and also pay the cash and highway tax. He was to receive from the defendant the income of the farm, the use of the cow, oxen, and sheep, the grain raised, the wool, and lambs of the next year. The hay was to be fed to the stock on the place.

Soon after the 1st of October Hunt left the farm and abandoned the contract. About the 18th of October the defendant came to the plaintiff, stated to him the trade with Hunt and 1 Me.

that Hunt had left, and asked him to take Hunt's place,—“step into Hunt's shoes.” The plaintiff agreed to do so, except as to the cash tax, which defendant agreed to pay himself. The plaintiff thereupon moved upon the farm with his family, and remained there till May 1, 1885. He performed his part of the contract, except that he did not pay all the highway tax, and has never paid it all. While living there, he bought of the defendant some stumpage of cedar and other lumber, which he did not and has not paid for.

When the time was up, May 1, 1885, the parties had no settlement, though the plaintiff says he was ready to settle and pay any balance. The plaintiff, after failing to get a settlement, undertook to remove from the farm the grain, the heifer (the product of the cow), and the wool, and the lambs of that spring, but was prevented by the defendant, who claimed there was a balance due him. The plaintiff thereupon brought this action of trover. As to these articles the question is as to title. The plaintiff's counsel claims that the title to the grain vested in the plaintiff at once, at the time of the trade; and that the heifer, lambs, and wool became his at once, upon their coming into existence. If this were so he could at once have removed them and abandoned his duty, leaving the defendant only a right of action. It seems clear to us that such was not the intention. Hunt evidently did not so understand it, for he left the grain and heifer behind him. The plaintiff did not think so at first, for he says he sought a settlement, and was willing to pay any balance, and he only undertook to remove the property after a failure to settle. His possession was only that of a bailee, as tenant or farm bailiff. There is no evidence of any delivery.

The title to personal property in a trade does not pass until the parties intend it shall pass. It may sometimes be difficult to ascertain the intention, but, when ascertained, it governs. We think it very clear, from the conversations and circumstances detailed by the plaintiff, that the intention of the parties was that the plaintiff should first earn the property as the price of his service, and by fully rendering the promised consideration; and should be entitled to the ownership of the property only after he had fully performed his part of the contract. No other intention would be consistent with the usual course of farm management. We do not think the jury could have found such an intention as the plaintiff now claims. If they had, the verdict must have been set aside as against evidence.

Therefore, for the plaintiff to show that the title had completely passed from the defendant to himself, he must show a complete performance of the agreement on his part. Nothing less than a complete, finished performance will avail him. The omission of a day or a dollar in that performance will prevent the title passing. *Brown v. Haynes*, 52 Me. 578.

Equity and good conscience might require the plaintiff to also pay for the stumpage before he removed the articles. It seems probable that the parties understood that the stumpage matter modified the original agreement and became incorporated into it, instead of being and remaining an independent agreement. But,

passing the matter of the stumpage, the plaintiff admits he did not perform all his original agreement. He has not paid all the highway tax, which was for him to pay, and he shows no reason for his omission. It is true, only a small part remains unpaid; but as the plaintiff relies upon a strict legal title, he must show a strict performance. This he has not done.

There was no conversion of the lumber. It was in the highway, and the defendant exercised no dominion over it. The first item—the wood—is stricken out. We think the plaintiff has mistaken his remedy, and that the nonsuit was properly ordered. He can bring an action on the agreements if he desires right and justice against the defendant.

Exceptions overruled. Nonsuit confirmed.

Edmund F. WEBB, Admr.,

v.

Edmund A. FULLER *et al.* /

1. When, in equity, issues of fact have been submitted to a jury, and the verdict of the jury has been confirmed by the presiding justice, and an appeal is taken to the full court, the decree will not be reversed unless it clearly appears to be erroneous.
2. The burden to show error rests upon the appellant.

(Waldo—Decided January 3, 1888.)

ON appeal by the defendants. *Decree affirmed.*

The opinion states the point.

Mr. William H. Fogler for defendants.

Mr. Appleton Webb, for plaintiff:

In *Noyes v. Shepherd*, 80 Me. 178, the court held: "The cases in which the court may decline to set aside a verdict where it is rightfully found, though under erroneous instructions, are only those in which the court is able to perceive that, under correct instructions, a different verdict could not have been rightfully found."

Neither will a new trial be granted where the court would come to the same result and pass a judgment like that which has been rendered, for it is not the intention that a new trial shall be granted for an error which is not injurious to the party.

Hathaway v. Crosby, 17 Me. 448.

The verdict is conclusive upon the issues submitted, unless set aside by the court for good cause shown.

Ross v. New England Mut. Ins. Co. 120 Mass. 117.

The burden rests upon the defendant to show that the verdict and decree are erroneous.

In *Reed v. Reed*, 114 Mass. 372, which was a bill in equity to set aside a conveyance by the plaintiff of her real and personal property, as having been obtained by fraud, false representations, and undue influence, the case was fully heard upon bill, answer, and general replication, and upon the evidence, mostly oral, taken by a commissioner appointed for the purpose, before a justice of this court, who entered a decree for the plaintiff. The defendants appealed to the full court. Gray, *Ch. J.*, said:

"The decision of a single justice of this court upon questions of fact was final in suits in equity as in other cases." The chief justice cites *Lloyd v. Trimleston*, 2 Molloy, 81; *The Atlas*, L. R. 2 P. C. 245; *United States v. 112 Cases of Sugar*, 33 U. S. 8 Pet. 277 (8 L. ed. 944); *Taylor v. Harwood*, Taney, 487, 446,—and continues: "The decision of the present case turns mainly upon the comparative weight to be given to the testimony of the respective parties, who were examined in person at the original hearing; and upon careful examination of the whole evidence we see no reason to reverse the decree."

Per Curiam:

The issues of fact were framed under the direction of the court and tried by a jury. The jury found the issues in favor of the plaintiff, and the presiding justice, who had heard all the evidence, entered a decree confirming the verdict and requiring the defendants to account as prayed for in the bill. The defendants appealed and bring the case here for revision.

When, in equity, issues of fact have been submitted to a jury, and the verdict rendered by the jury has been confirmed by the presiding justice, and the case is brought before the whole court by appeal, and comes up on a report of the evidence submitted to the jury, the decree below will not be reversed unless it clearly appears that the decree is erroneous. The burden to show the error lies on the appellant. *Young v. Witham*, 75 Me. 536.

A careful consideration of the whole case does not satisfy us that the verdict and decree are against the evidence. On the contrary, we are of opinion that they are well supported by it.

Decree below affirmed; master to be appointed at Nisi Prius; costs for plaintiff.

John CUNNINGHAM

v.

Inhabitants of FRANKFORT.

When an inhabitant of a town has incurred necessary expenses for the relief of a pauper, the town is bound to pay such expenses after notice and request to the overseers, until provision is made for the pauper.

(Waldo—Decided January 3, 1888.)

ON motion of the defendants to set aside the verdict and for a new trial. *Overruled.*

The opinion states the case.

Mr. Philo Hersey for plaintiff.

Mr. William H. Fogler for defendants.

Per Curiam:

One Mrs. Treadwell was a pauper in need of relief in the defendant town. The plaintiff was an inhabitant of that town, and incurred necessary expenses for her relief. The town was therefore bound to pay the plaintiff those expenses, after notice and request to the overseers, and until provision was made for the pauper. *Rev. Stat. chap. 24, § 43.*

There is evidence in the case tending to show that the plaintiff did make notice and request to the overseers, for relief for the pauper.

The only provision, if any, made for her by the overseers, was some arrangement with the plaintiff for her care. If there was an arrangement, the town is bound to pay on the contract. If there was no arrangement, there was then no provision made for her, and the town is bound to pay under the statute.

The contention of the defendant, that the plaintiff withdrew his notice and request and consented to assume the relief himself, is negated by the verdict.

Whether the town's liability is under the statute or under some contract may be uncertain, but we think it is not material after verdict. *Knight v. Fort Fairfield*, 70 Me. 502.

The judgment will be the end of the matter. *Motion overruled.*

Margaret J. DUREN

v.

Edward R. HALL *et al.*

The law court will not reverse the decision of a single justice upon matters of fact, on appeal in equity, unless convinced that the decision is clearly wrong.

(Penobscot—Decided January 3, 1888.)

A PPEAL in equity from a decision of a single justice upon matters of fact. *Decree affirmed.*

The point is stated in the opinion.

Messrs. Wilson & Woodard for plaintiff.

Mr. I. W. Davis for Edward R. Hall, defendant.

Mr. A. J. Merrill for Perley G. Duren, defendant.

Per Curiam:

This is an appeal in equity from the decision of a single justice upon matters of fact.

To reverse such a decision, it is not enough that the justices hearing the appeal differ from the justice hearing the cause in the first instance. They must be convinced that his decision is clearly wrong. *Young v. Witham*, 75 Me. 586.

We cannot say, in this case, that the decision below is clearly wrong. There is evidence to support it, though there may be evidence the other way.

Decree affirmed.

Stillman ILSLEY *et al.*,

v.

Leonard ILSLEY *et al.*

When a testator devises property to a trustee with the authority to use for the support of the *cestui que trust* such part thereof as he "in his good judgment may deem necessary," a later provision of the will, directing that the *cestui que trust* shall have no part of the trust fund paid him so long as his health and strength continue and he is able

to do anything towards his own support, and saying the fund is to be a reserve fund in case of sickness, and describing what he means by sickness, etc., will be regarded as merely advisory, to be followed or not as the trustee "in his good judgment may deem proper."

(Cumberland—Filed March 14, 1888.)

ON report of a suit in equity by the trustees under the will of Joseph Isley to obtain a construction of the will. *Bill sustained.*

Mr. Lewis Pierce for plaintiffs.

Mr. John A. Waterman for respondents:

A clearly expressed intention in one portion of the will is not to yield to a doubtful construction in any other portion of the instrument. The plain and unambiguous words must prevail.

1 Redf. Wills, pp. 480 (12), 483 (2), 484 (4).

When the intention is obscured by conflicting expressions, it is to be sought rather in a rational and consistent, than an irrational and inconsistent, purpose.

Jarm. Wills, Rule XIII.

Virgin, J., delivered the opinion of the court:

In the first sentence of this holographic will the testator expresses himself as "being desirous to make a suitable provision for my (his) brothers, nephews, and nieces." After making a few specific bequests to various persons, he then bequeathed five sevenths of the "residue of his estate" to certain trustees named; one seventh "for the benefit," during life, of two surviving brothers; and one seventh "for the equal benefit," during life, of the respective nephews and nieces of each of three deceased brothers,—thus creating five separate and distinct trusts.

After designating the fund which the respective *cestuis que trust* are to have the benefit of, the testator then declared his general intent as to the mode of dispensing the funds among them, in the following clear and unambiguous language: "Each of said trustees is hereby authorized to use for the support of either of the persons for whom he is trustee, such part of his or her fractional share of the principal funds (as) in his good judgment (he) may deem necessary." And, to show his entire confidence in the "integrity and faithfulness" of the trustees, he also appointed them executors of his will, and "directed that no bond shall be required of them as executors or trustees."

Each and all of the provisions of the will harmoniously concur in showing the manifest purpose and general intent of the testator, in dispensing the five sevenths of the residue of his estate among his beneficiaries, to be as above indicated,—leaving it at the discretion and in the good judgment of the trustees,—except one paragraph, which occurs later in the will. That contains expressions which not only render obscure the general import of the will, but which are repugnant to it. For instance, the provisions that none of the funds shall be paid to any of the beneficiaries "so long as their health and strength continue and they are able to do anything (or something) for themselves for their support—to be held till any one

of them becomes sick and totally unable to support themselves." "The fund to be a reserve fund in case (any one) of sickness." And "what I mean by sickness is to take the case of my" his brothers named and his sister-in-law named, "all of which proved incurable or total."

The literal force and effect of these expressions would utterly defeat the obvious intention and primary purpose of the testator which the earlier language of the will legitimately imported. These expressions are repugnant to all that goes before. It is absurd to suppose that the testator really intended that no part of the trust funds should be used for the benefit of those for whom he was "desirous to make a suitable provision" to keep them from the poor-house,—or for their relief in case of sickness,—until the trustees knew that the objects of his bounty had become "incurable" and were beyond relief. Such a construction of the whole will would be unreasonable and inconsistent with its manifest intention.

We think these latter clauses, at most, should be deemed merely advisory in character,—to be followed by the trustees as nearly as their "good judgment," in which the testator so implicitly relied, "may deem proper."

Decree accordingly.

Peters, Ch. J., Walton, Libbey, Foster, and Haskell, JJ., concurred.

William LEADER, Admr. *d. b. n.*,

v.

Frank O'LOUGHLIN *et al.*

The will of a testatrix contained the following clause: "I have but one son, John Russell, and I do not know whether he is alive or not. I have not heard from him for a long time. I give and bequeath and devise unto him the amount of money that stands in his name in the Bath Savings Institution, at Bath, Maine." After other bequests, and making her brother residuary legatee, the will contained the following: "If I take the money that stands in the name of my son, John Russell, from the Bath Savings Institution, and deposit it in the bank in my name, it is my will and desire that the amount, which is about \$600 or \$700,—I cannot remember the exact amount,—shall be given my son John Russell, if he should return at any time within ten years of my death; and it is my will that that amount shall be kept at interest for my said son, John Russell, that he may have it for his own forever if he returns or is found anywhere alive within ten years after my decease." The testator did make the change of the deposit to her own name. The executor kept the money at interest for ten years. The son never returned nor was he ever heard from. *Held*, that the money and accumulated interest belonged to the residuary legatee.

(Androscoggin—Filed January 9, 1888.)

ON report of a suit in equity brought to obtain a construction of the last will and testament of Mary Russell. *Bill sustained.*

Mr. D. J. Callahan for plaintiff.

Messrs. Frye, Cotton, & White, for respondents.

Foster, J., delivered the opinion of the court:

The complainant, administrator *de bonis non* of the estate of Mary Russell, late of Lewiston, who died in October, 1873, brings this bill to obtain a proper construction of her will.

The only doubt arises in relation to the items wherein her only child is mentioned.

The first item is as follows: "I have but one son, John Russell, and I do not know whether he is alive or not. I have not heard from him for a long time. I give and bequeath and devise unto him the amount of money that stands in his name in the Bath Savings Institution, at Bath, Maine."

Then follow other bequests to relatives, with a general residuary clause, in which all the rest, residue, and remainder of her property is bequeathed and devised to her brother, Frank O'Loughlin.

Item 7 reads thus: "If I take the money that stands in the name of my son, John Russell, from the Bath Savings Institution, and then deposit it in the bank in my name, it is my will and desire that that amount, which is about \$600 or \$700,—I cannot remember the exact amount,—shall be given my son, John Russell, if he should return at any time within ten years of my death; and it is my will that that amount shall be kept at interest for my said son, John Russell, that he may have it for his own forever if he returns or is found anywhere alive within ten years after my decease."

This son entered the army at the commencement of the war, and nothing has ever been heard from him, directly or indirectly, since the spring of 1865, although every effort has been made, both before and since the death of the testatrix, to ascertain whether he is living or dead. Considering the length of time, the fact that he was a dutiful son and in the habit of frequent correspondence, and the efforts which have been put forth for many years to find him, there is no room at the present time to question his death, even if there was at the time of making the will. It may well be presumed.

What the intention of the testatrix was, must be sought from an examination of the foregoing items when taken and examined in connection with each other. That intention seems to have been to give the money named to her son if living. She was uncertain whether he was living or not, as her language clearly indicates. Moreover, she had not seen him, she says, for a long time.

The last item, wherein the son is mentioned, while indicating a hope, still bears upon it the expression of uncertainty, as to whether her son may be living; and appears to be in the nature of a conditional limitation of the first item; and provides that if she takes the money named from the Savings Institution and redeposits it in her own name, then it is her will that it should go to the son if he should return or be found alive at any time within ten years after her

death. She also directs that it may be kept at interest for him if he can be found anywhere alive within that time.

She withdrew the money from the Savings Institution, and deposited it in a bank in her own name. If the son was dead at the time the will was made, the unqualified bequest under the first item, if considered alone, was inoperative, and the money would become a part of the residuum. If considered in connection with the other item, the money having been drawn and deposited by her, and the administrator having held the amount for the ten years named, upon interest,—and nothing ever having been heard of the son, his death may properly be presumed,—this money, with the accumulated interest, would become a part of the residuary estate, and should go to the residuary legatee, Frank O'Loughlin.

The costs of this suit should be borne by the estate.

Bill sustained. Costs of complainant to be paid out of the estate.

Decree in accordance with this opinion.

Peters, Ch. J., Walton, Virgin, Libbey, and Haskell, JJ., concurred.

Samuel B. THAYER

v.

Joseph I. EATON.

1. A verdict will be set aside, and a new trial granted, when it is clear to the court that the jury were under some great misapprehension, or unduly biased.

2. Facts stated which were deemed by the court sufficient reason for granting a new trial.

(Penobscot—Decided January 16, 1888.)

ON motion to set aside the verdict and for new trial. *Granted.*

Assumpsit for services in and concerning pending litigation by one who was not a lawyer, but who testified that he read law "more or less for six or eight years."

The facts, as found by the court, are stated in the opinion.

Mr. B. L. Smith for plaintiff.

Mr. D. A. H. Powers for defendant.

Per Curiam:

The plaintiff alleges a special contract by which the defendant was to pay him the difference in the expense of trying several suits in court, and of trying them before referees, if the plaintiff would bring about such a reference of the suits. The evidence, however, fails to show that the plaintiff did bring about such a reference. The most he seems to have done toward such a result was to ask the counsel for the other party to the suits to meet the defendant. He does not seem to have done anything to induce the other party or his counsel to consent to a reference. The reference was brought about by negotiations directly between the defendant and the other side, in which negotiations the plaintiff had little, if any, part.

1 ME.

The plaintiff has received from defendant \$85 for services and expenses in the matter of the suits of the defendant. We do not think his services are worth any more, including his services in writing letters to the newspapers. The jury awarded him \$810, which is more than either counsel in the suits charged. We think it clear that the jury were under some great misapprehension, or were unduly biased. Their verdict seems to us clearly against the evidence, and one that should not be sustained.

Motion sustained. Verdict set aside. New trial granted.

Eben A. HOLMES

v.

Levi K. CORTELL.

1. A declaration for damages for obstructing a public way may be either in trespass or in trespass on the case.

2. The declaration should allege some special damage to the plaintiff caused by the act of the defendant.

3. One who suffers special damage from a public nuisance may recover the same from the person who created the nuisance, or who continued it after being requested to abate it.

(Washington—Decided January 4, 1888.)

ON exception by the plaintiff. *Overruled.*

The opinion states the case.

Mr. John H. French, for plaintiff:

"Any person injured in his comfort, property, or the enjoyment of his estate by a common and public, or a private, nuisance, may maintain against the offender an action on the case for his damages, unless otherwise specially provided." Rev. Stat. chap. 17, § 12.

In *Ashby v. White*, 2 Ld. Raym. 988, Lord Holt says: "If men will multiply injuries, actions must be multiplied too; for every man that is injured ought to have his recompense."

The case of *Brown v. Watson*, 47 Me. 161, explains the law fully, and quotes the decision in *Greasley v. Codling*, 2 Bing. 268, that a person obstructed on his journey, and obliged to proceed by a more circuitous route, might recover for the loss of time and inconvenience against the individual by whom the obstructions were erected.

The case of *Norcross v. Thoms*, 51 Me. 508, gives a construction to Rev. Stat. chap. 17, § 12, even beyond what we claim, on this point.

The case of *Wesson v. Washburn Iron Co.* 18 Allen, 95, though referring to a private nuisance, seems to indicate that the same principle may apply to a public one.

Messrs. Harvey & Gardner, for defendant:

Shaw, Ch. J., in *Blood v. Nashua & L. R. Co.* 2 Gray, 140, said: "The obstruction of a public right of way is a public, not a private, wrong; it may affect those near the obstruction much more than the rest of the public, but the damage sustained by those near it differs in degree only, not in kind. It is a wrong therefore, if it be one, to be redressed by a public prosecution, not by recovering damages in a private action."

The damage, if any, suffered by an individual from the obstruction of a way, is the same in kind whether he wants to pass three times a day or three times a year; and what his purpose is makes no difference in kind, though it may in degree.

See *Willard v. Cambridge*, 3 Allen, 574, and cases there cited by Bigelow, J.; *Quincy Canal v. Newcomb*, 7 Met. 276; *Brainard v. Connecticut River R. Co.* 7 Cush. 511; *Blood v. Nashua & L. R. Co.* 8 Gray, 140; *Brightman v. Fairhaven*, 7 Gray, 271; *Harvard College v. Stearns*, 15 Gray, 1; *Hartshorn v. South Reading*, 8 Allen, 504.

The plaintiff's property does not even abut upon the alleged street, which is a very material fact in determining whether his damage, if any, is direct and special (see *Smith v. Boston*, 7 Cush. 254); also the fact that plaintiff's store is "still accessible by other public streets." See also *Brainard v. Connecticut River R. Co.* 7 Cush. 510.

This distinction is very clearly stated by Bigelow, J., in *Wesson v. Washburn Iron Co.* 13 Allen, 95, and by Dickinson, J., in *Franklin Wharf Co. v. Portland*, 67 Me. 59. See also *Brayton v. Fall River*, 113 Mass. 218, and *Harvard College v. Stearns*, 15 Gray, 1.

The case of *Dudley v. Kennedy*, 68 Me. 465, is not applicable; nor is the case of *Brown v. Watson*, 47 Me. 161.

The statute cited by plaintiff's counsel does not change the law in the particulars which we contend. Under the statute his damage must still be direct and "special and peculiar," as stated by Dickinson, J., in—

Norcross v. Thoms, 51 Me. 508. See also *Cole v. Sproul*, 85 Me. 161.

Haskell, J., delivered the opinion of the court:

Trespass for obstructing a public way by building a stone wall across it, whereby the plaintiff claims to have suffered special damage.

The distinction between trespass and trespass on the case is abolished by Rev. Stat. chap. 82, § 15. "A declaration in either form is good." *Hathorn v. Eaton*, 70 Me. 219.

It is settled in this State that one who suffers special injury, no matter how inconsiderable, from a common nuisance, may recover damages in an action at law, from the person creating it (Rev. Stat. chap. 17, § 12; *Brown v. Watson*, 47 Me. 161; *Dudley v. Kennedy*, 68 Me. 465), and from the person maintaining it after request to abate it (*Pillsbury v. Moore*, 44 Me. 154).

Three demurrers to the declaration have been filed, and two amendments of it have been allowed. To the sustaining of the last demurrer to the declaration as finally amended the plaintiff has excepted.

The declaration avers the existence of a public way, and the obstruction of it by the defendant in erecting a stone wall across it, whereby, on a given day and on divers other days and times, etc., the plaintiff, in attempting to travel upon such way, was "hindered, obstructed, and prevented from passing" along it, and "incurred great danger, and suffered great pain and inconvenience, in attempting to climb and pass over said wall," and thereby

was injured in his comfort, property, and the enjoyment of his estate.

The plaintiff avers that he was "hindered," etc., from passing along the way. Be it so: no averment shows any specific damage from this hindrance; it does not appear that upon any special occasion he was thereby compelled to make a longer detour to reach a particular place where he had need to go, or that he lost any time or was put to any expense thereby.

He may have incurred danger and suffered pain in trying to climb the wall, both of which may have resulted from his own careless or rash conduct, for which the defendant is not responsible.

The plaintiff avers that certain of the work-people in his sardine factory "were hindered and prevented from going to and attending to their work, whereby he lost and was deprived of their services." Suppose this to be true, where is the injury to the plaintiff? He does not aver the loss of their services to be at his cost; nor that their services, if rendered, would have been of any value to him. Upon this score the plaintiff does not appear to have suffered any damage.

Exceptions overruled.

Peters, Ch. J., Walton, Danforth, Virgin, and Libbey, JJ., concurred.

Samuel HUBBARD

v.

GREAT FALLS MANUFACTURING
COMPANY.

1. When the right to flow is controverted in proceedings upon a complaint for flowage, that right must be established before the appointment of commissioners.
2. The commissioners cannot determine that question.
3. When private parties submit a matter in controversy to arbitrators, and do not empower a less number than the whole to decide, the award will be void if not made by all the arbitrators.

(York—Filed January 9, 1888.)

ON exceptions by the respondent. *Overruled.*
The points raised by the exceptions are stated in the opinion.

Mr. R. P. Tapley, for respondent:

This court has determined that simply flowing a man's land may not in all instances produce injury to him,—that actual injury must be shown.

Bryant v. Glidden, 39 Me. 462.

The agreement must be construed like any other contract. It was made upon sufficient consideration and has been executed. The intent of the parties must be sought, and sustained, if it can be done without doing violence to well-settled rules of law.

Each has had the benefit of its stipulations, and, says the court in *Knowlton v. Homer*, 30 Me. 555, "it is one of the plainest principles of law and of common sense, that when a party has voluntarily surrendered a right which he could

have asserted, he should not avail himself of it to the prejudice of his adversary."

Merr. James A. Edgerly and Harry V. Moore, for complainant:

An examination of the case shows that, from the time of its appearance in court, the defendant corporation has neglected to comply with the plain provisions and requirements of the statute. Not having pleaded to the complaint before the appointment of the committee, it was practically defaulted; and the only duty left to the committee was to estimate the damages and do those other things which Rev. Stat. chap. 92, § 9, empowers such a committee to perform.

No pleadings having been filed, some damage must be found.

Vandusen v. Comstock, 3 Mass. 185.

"Upon a verdict which finds neither the amount of yearly damages nor what portion of the year the land ought not to be flowed, no judgment can be rendered."

Bryant v. Glidden, 36 Me. 36.

These are well-known principles,—that in an award all questions submitted must be decided; that an award must be final and conclusive.

Lincoln v. Whittenton Mills, 12 Met. 34.

If this be a common-law reference, the report is void because signed by but two of the three commissioners.

Morse, Arb. p. 162, and cases cited.

The rejection of this report was a matter entirely within the discretion of the presiding justice, and is not reversible here on exceptions.

Furbish v. Ponsardin, 66 Me. 480; *Cutler v. Grover*, 15 Me. 159; *Walker v. Sanborn*, 8 Me. 288.

Foster, J., delivered the opinion of the court:

This was a complaint for flowage. At the first term after notice the respondent appeared, and, without any pleadings being filed or other action had, the court, by consent and agreement of parties, appointed three commissioners as provided by Rev. Stat. chap. 92, § 9.

When their report was returned to court, the respondent moved its acceptance, and the complainant claimed a trial by jury. Thereupon the case was continued to the next term, when the justice presiding declined to accept the report, and rejected the same, to which the respondent excepted.

The exceptions cannot be sustained.

It must be conceded that, inasmuch as this is a statutory proceeding, it must be strictly pursued, and can be sustained only in accordance with the statutory provisions relating to such proceedings.

The statute unquestionably contemplates that, when the right to flow is controverted, such fact must be established or admitted before the appointment of commissioners. It is no part of their duty, nor is it within their power, to determine that question. Not having pleaded to the complaint before the appointment of commissioners, and not having shown "any legal objection to proceeding," the effect was practically the same as if a default had been entered; and all matters that should have been determined by the proper tribunal before such appointment were shut out. *Artell v. Combs*, 4 Me. 824, 825; *Vandusen v. Comstock*, 3 Mass. 187; *Bryant v. Glidden*, 36 Me. 42.

1 ME.

It only remained for the commissioners to proceed in accordance with the authority with which they were invested under the statute and their warrant issued from the court. By that they were directed and empowered to go upon the premises and make a true and faithful appraisal under oath of the yearly damages, if any, done to the complainant by the flowing of his lands described in the complaint, and determine how far the same may be necessary, and ascertain and make report what portion of the year the complainant's land ought not to be flowed.

Instead of this, however, at the hearing before the commissioners, the parties entered into a written agreement to open the whole question of damages, without regard to the Statute of Limitations of three years,—and that the defendant might show what right they had to modify the same, and to assess damages in a lump sum.

The commissioners proceeded and heard the cause under this agreement.

The parties, by this agreement in writing, constituted the commissioners a tribunal to try matters entirely outside of the authority conferred upon them by their appointment or by statute. Not only the agreement, but also the report, signed by two of their number, shows that the right to flow was a question submitted to their consideration, and which they undertook to determine.

They were not the proper tribunal to decide that question. In undertaking to act in accordance with the agreement of parties, they failed to act in accordance with the provisions of the statute by which their powers and duties are clearly defined. Such proceedings were therefore irregular.

Nor could an acceptance of their report properly be claimed as an award upon a submission at common law. If it could be deemed such, then this court has nothing to do with it. And, moreover, a further objection would lie, and that is that, of the three arbitrators selected by the parties, two only have concurred in the award.

For it is a well-settled principle that where a submission is made by private parties to a given number of persons, without any express authority, given or to be inferred from the manner or circumstances of the submission, that a small number may decide,—an award or decision will be void unless made by all; though a different rule prevails where authority is conferred upon several persons in matters of public concern. *Towne v. Jaquith*, 6 Mass. 46; *Green v. Miller*, 6 Johns. 39; *Ex parte Rogers*, 7 Cow. 530; *Eames v. Eames*, 41 N. H. 181; *Patterson v. Leavitt*, 4 Conn. 50; *Anderson v. Farnham*, 34 Me. 161.

The result is that the entry must be—

Exceptions overruled.

Peters, Ch. J., Walton, Virgin, Libbey, and Haskell, JJ., concurred.

Nathan F. BACKUS *et al.*, *Appts.*,

v.

Oren B. CHENEY *et al.*

1. When, in a probate appeal, an issue of fact is framed under the direction of the court, to submit to the jury, the

court has power to order a **change of venue** for a trial of the same.

2. If the issue framed is **decisive** of the whole case, the **whole cause** should be **transferred** to the other county, and the decree of the court there sitting should be certified directly to the probate court whence the appeal came.
3. If **other proceedings** will be **required** in the appellate court after the issue framed for the jury is decided, such **issue only** should be **transferred** to the other county, and the determination thereon should be certified back for the further consideration of the court in the county whence it came.
4. When **questions of law** arise at the trial before the jury, they should be entered and **heard in the law court** in the district **where the trial was had**, and the mandate of the law court should be sent to the clerk of the court whence the exceptions came.

(Franklin—Filed February —, 1888.)

ON exceptions of the appellees. *Sustained.*

This was an appeal from the judge of probate for Franklin County, approving and allowing the last will and testament of Sarah S. Belcher, late of Farmington, in said county, deceased, and the codicil thereto.

The proponents of the will and codicil, on the first day of the term, verbally moved:

1. For trial of the issues involved before the presiding justice without the intervention of a jury; stating that, if an assignment for trial before the court should be granted, the motion for change of venue would not be insisted upon, and asking a decision upon this motion before hearing upon the second.

2. In case the first motion should not be granted, the proponents of the will and codicil moved, in writing, that the appeal should be transferred to the docket of the supreme judicial court of some county other than Franklin County, alleging good cause for such removal and change of venue.

The court decided to hear both motions together.

After hearing and argument, the adverse party stating that they should claim a jury trial, the presiding justice declined to state that he would hear the cause without a jury, and decided and ruled that, as a matter of law, he had no authority to grant the change of venue as asked for in the second motion.

To the ruling that, as a matter of law, the presiding justice has no authority to grant a change of venue in this case, the proponents of the will and codicil alleged exceptions.

Messrs. Symonds & Libby and S. Clifford Belcher, for appellees:

Our statutes provide that "any judge of the supreme judicial court, while holding a nisi prius term, on motion of either party, shall, for cause shown, order the transfer of any civil action or criminal case pending in said court to the docket thereof in any other county, for trial, preserving all attachments.

Rev. Stat. chap. 82, § 14.

As to the power of the court to change the venue, see—

Tidd, Pr. 544, 548, 549; *Pool v. Bennet*, 3 Str. 874; *Mylock v. Saladin*, 3 Burr. 1564; *Re v. Amery*, 1 T. R. 868; *Re v. Harris*, 3 Burr. 1380; *Holmes v. Wainwright*, 3 East, 380. Compare *Gerard v. De Robeck*, 1 H. Bl. 290; *Hocarth v. Willett*, 2 Str. 1180; *Foster v. Taylor*, 1 T. R. 781; *Watkins v. Towers*, 2 T. R. 275; *Casland v. Champion*, 7 T. R. 205; *Mostyn v. Fabrigas*, Cowp. 177; *Petyt v. Berkeley*, Id. 510; *Watt v. Daniel*, 1 Bos. & P. 425; *Bowley v. Allen*, Willes, 318; Esp. N. P. 211, 516, 517; Jacob, L. Dict. *Venue*; 3 Bl. Com. *383, § 4.

In *Cochecho R. Co. v. Farrington*, 26 N. H. 428, the whole subject of the right of the courts in this country, having common-law jurisdiction, to exercise the common-law power of changing the venue of civil actions, in the absence of any express statute authorizing them to do so, is fully and learnedly discussed, and the conclusion is reached that such power resides in the courts of that State as a part of their common-law jurisdiction, as inherent in the courts and included among their general common-law powers, to be exercised in all proper cases without the aid of any express statute.

See *Hilliard v. Beattie*, 58 N. H. 112; *Putnam v. Bond*, 102 Mass. 371; *Osgood v. Lynn*, 190 Mass. 335. See also *Lincoln v. Prince*, 2 Mass. 546, 547; *Cleveland v. Welsh*, 4 Mass. 592; *Hawkes v. Kennebeck County*, 7 Mass. 463, 464.

The Statute of 1872, chap. 45, was intended to authorize a change of venue in any civil or criminal proceeding, whenever, in the judgment of the court, there was good cause for making such change.

It has become the practice, in such a sense as to be almost the rule, and therefore the law, of the court, to submit questions of sanity and undue influence arising upon the probate of wills to the judgment of the jury for determination. This court has already said that, when such probate appeals are submitted to the jury, all the incidents of jury trial follow.

Carroll v. Carroll, 78 Me. 189.

It is as important to parties to have a fair trial of a probate appeal as of any case pending in court, and it is as much their right to claim that such an appeal should be submitted only to an impartial tribunal. If it is to be decided by jury trial, it should be by a jury trial with all the incidents and rights which go along with it.

As to meaning of the words "cause" and "action," see—

Bridgton v. Bennett, 28 Me. 425; Abb. L. Dict. *Action*; *Valentine v. Boston*, 20 Pick. 208; *Ex parte County Comrs.* 30 Me. 221; *Webster v. County Comrs.* 63 Me. 29; *Belfast v. Fogler*, 71 Me. 403.

The statute which provides that, in any action pending in the superior court, if either of the parties shall die his executor or administrator may enter and prosecute or defend the suit, applies to appeals from decrees of courts of probate.

Stiles's App. 41 Conn. 329; *Carroll v. Carroll*, *supra*.

It is sufficient for the petition for change of venue to allege that, by reason of local prejudice and the feeling entertained by the people of a county, the petitioner cannot have a full, fair, and impartial trial in said county without setting forth the particular facts going to show

the condition of the prejudice or feeling complained of.

Taylor v. Gardiner, 11 R. I. 182.

Messrs. S. C. Strout, H. L. Whitcomb, and Holman & Belcher, for appellants:

At common law, as adopted and applied in New England, no court had power to change the venue in any action.

Lincoln v. Prince, 2 Mass. 544; *Hawkes v. Kennebeck County*, 7 Mass. 481.

The power never existed in Maine until 1872, when it was conferred by the Laws of 1872, chap. 45, now incorporated in Rev. Stat. chap. 82, § 14.

As the power exists only by virtue of the statute, it can only be exercised, and ought only to be exercised, in cases expressly provided for, and as provided in the statute.

Powers v. Mitchell, 75 Me. 389.

Such statute, being in derogation of the common law, must be construed strictly.

Dwelly v. Dwelly, 46 Me. 377.

If the supreme court of probate and the supreme judicial court can be considered as one and the same, then the power to transfer these appeals does not exist. The words of the statute are "any civil action or criminal case." This is not a criminal case, nor is it a civil action. *Scire facias* is not a civil action.

104 Mass. 375.

Habeas corpus is not a civil action.

41 Ind. 92.

Submission to arbitration is not.

1 Allen, 212.

Mandamus is not.

6 Binn. 5.

Civil actions are divided into three classes:

(1) real actions (this is not a real action); (2) personal actions, such as concern contracts, sealed or unsealed, and offenses or trespasses; (3) mixed actions, which lie as well for the recovery of the thing as for damages for the wrong sustained,—as ejectment.

Whart. L. Dict. *Actions*; Bac. Abr. *Actions*, A. 47.

None of these old and well-settled definitions of the term "civil action" can apply to or include a statute appeal of the kind here in issue. When the Legislature uses a phrase having a well-known and definite meaning in the law, it is presumed to be used in such sense.

4 Pick. 411; 7 Mass. 523; 27 Me. 16; 24 Pick. 296; 1 Pick. 261; 66 Me. 161.

The phrase "civil action" is within this rule.

By the Constitution, art. 1, § 20, in all civil suits the party shall have a right to a trial by jury. "Suit" and "action" are synonymous. 88 Vt. 171.

Therefore, if this was a civil action or suit, the right to such a trial by jury must exist; but neither party can claim a trial by jury in a probate appeal as a matter of right.

Bradstreet v. Bradstreet, 64 Me. 209.

Haskell, J., delivered the opinion of the court:

This is a probate appeal wherein the validity of a will is denied because of the incompetency of the testator and because the same was procured by undue influence.

The appellees moved a change of venue because of local prejudice so great as to prevent a 1 Me.

fair and impartial trial of the issues involved before a jury of the vicinity.

The presiding justice ruled, as matter of law, that the court had no power to grant the motion; to which ruling the appellees have exception.

Rev. Stat. chap. 68, § 28, makes the supreme judicial court the supreme court of probate; and § 28 provides that the supreme court of probate "may reverse or affirm, in whole or in part, the sentence or act" of the probate court "appealed from; pass such decree thereon as the judge of probate ought to have passed; remit the case to the probate court for further proceedings, or take any order therein that law and justice require; and if, upon the hearing, any question of fact occurs proper for a trial by jury, an issue may be formed (framed) for that purpose under the direction of the court, and so tried."

Questions of sanity and of undue influence arising upon the probate of wills are usually submitted to a jury for determination. This practice has been so common and uniform as to become almost a law of the court.

When such issues are framed for a jury trial, "all incidents of such trial follow." *Carrill v. Carrill*, 73 Me. 186. The cause then assumes the character of an action at law. The procedure is according to the course of the common law, and is governed by legal rules throughout.

Rev. Stat. chap. 82, § 14, provides that any judge of the supreme judicial court, while holding a nisi prius term, on motion of either party, shall, for cause shown, order the transfer of any civil action or criminal case pending in said court to the docket thereof in any other county for trial.

No good reason is shown why a probate appeal, when it has assumed the character of, and is to be conducted as, an action at law, should not be subject to the provisions of the above statute.

If the issue framed for the jury is substantially decisive of the whole case, and no ulterior proceedings are to be had before the court, requiring further investigation or consideration, the whole cause should be transferred to the other county, and the decree from the court there sitting should be certified directly to the probate court from whence the appeal comes.

If, however, the court is of opinion that further proceedings before the court are necessary after the issues framed for the jury shall be decided, it may, certify to another county such issues only for trial; and, upon their determination, the result should be certified back to the court from whence they came, for its further consideration.

When a jury trial is had in another county from that where the cause was originally pending, questions of law arising upon the trial should go to the law court in the district where the trial was had, and there be settled; and the mandate of the law court should be sent to the clerk of the court from whence the exceptions came, to be obeyed as its tenor may direct.

Exceptions sustained.

Peters, Ch. J., Walton, Virgin, Libbey, and Foster, JJ., concurred.

Mary L. NICKERSON

v.

Rufus L. NICKERSON and Dwelling-House Insurance Co., Trustee.

1. An insurance company can not be charged as trustee, for loss or damage under its policy, by trustee process in favor of the mortgagee of the property damaged, until the preliminary proofs of loss required by the statute have been furnished or waived.
2. After the notice provided by the statute has been given by the mortgagee of property damaged by fire, to the underwriter upon such property, the mortgagee becomes the owner of the insurance policy *qua* his mortgage, and may furnish the preliminary proofs of loss.
3. The underwriter may waive the production of the preliminary proofs by the mortgagee in such a case.
4. Whether or not there has been such a waiver is a question of fact for the jury, whenever it is to be inferred from evidence adduced, or is to be established from the weight of evidence.

(Waldo—Filed January 23, 1888.)

ON exceptions by plaintiff and on motion to set aside the verdict by the trustee. *Exceptions and motion sustained.*

The opinion states the points and essential facts.

Messrs. W. P. Thompson and R. F. Dunton, for plaintiff:

The question raised by the exceptions is one of fact purely, and should have been submitted to a jury under proper instructions from the court.

Martin v. Fishing Ins. Co. 20 Pick. 389.

In *Butterworth v. Western Assurance Co.* 132 Mass. 492, proof of loss was forwarded, and no objection made thereto at the time, and the plaintiff and an agent of the company adjusted the loss; which adjustment was repudiated by the company on the ground that the agent had no authority to make it. The company wrote the plaintiff, refusing to pay the claim. The court says: "It is against good faith for the defendants, after having thus lulled the plaintiff into a feeling of security, to object at the trial that the proofs were not sufficient; and the jury were justified in finding, if not required to find, a waiver by the defendants."

The agent of the company, when he was at the plaintiff's, knew whether any or sufficient proof of loss had been furnished by the defendants; and if they required anything more than the plaintiff had furnished them, or had been furnished by defendants, it was his duty to make it known to her at the time, and, not having done so, they waived their right to any further or different account, or proof of loss.

Bartlett v. Union Mut. F. Ins. Co. 46 Me. 500; *Leis v. Monmouth Mut. F. Ins. Co.* 52 Me. 492; *Works v. Farmers Mut. F. Ins. Co.* 57 Me. 282.

The condition in respect to notice and proof of loss may be waived by an agent by parol, in spite of a provision that no agent can change

the terms and conditions, and that the same shall not be changed or waived except in writing signed by the president or secretary.

Carson v. Jersey City Ins. Co. 43 N. J. L. 300. See *Couch v. Rochester G. F. Ins. Co.* 25 Hun, 469.

In *Franklin F. Ins. Co. v. Chicago Ice Co.* 38 Md. 102, the court says "that the failure on the part of the insurer to promptly object to the form and sufficiency of the notice and proofs of loss amounted to a waiver of such a stipulation."

In *Rokes v. Amazon Ins. Co.* 51 Md. 512, the court says "that a waiver of preliminary proofs of loss may be inferred from the acts and conduct of the insurer, inconsistent with an intention to insist upon the [strict performance of the condition.]"

The agent's failure to notify the plaintiff that the account of the loss was insufficient was a waiver of all defects in this respect, and this objection cannot be made at the trial.

Patterson v. Triumph Ins. Co. 64 Me. 500; *Bailey v. Hope Ins. Co.* 56 Me. 474; *Works v. Farmers Mut. F. Ins. Co.* 57 Me. 281; *Eliot Fire Cent Sav. Bank v. Commercial Union Assur. Co.* 2 New Eng. Rep. 536, 142 Mass. 142.

Where a jury have, on evidence before them, decided against an alleged fraud, this court will not, except in glaring cases, grant a new trial.

Googins v. Gilmore, 47 Me. 9.

Although the conclusion to which the jury arrives may be different from that of the court had the issue been submitted to it, the verdict will not be set aside unless it was most manifestly against the weight of evidence.

Googins v. Gilmore, *supra*; *Williams v. Baker*, 49 Me. 427.

Mr. Daniel C. Robinson, for defendants:

It was plaintiff's duty, as mortgagee, to see that the insured took the proper preliminary steps for the recovery of the insurance, or, in case of his neglect so to do, to take such steps herself.

Wood, F. Ins. § 488; *Graham v. Phamiz Ins. Co.* 77 N. Y. 171.

The company admitted that it "had knowledge of the fire, in some way, on the day after it occurred." But this did not obviate the necessity of such notice.

Wood, F. Ins. § 489; *Woodfin v. Asheville Mut. Ins. Co.* 6 Jones, L. 558; *Edwards v. Lycoming County Mut. F. Ins. Co.* 75 Pa. 878.

The company had had information that this fire was caused by the act of the insured; and Richardson went there, as he testified, for the purpose of investigating that matter, and, according to his testimony, that was the burden of the whole interview. And such a visit as he made could not affect the duty of the plaintiff to make proper proof of loss.

Underwood v. Farmers J. S. Ins. Co. 57 N. Y. 500; *Edwards v. Baltimore Ins. Co.* 3 Gill, 176; *Blossom v. Lycoming F. Ins. Co.* 64 N. Y. 162. See *Boyle v. Mutual Ins. Co.* 7 Jones, L. 373.

A waiver "is an intentional relinquishment of a known right;" and, in order to find a waiver on the part of the company by Richardson's act (supposing him to have any authority to waive, which we deny), we must find that he intended to waive the furnishing of the

proofs, and that his acts and words were to that end. It would be the height of unreason to deduce this from the evidence. Richardson was talking with the old man and woman, not as the assured, but simply as people who lived on the premises and were conversant with the circumstances of the fire; and there is no evidence to go to the jury of the requisite intention, which is a *sine qua non*.

Donahue v. Winsor County Mut. F. Ins. Co. 56 Vt. 374; *Home Ins. Co. v. Baltimore W. Co.* 16 Am. L. Reg. 162; *Enterprise Ins. Co. v. Pariot*, 85 Ohio St. 35; *Findeison v. Metropole F. Ins. Co.* 57 Vt. 520.

See a thorough discussion of the principle of waiver of proof of loss by company's agent in *Bowlin v. Heckla F. Ins. Co.* (Minn.), reported in Insurance Law Journal for April, 1887.

A representation, upon applying for insurance, that the property has no mortgage upon it, is a material one.

Richardson v. Maine Ins. Co. 46 Me. 894; *Gould v. York County Mut. F. Ins. Co.* 47 Me. 408.

Whether or not the omission to disclose the mortgage was intentional does not matter.

Dennison v. Thomaston Mut. Ins. Co. 20 Me. 125; *Gould v. York County Mut. F. Ins. Co.* *supra*.

Haskell, J., delivered the opinion of the court:

Trustee process, under Rev. Stat. chap. 49, § 53, by a mortgagee of real estate, to enforce a lien upon a policy of insurance against fire procured by the mortgagor, brought within 60 days after the loss.

The insurance company disclosed a burning of the property insured, and that the policy was void by reason of a false representation of title by the assured, in that he concealed a mortgage thereon to the plaintiff conditioned to secure the support of herself and husband during their natural lives; and that no proof of loss had been furnished; and that the property was feloniously fired by the assured, whereby all claim under the policy became barred.

The plaintiff answered the disclosure by averring that, if false representations of title were made, the risk was not increased by reason of the mortgage concealed, and that formal proof of loss had been waived, and that the property was not fired by the assured.

These issues of fact were submitted to a jury, who found in substance, by direction of the court, that no sufficient proof of loss had been furnished or waived, and, upon the evidence, that the risk by reason of the mortgage concealed was not increased, and that the fire was not the fraudulent act of the assured.

The principal defendant neither appears to have answered to the suit nor to have testified at the trial.

To the ruling of the court directing the jury to find that sufficient proofs of loss had neither been furnished nor waived, the plaintiff has exception.

This ruling is expressly based upon the statement that evidence was adduced tending to prove that one Richardson, a duly authorized agent of said company, and sent by said company, went to Knox and held an interview with the plaintiff and her husband; that said

agent was informed by said plaintiff and her husband about the fire, the property burned, and the value thereof; that said Richardson wrote what they said to him in a book, and stated to them that "that was all that was required."

Rev. Stat. chap. 49, § 21, requires the assured, within a reasonable time after notice to the company of the loss, to furnish it with "as particular account of the loss and damage as the nature of the case will admit, stating therein his interest in the property; what other insurance, if any, exists thereon; in what manner the building insured was occupied at the time of the fire, and by whom; and when and how the fire occurred so far as he knows or believes,—to be sworn to before some disinterested magistrate, who shall certify that he has examined the circumstances attending the loss, and has reason to and does believe such statement to be true. The assured shall, if requested, * * * submit to an examination under oath in the place of his residence. No other preliminary proof of any kind shall be required before commencing an action against the company. * * * All contracts of insurance made, renewed, or extended, or on property within the State, are subject to the provisions hereof."

It is not pretended that the preliminary proofs of loss prescribed by the statute had been furnished, but it is contended that they were waived.

Rev. Stat. chap. 49, § 52, gives a mortgagee of real estate a lien upon the policy insuring the mortgaged property, after notice to the company of his mortgage and the amount due thereon. Section 53 gives such mortgagee a right to collect his mortgage debt by trustee process against the assured, and the insurance company, as trustee, commenced within 60 days after the loss.

Rev. Stat. chap. 86, § 55, provides that "no person shall be adjudged trustee * * * by reason of money or other thing due from him to the principal defendant, unless, at the time of the service of the writ upon him, it is due absolutely, and not upon any contingency."

The insurance company can neither be subjected to a suit upon the policy by the assured, nor to trustee process either in favor of a mortgagee or other creditor, until the preliminary proofs of loss required by statute have been furnished or waived.

The court says in *Davis v. Davis*, 49 Me. 282: "The liability of the insurer does not become absolute unless the preliminary proof, as required in the conditions of the policy, is obtained. If no proof is furnished, the liability does not attach. * * * The contingency is not proving a case, but of ever having one to prove,—of there ever being a time when the insured would have a right of action."

Rev. Stat. chap. 49, § 21, was enacted in 1861, and took effect in May, before the loss under the policy in *Davis v. Davis*, in November; and that case was decided without reference to the statute—no doubt because that policy was in force prior to its passage; but that decision applies equally well to conditions engrafted upon a policy by statute and conditions contained in it.

After the notice provided by statute has been given by a mortgagee of real estate, he becomes

the equitable owner of the policy *qua* his mortgage; and inasmuch as preliminary proofs are required to fix the liability of the insurance company, and he must commence his action within 60 days after the loss, unless he may furnish the requisite proofs of loss in his own name, if the assured neglects or refuses to furnish them, his lien upon the policy might become worthless. The Legislature could never have intended that result; and an illogical and unreasonable construction of statute law could only produce it.

If the mortgagee may furnish the preliminary proofs of loss in his own behalf, it follows that he may avail himself of any waiver of the same by the insurance company; and it is settled law that an insurance company may waive the furnishing of preliminary proofs altogether, or objection to irregular or defective ones. *Carson v. Jersey City Ins. Co.* 43 N. J. L. 300; *Martin v. Fishing Ins. Co.* 20 Pick. 389; *Bartlett v. Union Mut. F. Ins. Co.* 46 Me. 500; *Bailey v. Hope Ins. Co.* 56 Me. 474; *Works v. Farmers Mut. F. Ins. Co.* 57 Me. 281; *Patterson v. Triumph Ins. Co.* 64 Me. 500.

Waiver may be a question of fact for the jury. It is always so, whenever it is to be inferred from evidence adduced or is to be established from the weight of evidence. In the case at bar an express waiver is asserted. The true inquiry is, What was said or written?—and whether what was said indicated the alleged intention (*West v. Platt*, 127 Mass. 372); and this must be for the jury (*Savage Mfg. Co. v. Armstrong*, 17 Me. 84).

The authorized agent of the company, after the fire and after notice from the plaintiff that she, as mortgagee, claimed a lien upon a policy under the statute, went to the plaintiff and her husband, and took in writing their account of the fire and of the property burned and of the value of it, and stated to them that "that was all that was required."

Taking into consideration the parties, and the nature of the interview, and the statement made by the company's agent,—might not the plaintiff have understood that she was relieved from any further account of her loss? May not the state-

ment of the agent, fairly considered, convey the meaning that he had gained all the information he desired, and that it was satisfactory to him, and that nothing further would be required as a prerequisite to the payment of the loss? If regular proofs had been required by the agent, would he not have said so? If he did not mean to deceive the parties, ought he not to have said so? He did say, after writing their statements, "That was all that was required." Can it be said that a jury would not be warranted in taking him at his word, and that, if they did, the verdict could not stand?

The agent of the company apparently had full authority in the premises; and his acts bind the company, even though he exceeded his powers. *Packard v. Dorchester Mut. F. Ins. Co.* 77 Me. 144.

The trustee moves for a new trial because the findings of the jury that the risk was not increased by reason of the mortgage, and that the assured did not fire the buildings, are not supported by the evidence.

The assured appears to have been repeatedly charged with setting the fire, and never to have positively denied it. He surrendered his policy after the fire, and requested an assurance that he should not be prosecuted for the felony. He has not made any claim under the policy, and did not testify at the trial. The circumstances attending the fire, and his presence and conduct, are suspicious.

Both issues submitted to the jury are so intimately connected that the consideration of one necessarily bears upon the other, and cannot well be separated from it. The motive causing the felonious burning, if any there was, arose from his agreement to support the mortgagee and her husband secured by the mortgage. Had there been no mortgage he might have had no inducement to fire the buildings.

After a careful consideration of the evidence, the court is of opinion that the findings of the jury are not supported by the evidence.

Exceptions sustained. Motion sustained. New trial granted.

Peters, Ch. J., Walton, Danforth, Virgin, Libbey, and Emery, JJ., concurred.

1 ME.

MASSACHUSETTS.

SUPREME JUDICIAL COURT.

Leander L. GIBSON, Admr.,

v.

Arvilla LEWIS *et al.*

David TAYLOR v. Arvilla LEWIS and Leander L. Gibson, Admr., etc., Trustee.

Arvilla Lewis was entitled to a distributive share of the estate administered upon by Leander L. Gibson, after payment of debts, etc. To actions upon her promissory notes she pleaded general denial and payment, and offered to prove an oral agreement with the administrator that the balance due on the notes should, before his final settlement, be deducted from her distributive share of said estate, in payment thereof; and that said agreement had never been annulled. *Held:*

(a) That it was not an agreement for an actual, present setting off of one debt against another.

(b) That the notes were left as good, subsisting contracts, capable of passing by indorsement.

(c) That the offer was insufficient proof of payment.

(Middlesex—Filed March 1, 1888.)

ON defendants' exceptions. *Overruled.*

The first above-named action was brought by the administrator of the payee named in the following note, to recover balance due thereon:

\$300. Fitchburg, Mass., Dec. 15, 1880.

For value received I promise to pay to Susan Gibson or her order \$300, on demand, ninety days from date.

Nelson G. Lewis,
Arvilla Lewis.

The second action was brought to recover balance of two promissory notes made by the defendant Lewis to defendant Gibson, and by him indorsed "without recourse." The defense to both actions was general denial and payment, with the further allegation, in the answer to the second action, "that the indorsement and transfer of the notes to Taylor were only colorable and without consideration."

Defendants' offer in proof of payment was rejected. The jury returned a verdict for balance due on the notes, and defendants alleged exceptions.

Mr. Stillman Haynes, for defendants:

As it appears that the note was written: "I promise to pay to Susan Gibson," etc., and signed by both of the defendants, it may be treated as either a several or joint note.

Hemmenway v. Stone, 7 Mass. 58.

The defendants, in support of payment, offered to introduce evidence tending to prove that in June, 1886, the defendant Arvilla Lewis entered into and made an oral agreement to and with the plaintiff, the said Leander L. Gibson, as administrator, that the balance due on said note should be deducted from her distributive share of the estate of said Susan Gibson, in payment thereof, to be taken therefrom before the

final settlement of said estate; and that said agreement has never been annulled.

Some nineteen months had elapsed after the appointment of said Leander L., as such administrator, when the alleged agreement was entered into,—sufficient time to enable him to estimate the amount of said Arvilla's distributive share. That the amount of the same was ample to pay such note has never been questioned at any time, and the fact that the trial of this action occurred about two years and six months after the plaintiff was appointed administrator, without any question then being raised by him, would seem to be conclusive upon that point.

There was a good and sufficient consideration for the agreement between the parties; it would enable the plaintiff, as administrator, to keep the funds of the intestate, as invested in this note, at interest, until such time as he should render his administrator's account; and the defendant Arvilla would be enabled to pay this note upon which, as a several note, she alone would be individually liable, from her distributive share of said estate.

The note was due to the plaintiff, the said Leander L., in his representative capacity as administrator of the estate of said Susan; and the distributive share of said Arvilla as an heir at law of said Susan was also in his hands in the same representative capacity.

The alleged agreement was executed and complete between the parties, in this, that the plaintiff, said Leander L., in his representative capacity as administrator, had the right, at any time prior to that when he should settle his administrator's account, to compute the interest and ascertain the balance due upon this note, and deduct the same from the distributive share of said Arvilla. And such distributive share may properly be treated as—in fact it was by such agreement made,—a deposit in the hands of said Leander L. for the payment of the note in suit.

Shaw, *Ch. J.*, says: "It is a general rule, that where collateral security is received for a debt, with power to convert the security into money, this is specifically applicable to the payment of such debt; the same person being the party to pay and to receive, no act is necessary, and the law makes the application; if the proceeds equal or exceed the amount of the debt, it is *de facto* paid; no action would lie for it, and proof of these facts would support the defense of payment."

Hunt v. Nevins, 15 Pick. 504.

In applying this rule to the present case, can there be any doubt as to the competency of the evidence which was excluded in support of payment?

For here, at the time of the agreement, the funds of the defendant Arvilla as an heir at law of said Susan were actually in the hands of the plaintiff, Leander L., as administrator of the estate of said Susan, in the same capacity and trust, and could be applied in payment of said note whenever the plaintiff chose to compute the balance due upon it and make the application.

In the present case the law would give the plaintiff, as administrator, the right to set off the amount of this note against the distributive share of the defendant Arvilla.

Blackler v. Boott, 114 Mass. 24; *Barrett v. Barrett*, 8 Pick. 342.

The Public Statutes provide that "a debt due to the estate of a deceased person from an heir, devisee, legatee, or distributee of such estate shall be set off against and deducted from the share or claim of such heir, devisee, legatee, or distributee; and the probate court shall hear and determine as to the validity and amount of any such debt, and may make all decrees and orders which may be necessary or proper to carry into effect such set-off or deduction."

Pub. Stat. chap. 186, § 22, first enacted by Stat. 1879, chap. 225.

And shall the evidence of a mode of payment, in cases like the present, which is specially provided for by statute, when entered into by a voluntary agreement of the parties, be excluded as immaterial and incompetent?

The fact that said Leander L. has never assigned any reason or cause for not carrying out the agreement entered into by him with said Arvilla ought to estop him from objecting to evidence in support of his agreements relative thereto, and preclude his making unnecessary costs either to the estate of said Susan or the defendants in these suits.

It may be claimed by the plaintiff Taylor that, as said Leander L. had not applied such funds in payment before the notes were transferred to him, such defense would not be open to the defendant.

The defendant in her answer alleges "that the indorsement and transfer of said notes by said Leander L. to the plaintiff Taylor were only nominal, colorable, and entered into at the request of said Leander L., and without consideration paid therefor on the part of the plaintiff Taylor."

And the facts that Taylor was son-in-law of said Leander L., and resided with him, and went with him to the attorney of said Leander L., where the notes in suit were indorsed to him and the arrangement made for bringing this action, with no evidence or claim on the part of Taylor that he had paid any valuable consideration for said notes, coupled with the fact that said Leander L., the payee of said note, was made the trustee of the defendant, tended to prove that said Taylor was only the nominal plaintiff, and had no interest therein.

The defendant does not claim that said Leander L. could not, as a general rule of law, transfer the notes in question, either with or without consideration, to any person to whom he chose, or that a suit could not be brought, when so transferred, for his own benefit; but does claim that the facts in this case are such that she is entitled, as under the ordinary rule of law when applied to over-due notes, to set up any defense which she might have set up had this suit been brought in the name of the original payee.

The defendant also suggests, as a matter of law, that said Leander L., if the plaintiff in interest, could not by making Taylor the nominal plaintiff constitute himself the trustee of the defendant; as the real plaintiff and trustee would then be one and the same person.

Messrs. Charles S. Hayden and S. L. Graves, for plaintiff:

The defendants do not claim that the prom-

issory note declared on by the plaintiff in this action had been paid.

The agreement had not the first elements of a legal and binding contract,—no consideration passed, no delivery of the note, no time expressed for the actual payment of the note, no absolute knowledge of sufficient funds due this defendant from the estate to pay the sum due on the note.

The bill of exceptions show that the only defense offered to the action was payment of the notes. The evidence offered tended to show an agreement to pay the notes.

Under the pleadings of general denial and payment, this specific defense was not open to the defendants at the trial.

Pub. Stat. chap. 167, § 20.

The law is well settled in this Commonwealth that, when a note is payable on demand, no other demand need be made except by bringing a suit thereon.

Story, Prom. Notes, 6th ed. p. 35, and authorities cited.

C. Allen, J., delivered the opinion of the court:

The only question in these cases is whether the plea of payment was supported by the evidence offered. There was no declaration in set-off, and no averment of an agreement for a set-off. Set-off can only be pleaded in the manner prescribed by Pub. Stat. chap. 168, § 16, and an answer must set forth in clear and precise terms each substantive fact intended to be relied on in avoidance of the action. Pub. Stat. chap. 167, § 20. The statutes and the practice of the courts are very liberal in respect to allowing amendments; but in these cases there was no amendment to the answer, and no averment in the answer which the offered evidence was thought to support, except that of payment. And we are of opinion that the facts offered to be proved were not sufficient to show a payment. The estate in the hands of the administrator had never been settled; no account had been rendered; and, of course, it had not been ascertained what Mrs. Lewis's distributive share would amount to. Her counsel now assumes, in argument, that it would amount to more than the sums due upon the notes. But this is not conceded, and it was not included in the offer of proof; and, if it had been, it is at least doubtful whether it would have been sufficient to establish a payment. The difficulty is that there was no agreement for an actual present setting off of one debt against the other. There was, upon the offer, merely an executory agreement that the notes should be deducted from her distributive share in payment of the same, to be taken therefrom before the final settlement of the estate. The time had not come for carrying this agreement into execution by making the actual application of the notes, as contemplated. The notes were left as good, subsisting notes, capable of passing by indorsement. It was not an agreement for a present deduction or set-off, but for one in the future. The notes were not extinguished or paid by the agreement that, in the future and before the final settlement of the estate, they should be deducted from her distributive share. *Dehon v. Stetson*, 9 Met. 341;

Cary v. Bancroft, 14 Pick. 815. See also *Lit-
ingstone v. Whiting*, 15 Q. B. 722; *Callander v.
Howard*, 10 C. B. 290.

Exceptions overruled.

Patrick J. HOAR

v.

John W. ABBOTT *et al.*

Where the plaintiff, who was injured while temporarily operating a "preparing machine" in a yarn factory, testified that in consequence of a conversation with the operator he attended the operator's machine while the operator was temporarily absent, it was competent for defendant to prove that, at the time plaintiff stated such conversation to have taken place, the said operator requested defendant's witness to see to his work until he (the operator) should return.

(Middlesex—Filed March 2, 1888.)

ON plaintiff's exceptions. *Overruled.*

This was an action of tort, wherein the plaintiff claimed damages for injuries received in November, 1878, while a minor of about the age of fourteen years and in the employ of the defendants, who were manufacturers of worsted yarns.

The plaintiff's injury consisted in having his left arm caught and drawn into the gearing of a machine of the defendants, and so crushed as to necessitate its amputation at the shoulder.

The machine was what was known as a "preparing machine,"—was a part of one of two sets, consisting of five machines to a set, all similar in their general arrangement.

As originally constructed, the gearing upon these machines was securely shielded by cast-iron guards permanently fixed to the machine; but at the time of the accident to the plaintiff the guard to the gears of the machine wherein he was caught was off from the same, and had been so for some few days previous.

On the day of the accident, the workman in whose particular charge was the machine in which plaintiff was caught and injured was one Casey, and it was undisputed that just prior to the accident Casey had had occasion to be temporarily absent from his machine.

On the day of the accident the plaintiff, under the orders of defendants' superintendent, was actually working in the same room wherein the preparing machines were situated; and it was undisputed that on different occasions during some four months previous he had been employed in said room.

The plaintiff claimed and introduced evidence tending to show that there was at the time the injury occurred a usage or custom prevailing in defendants' mill, and known to the defendants, permitting the workmen regularly employed in running said preparing machines, when obliged to be temporarily absent therefrom, to call upon other of defendants' employees engaged in the same room to look after and run said machines during the said temporary absence of said regular workman thereon; and the plaintiff testified that, in accord-

ance with said custom, he had on different occasions, when working in the same room, during the temporary absences of some one of the regular operators, looked after, managed, and run some of said preparing machines.

In direct examination the plaintiff testified that on the day of the accident, shortly before it occurred, Casey went out, and that he had a conversation with him as he was about to go, and that in consequence of said conversation he "attended Casey's machine while Casey went to the watercloset." The plaintiff's claim of employment by the defendants to work upon this machine at the time of the accident rested solely upon the evidence of said custom and of Casey's going out, and a conversation had with plaintiff when he went, the terms of which were not in direct evidence.

It was denied by defendants that the custom extended so far as to warrant the plaintiff in attempting to run the machine, or that he was required, in the discharge of his duties, to attempt to do so or to go within any near proximity of it; and defendants claimed that the accident occurred when plaintiff was attempting, without right, authority, or directions, and against positive orders, to run it; and there was evidence on the part of defendants' witnesses in support of said denial.

The defendants claimed that when Casey left his machine shortly before the accident, as testified by the plaintiff, he, Casey, called another workman, one O'Brien, who was employed on a similar machine, and so within the custom as testified to by the plaintiff and the defendants' superintendent, and that during Casey's absence said O'Brien was engaged in attending Casey's machine together with his own.

The defendants called O'Brien as a witness, and over plaintiff's objection he was allowed to testify that when Casey left his machine he asked witness to see to his work until he returned.

There was no evidence, except what appears in this bill, that plaintiff was present at any part of the conversation between O'Brien and Casey.

The jury rendered a verdict for the defendants, and to the ruling of the court permitting the witness O'Brien to testify as aforesaid to the conversation had between himself and Casey the plaintiff excepted.

Messrs. Pratt & Quinn, for plaintiff:

One essential element in this case was establishing the fact that at the time plaintiff received the injury he was engaged in the line of his employment. To establish this fact he depended upon a custom prevailing in the defendants' mill, and known to them, permitting workmen, regularly employed in running machines similar to that in which plaintiff was injured, when themselves obliged to be temporarily absent therefrom, to call upon other of their fellow workmen to look after and manage their machines, together with their own, until the return of said regular workman.

The plaintiff's claim of employment by defendants to work upon this machine, at the time of the accident, rested solely upon the evidence of said custom and of Casey's going out, and a conversation had with the plaintiff when he went, the terms of which were not in direct evidence.

Even if the terms of the conversation above referred to, between the plaintiff and the regular operator, Casey, were a proper subject for evidence (which was not claimed at the trial, and is not now claimed), it is undoubtedly true that the facts which were properly in evidence—viz., that such a custom existed, and that there was a certain conversation—afforded to the plaintiff a right to go to the jury upon the point whether or not he was acting within the line of his employment at the time the injury was received; and inasmuch as he did not put in evidence (whether a proper subject or not) the terms of said conversation, it is contended that the defendant could not put in evidence the terms, or any portion of the terms, of that conversation, to contradict the plaintiff's claim, much less could the defendants put in any portion of the terms of any other conversation for such a purpose.

The plaintiff had the right to have his claim and theory passed upon by the jury—however strong or weak may have been the evidence in support of it—without being in any way prejudiced by testimony of conversations the terms of which he did not in any way introduce or in any way rely on, and in which it does not appear that he took part. Had plaintiff put in evidence the terms of the conversation he testified he had with Casey, then undoubtedly the defendant could have introduced testimony relative to that conversation to contradict him.

But, in the first place, plaintiff did not put in evidence the terms of his conversation with Casey—simply the naked fact that he had a conversation; and, in the second place, defendants did not ask to contradict him by putting in the terms of the conversation which plaintiff testified he had, whatever its terms were, but sought, and were permitted, to put in the terms of another conversation had between other parties, viz., Casey and O'Brien, instead of Casey and plaintiff, in order thereby to overthrow plaintiff's claim.

It is submitted that the law of evidence furnishes no warrant for the admission of any such evidence for such a purpose.

Clark v. Fletcher, 1 Allen, 58; *Com. v. Keyes*, 11 Gray, 325; *Adam v. Eames*, 107 Mass. 275.

Neither was it admissible as being any part of the *res gesta*.

It consisted of a declaration, or declarations, made at a time other than at the occurrence of the accident, and therefore, in order to have formed part of the *res gesta*, it must have consisted of acts or statements bearing such relation to the accident, or to the main fact in controversy,—if main fact there was other than the accident,—as would tend to explain such main fact, and so become entitled to some degree of credit outside the mere declarations themselves.

Lund v. Tyngsborough, 9 Cush. 36, 44.

Had the declarations made by Casey to O'Brien, which, against the plaintiff's objections seasonably taken, were testified to by O'Brien, formed any part of the *res gesta* of the main fact or act which was in controversy, then, of course, such declarations would have been competent.

It becomes important, then, to determine what the main fact was which was in controversy in this case, and what were the declara-

tions, facts, and circumstances belonging to it, and so forming its *res gesta*.

It is submitted that the main fact—and, for that matter, for the purposes of this inquiry, the only fact—in controversy, was the justification of the plaintiff's presence at the machine at the time of the accident; or, in other words, Was he within the custom, and so in the line of his employment? Why and how and by what authority did he happen to be there?

It is submitted that any conversation between Casey and O'Brien had no tendency whatever to illustrate or explain why or by what authority the plaintiff was at the machine.

It tends to explain, perhaps, why O'Brien was there, but that is an entirely distinct proposition.

Evidence of the directions given by Casey to O'Brien as to tending his machine in his (Casey's) absence did not in any degree tend to make more clear, or to give any peculiar significance to, any act or transaction which was properly the subject of inquiry before the jury. The fact to be proved—the reason why plaintiff was at the machine—could not be shown or overthrown by declarations or directions made by Casey to O'Brien.

The declarations objected to were mere abstract statements; hence the rule laid down in *Starkie on Evidence*, p. 47, applies, and they should have been excluded.

Haynes v. Rutter, 24 Pick. 245; *Nutting v. Page*, 4 Gray, 584; *Stone v. Segur*, 11 Allen, 571.

Assuming that the details of the conversation between plaintiff and Casey were admissible in evidence, and that the plaintiff had introduced a part of them, then the general rule would apply that, where a party offers in evidence a part of a conversation, the other side is entitled to have the whole said on that occasion put in; but it would not extend beyond that,—it does not reach to what may have been said on other occasions.

See *Adams v. Eames*, *supra*.

On the contrary, the bill of exceptions, fairly construed, indicates that the conversation admitted against plaintiff's objections was on another occasion from that of the accident.

The conversation, admission of which was objected to, shows that Casey asked O'Brien for some tobacco, and, not getting any, asked him to look after his machine while he went "up the room."

There was no evidence, except what appears in this bill, that plaintiff was present at any part of the conversation between O'Brien and Casey. It is submitted that nothing appears in this bill to indicate that plaintiff was present at any part of the conversation between O'Brien and Casey.

Relative to the case of *Clark v. Fletcher*, 1 Allen, 58, cited by the plaintiff, but which may be relied on by the defense as well, attention is called to the fact that in that case the plaintiff had opened the inquiry by asking the witness on the examination in chief the subject in relation to which the conversation took place.

The court goes on to state in that case (see page 56) that the more decisive answer to the objection was that the plaintiff sought to draw an inference from the fact that the conversation related to a certain subject. It is there intimat-

ed that, had the plaintiff confined her question to the mere fact whether or not a conversation was had, and had refrained from inquiring concerning its subject-matter, the ruling would have been different.

It cannot be said that the testimony under consideration could not possibly have harmed the plaintiff.

Sherman v. Delaware, L. & W. R. Co. 9 Cent. Rep. 482, 106 N. Y. 542.

Mr. Samuel Hoar, for defendants:

There is only one question in this case, namely: whether the testimony of O'Brien to the conversation between himself and Casey, while Casey was in the act of leaving the machine of which he had charge and on which the plaintiff was injured during his absence, was properly admitted in evidence.

The defendants contended, and offered evidence to show, that this custom or usage permitted and authorized the operative, under the circumstances mentioned, only to call on workmen regularly employed in running similar machines to attend to and run his machine during his absence; and claimed that the accident occurred while the plaintiff was attempting, without right, authority, or direction, and against positive orders, to run said machine.

The defendants contended, and offered evidence to show, that when Casey left his machine, shortly before the accident, as testified by the plaintiff, he called O'Brien, who was employed on a similar machine, and so within the custom as claimed both by the plaintiff and defendants, and that, during Casey's absence, O'Brien was engaged in tending Casey's machine, together with his own.

The defendants were allowed to put in evidence the testimony of O'Brien to the conversation had with Casey while in the act of leaving his machine; and it is submitted that this evidence is admissible on several grounds.

1. It was part of the plaintiff's case to show that Casey was obliged to be temporarily absent from his work. It was also necessary for the defendants to show the same thing, in order to prove that O'Brien had authority to run Casey's machine during his absence. His act of going away, which was put in evidence by the plaintiff, was equivocal and ambiguous in all these particulars, and in all these particulars his declarations accompanying the act of "going away" serve to explain and characterize that act. His declarations, in which he told O'Brien to attend to his work, "while he went up the room, or till he returned," show that his absence was a temporary absence, and such as brought it within the custom permitting him to employ another to run his machine. Such a conversation was a part of the *res gestæ* and was therefore properly admitted.

Lund v. Tyngsborough, 9 Cush. 86; *Thorndike v. Boston*, 1 Met. 242; *Salem v. Lynn*, 13 Met. 544; *Com. v. O'Connor*, 11 Gray, 94; *Com. v. Rowe*, 105 Mass. 590; *Walker v. Flynn*, 180 Mass. 151; *Stevens v. Miles*, 8 New Eng. Rep. 87, 142 Mass. 571.

2. The plaintiff having put in evidence tending to show that he was employed to work on this machine at the time of the accident, it was competent for the defendants to show, as some evidence that the plaintiff was not so employed, that another workman—namely, O'Brien—was

employed to run and manage that machine at that time; and it was competent for them to show the manner of his employment, and therefore to put in evidence the declarations of Casey, their agent, through whom O'Brien was employed, which contained the terms and showed the circumstances and manner of his employment.

3. The conversation in question, showing, as it does, that Casey's "going away" was such as to necessitate the employment of another workman in his place, serves to identify it as the same "going away" during which the plaintiff says that he had the conversation in consequence of which he attempted to run the machine; and it is therefore admissible on this ground.

Earle v. Earle, 11 Allen, 1.

4. As the conversation to which the plaintiff testified, and that to which O'Brien testified, occurred at substantially the same time, with the same person, under the same circumstances, and on the same subject-matter; and as the plaintiff had not put in evidence the terms or substance of the conversation which he alleged he had with Casey,—the jury would be authorized to find, either that it was one and the same conversation, and therefore its terms became material as showing that it contained no authority to the plaintiff to work at the machine, or, if a different conversation, that the plaintiff heard it, and therefore its terms are material as showing that the plaintiff knew that this machine, during the absence of Casey, was in charge of O'Brien.

Holmes, J., delivered the opinion of the court:

The plaintiff was injured by a machine which it was not his regular duty to attend. He alleged that he was employed by the defendants to attend to it at the time. The defendants' evidence, on the other hand, was that he was intermeddling without right and against orders. To make out that he was employed, the plaintiff put in evidence that there was a known custom of the workmen in the mill employed to run such machines, when obliged to absent themselves temporarily, to call in other employees, and that the regular workman, Casey, went out, and just before doing so had a conversation with him, in consequence of which the plaintiff attended to Casey's machine during his absence. To meet this, the defendants put in the testimony of another workman, O'Brien, that Casey, just before going out, asked him to attend Casey's machine, and that O'Brien did so. The only exception is to the admission of what Casey said to O'Brien.

The conversation referred to the occasion testified to by the plaintiff, and was alleged to have happened at the same time as that on which the plaintiff alleged the conversation with himself to have taken place. O'Brien's evidence therefore tended to show that the plaintiff was not requested to attend Casey's machine, for the jury would have been warranted in finding that there was only one conversation upon the matter, and that that was a request from Casey to O'Brien, and, even if the alleged conversations had been placed a moment apart by the respective witnesses, and that with O'Brien had taken place in the plain-

tiff's absence, it would have been unlikely that Casey, within a few minutes, would have requested two persons to take charge of the same work at the same time.

A request from Casey was none the less material to the plaintiff's case, that he did not testify to it in terms, but left it to be inferred from the other facts put in evidence. The conversation with O'Brien was properly admitted as tending to disprove it.

Exceptions overruled.

S. B. LOGAN

v.

James R. DOCKRAY.

An agreement given by defendant to plaintiff, on taking an assignment of a chattel mortgage, whereby defendant promised to pay to the plaintiff one half of the amount collected on the mortgage over and above \$150, requires a division of the gross amount collected in excess of \$150.

(Suffolk—Filed March 2, 1888.)

ON defendant's exceptions. *Overruled.*

Action on contract to recover one half of the excess over \$150 collected on a second mortgage.

On the trial in the superior court, the court ruled that defendant was liable to plaintiff for one half of the gross amount in excess of said \$150 collected by defendant on the mortgage. Defendant alleged exceptions.

Mr. H. J. Edwards, for defendant:

The contract shows that it was a business venture, and that it was made and written in a hasty and thoughtless manner; and plaintiff did not expect, nor defendant intend, that the gross excess should be paid, but only the net amount received by defendant after deducting the proper and necessary expenses which the defendant was obliged to incur in order to collect anything on it.

Mr. O. B. Mowry, for plaintiff:

1. Parol evidence is not admissible to enlarge, vary, or control a written contract.

2. Said agreement should be construed most strongly against defendant executing same, if there is any doubt as to its true import and meaning. "If the defendant was unskillful in the use of language, and did not express in writing what he meant, it is his misfortune."

Plaintiff would cite the following cases:

Dascomb v. Bartell, 1 Allen, 281; *Driscoll v. Fiske*, 21 Pick. 508; *Barker v. Buel*, 5 Cush. 520; *Keller v. Webb*, 126 Mass. 393.

C. Allen, J., delivered the opinion of the court:

The defendant took from the plaintiff the assignment of the second mortgage, of the face value of \$350, subject to a prior mortgage of \$2,500 upon the same chattels, for which he paid to the plaintiff \$150 in money, and gave to him the written agreement declared on, by which he promised to pay to the plaintiff "one half of the amount collected on said mortgage over and above \$150; that is, one half of the

excess over \$150 collected on said mortgage by me or my assigns." The defendant now contends that he is only bound to pay one half of the net amount collected by him over and above the \$150, after deducting certain disbursements and expenses. But the agreement does not admit of this construction. There is nothing in the agreement to show that it was understood that the defendant would necessarily be put to any disbursements or expenses, or, if so, that they would probably be considerable in amount. The defendant took his chance. He would retain \$150 at all events, to reimburse himself for the sum paid to the plaintiff, and would also retain one half of the excess above that sum. If he had meant the net excess, after deducting whatever payments he might see fit to make, he should have said so. But there is nothing to show that he did not consider himself sufficiently protected by the reservation of one half of the gross excess; and such is the meaning of his words.

Exceptions overruled.

Elias HAM

v.

Thomas KERWIN.

Where a special denial of the genuineness of the signature of a written instrument declared on is defective, the court may in its discretion allow an amendment thereof, and exception will not lie.

(Suffolk—Filed March 2, 1888.)

ON plaintiff's exceptions. *Overruled.*

Action of contract to recover the amount of a promissory note alleged to have been made by the defendant, Thomas Kerwin, and indorsed to the plaintiff. Before the entry of the action the defendant died, and Mary Kerwin, his executrix, appeared as defendant, and filed the following answer:

"And the defendant, for answer, denies each and every item and allegation in the plaintiff's writ and declaration contained, as fully as if each item was taken up in order and denied separately.

"And further answering, defendant denies the genuineness of the signature to the note declared on, and says that if any such note was made,—and she denies that any such note was made by the testator during his lifetime,—the same has been paid in full."

Upon the trial the court ruled that the answer was not sufficient, under the statute, to require the plaintiff to prove the genuineness of the signature. The defendant thereupon moved to amend the answer by adding the following after the word "defendant:" "denies the genuineness of the signature thereof, and demands that it shall be proved at the trial." The court allowed the amendment. The jury found a verdict for the defendant, and plaintiff alleged exceptions to the ruling.

Messrs. Wiggin & Fernald, for plaintiff:

The defendant's amendment should not have been allowed. The statute provides that "if

natures to written instruments declared on," etc., shall be taken as admitted unless the party sought to be charged thereby files in court, within the time allowed for an answer, a special denial, etc.

Pub. Stat. chap. 167, § 21.

The statute provides a "rule of evidence and practice, rather than a rule of pleading." The special denial and demand mentioned in the statute are no part of the pleadings. Consequently, no amendment can be allowed by the court against objection, extending the time of filing the notice.

True v. Dillon, 188 Mass. 847.

The same rule should be applied in this case as is applied to the notice required by the statute to be given to municipalities, of injuries sustained through a defect in a highway or street, etc., and is likewise applied to the filing of motions to dismiss pleas in abatement, and to rules of evidence and practice. This court has held that the court had no power to allow an answer in abatement to be filed, which had not been filed within the time prescribed.

Hastings v. Bolton, 1 Allen, 580.

Mr. P. B. Kiernan, for defendant:

The statutes authorize the courts, in their discretion, to allow amendments in any civil suit or proceeding, by change of parties or of form of action, or in any other matter, in order to maintain the suit for the cause for which it was intended to be brought, or to enable the defendant to make a legal defense.

Gen. Stat. chap. 129, §§ 41, 82; Pub. Stat. chap. 167, §§ 41, 42, 85; *Winch v. Hoemer*, 122 Mass. 488; *Buckland v. Green*, 188 Mass. 421; *Costello v. Crowell*, 184 Mass. 280; *Sanger v. Newton*, Id. 306.

The amendment was allowed on terms; a continuance was offered to the plaintiff; consequently no injury was done the plaintiff. It is plain that the amendment is merely supplying a formal defect (in the answer) caused by mistake or inadvertence, and falls within the statutory authority to allow amendments; to such allowance the plaintiff is not entitled to except.

Mann v. Brewer, 7 Allen, 202; *Terry v. Brightman*, 188 Mass. 586.

The allowance of the amendment was within the discretion of the superior court, to the exercise of which no exception lies.

Hutchinson v. Tucker, 124 Mass. 240; *Lester v. Lester*, 8 Gray, 487; *George v. Reed*, 101 Mass. 378; Pub. Stat. chap. 167, § 42.

A continuance having been offered to the plaintiff, it does not appear that the plaintiff has in any respect been prejudiced by the action of the court.

Aldrich v. Aldrich, 8 New Eng. Rep. 181, 148 Mass. 45.

There is a large discretion vested in the superior court in the matter of amending their records.

Sawyer's Petition, 186 Mass. 389.

Morton, Ch. J., delivered the opinion of the court:

Our statutes of amendments are very broad in their spirit and scope, allowing amendments at any time before judgment in a civil suit, in any matter either of form or substance; in any 3 Mass,

process, pleading, or proceeding, in the suit, which may enable the plaintiff to sustain the action, or the defendant to make a legal defense. Pub. Stat. chap. 167, §§ 41-44.

The special denial of the genuineness of the signature to a written instrument declared on, required by Pub. Stat. chap. 167, § 21, if not in strictness a part of the pleadings is an important proceeding in the case. It is to be filed "within the time allowed for an answer," which by leave of court may be at any time before trial. It falls within the letter and the spirit of the statute; and, if the special denial is imperfect, we can have no doubt that it is within the power of the court to allow an amendment to the same extent that it might allow an amendment to an answer, and upon such terms as it deems reasonable. Such an amendment is within the discretion of the court, and no exception lies to the exercise of this discretion.

Exceptions overruled.

John P. CONSTANTINIDES

v.

James L. WALSH, Exr. of Louisa Constantinides.

1. The funeral expenses of a married woman are a preferred charge upon her estate.
2. Where a married woman dies leaving an estate, it is not the legal duty of her husband to pay the funeral expenses.
3. Where the funeral expenses of a married woman leaving an estate are paid by her husband, it is not to be presumed, in the absence of evidence, that he waives his legal rights and makes a gift to the estate; and the same may be recovered by him.

(Suffolk—Filed March 2, 1888.)

ON plaintiff's exceptions. *Sustained.*

The plaintiff was the husband, and the defendant is the executor, of Louisa Constantinides, who died October 28, 1884, possessed of separate estate, all of which she gave to her son, the stepson of plaintiff, by her will, admitted to probate November 17, 1884. The plaintiff had no knowledge of the will until three weeks after her decease. Between October 28, 1884, and October 27, 1884, he contracted, and on October 27, 1884, paid, a bill for necessary funeral expenses of his deceased wife. The amount of the bill, \$151, was agreed to be reasonable, and is sued for in this action.

It was not contended that the executor had, prior to or after his appointment, made any promise of payment.

The defendant asked the court to rule that the plaintiff could not recover; and the court so ruled, and ordered a verdict for defendant. Plaintiff alleged exceptions.

Mr. J. A. Maxwell, for plaintiff:

The defendant contends that the law made it the duty of the plaintiff to bury his deceased wife; that when, therefore, he paid the undertaker's bills he extinguished his own debt, and

cannot be legally reimbursed out of the assets of her estate. This would be so if she left no estate; perhaps, if she left estate, such was the duty of the plaintiff prior to Stat. 1883, chap. 141.

Weld v. Walker, 180 Mass. 422; *Cunningham v. Reardon*, 98 Mass. 588; *Lakin v. Ames*, 10 Cush. 198, 221.

It seems that the statutes of distribution in this Commonwealth, commencing with the statute of 1803, have made it primarily the duty of the administrator to pay the funeral expenses of the deceased; and the duty of the surviving husband or surviving wife became secondary.

If the earlier statutes did not relieve the husband as against the administrator of his wife's estate, it is certain that Stat. 1882, chap. 141, did give him such relief.

It may be said that in the case at bar the plaintiff paid as surviving husband, and not as administrator. Not so; when he contracted and when he paid the bill, he had no knowledge of the existence of the will, and so far as he knew, had a right to administer on the estate. He therefore paid as administrator expectant, or as executor in his own wrong, and as such he is protected by statute against the true executor or administrator, to the extent of his payments for debts, funeral expenses, and other charges.

Pub. Stat. chap. 132, § 18.

We suppose that Pub. Stat. chap. 187, *Insolvent Estates of Deceased Persons*, includes estates of deceased wives, and § 1 makes such estates subject to the payment of funeral expenses. If this plaintiff's wife's estates had been represented insolvent, he could have proved his claim in insolvency.

Savage v. Winchester, 15 Gray, 458.

The policy of our Legislature has been "to enlarge the rights and liabilities of married women as to property, and to impair the unity and identity of interest between husband and wife which existed at common law. As the laws have destroyed this unity, the incidents or consequences of the unity ought not to continue to operate."

Butler v. Ives, 189 Mass. 202, 204.

The view we contend for does not relieve the husband of his common-law duty and liability when his wife's estate is insolvent, and therefore does not deprive him of his interest in and control over the body and burial of his wife, and is not in conflict with the three cases first cited in this brief.

It is immaterial that the plaintiff's wife died testate. The residue, under the statutes of distribution, comprises all the personality that can be disposed of by will. An executor is an administrator.

If the administrator, before his appointment, employs the undertaker, he is afterwards liable upon his express promise, and chargeable *de bonis propriis*, with the privilege of allowance, however, in his probate-court accounts, for expenditures thus reasonably made. If he has made no such promise, he is nevertheless liable upon a promise raised by law, to any person, for the reasonable expenses of burying the deceased, and in such case he is chargeable *de bonis intestati or testatoris*.

Sweeney v. Muldoon, 189 Mass. 804. See *Id.* pp. 805, 806 and cases cited.

Mr. George A. Bruce, for defendant:

This action cannot be maintained, for the following reasons:

1. The plaintiff is seeking to recover for the performance of a duty which the law imposed upon him.

Cunningham v. Reardon, 98 Mass. 588.

2. No suit could have been maintained against the defendant, when living, by her husband, and her death does not gain a right of action against her executor.

3. The bill in suit was voluntarily contracted for, and paid, by the plaintiff; and no contract, express or implied, exists as against this defendant.

Holmes, J., delivered the opinion of the court:

The funeral expenses of the testatrix were a preferred charge upon her estate. Pub. Stat. chap. 185, § 8; chap. 187, § 1; Stat. 1882, chap. 141. Under these statutes and those establishing the independent position of married women with regard to their property, we think that, as between the estate of a married woman leaving property and her husband, the liability of the estate must be regarded as primary, and that it would be unreasonable to charge the husband for the funeral expenses, in all events, as necessities, irrespective of any fault on his part.

If, then, it was still, as formerly, the plaintiff's legal duty to see that his wife was buried, but her estate was primarily liable, he is entitled to recover his reasonable expenditures, as in other cases where a person has paid, in pursuance of a legal duty, what, as between himself and another, that other was bound to pay. There is no technical difficulty in a husband's imposing a liability upon his wife's executor, after her death.

If it was not the plaintiff's legal duty to do what he did, nevertheless we are of opinion that he stood on no worse ground than a stranger would have done. A stranger could have recovered against the estate of a man, if he was justified in intermeddling (*Sweeney v. Muldoon*, 189 Mass. 804, 806), and formerly in the case of a married woman he could have recovered against her husband (*Lakin v. Ames*, 10 Cush. 198, 221; *Weld v. Walker*, 180 Mass. 422, 423; *Bradshaw v. Reard*, 12 C. B. N. S. 844). Undoubtedly he could now recover against her estate. If so, the husband can. In such a matter it is not to be presumed that the husband waives his legal rights and makes a gift to the estate of his wife, in the absence of any expression or other evidence to that effect.

Exceptions sustained.

Austin FORD

v.

Garrett LINEHAN.

In an action to recover \$580 for the erection of a curbing around a burial lot, in pursuance of a written contract with the only son of the defendant, the owner of the lot,—where it appeared that the defendant was an aged man, who had been confined to his house for about

five years, was possessed of considerable property, intended before he was taken sick to put a curbing around his lot, and signed a request to the superintendent of the cemetery to allow the plaintiff to set the curbing; that the son had very little property of his own, had told defendant of the contract with plaintiff, and had conferred with him about the work from time to time during its progress, and was defendant's general agent for the transaction of his business, and had said nothing to show that he intended the work as a gift to the defendant,—the jury was justified in drawing the inference that the son acted for the father in the matter, notwithstanding the testimony of defendant and his son to the contrary.

(Suffolk—Filed March 2, 1888.)

ON defendant's exceptions. *Overruled.*

Action on a contract executed by plaintiff with defendant.

The facts sufficiently appear in the opinion. The defendant requested the court to rule that there was no evidence which would warrant the jury in finding that the defendant was a party to the contract. The court refused, and submitted the case to the jury, with instructions not excepted to. Jury found for the plaintiff; defendant alleged exceptions.

Mr. J. A. Maxwell, for defendant:

The defendant's name does not appear in the agreement, and there is nothing therein to suggest agency. The plaintiff in fact presented his bill,—“Denis A. Linehan, to Austin Ford, Dr.”

There is nothing in the testimony which warranted a finding that Denis A. Linehan acted as agent in making said agreement, or that the agreement was ratified by the defendant.

The only agency disclosed by the evidence was an agency to represent the defendant as owner of the houses, to collect rents, to contract bills for repair, to let tenements, and generally to do what was incidental to the management of such realty.

The plaintiff was not led to believe, and did not believe, that the son was acting for the father. At the time he made the agreement, and after the completion of the work, he looked to the son for payment; and, in spite of the fact that he had in the mean time received a note, signed by the father, empowering him to get a permit from the cemetery authorities to go upon the lot, he even brought a suit against the son.

The work done by the plaintiff was not more to the benefit of the father than the son. The son's interest and motive were equally strong. Burial lots are not real estate of the so-called owners. They have merely a right of burial,—an easement; and, while the legal title is required to be in the name of one member of a family, the rights of all in the lot are regulated by law.

Pub. Stat. chap. 82, §§ 2-4.

In *Arnold v. Spurr*, 180 Mass. 847, much stress seems to be laid upon the fact that the plaintiff sold his goods upon the credit of the

person whom he supposed to be the owner, and it is said that otherwise “his relation to the subject would be entirely changed.” In the case at bar the plaintiff gave credit to the son, although, and after, he knew the father was the owner.

If there was no agency in the beginning, there was certainly no evidence of ratification.

Defendant was not called upon to approve or disapprove the act of his son, and his failure to disapprove is without effect. He never had any communication with the plaintiff; and there is no evidence, apart from the evidence of original agency, tending to show any knowledge that the plaintiff would ever make any demand upon him for payment.

Mr. Thomas F. McGuire, for plaintiff:

The ruling of the court was correct, as it was a question of fact, properly submitted to the jury, to say whether or not, on all the evidence, the defendant was a party to the contract, and whether or not Denis A. Linehan was his authorized agent.

Reed v. Ashburnham R. Co. 120 Mass. 43, 47; *Tozier v. Crafts*, 123 Mass. 490.

It was a question for the jury to say what was the intention of the defendant.

The question here is whether there is any evidence which can properly be submitted to the jury, and upon which they can find for the plaintiff.

Forsyth v. Hooper, 11 Allen, 419; 2 Met. 319; *Lerned v. Johns*, 9 Allen, 419; *Gowen v. Klous*, 101 Mass. 454; *Kingsley v. Davis*, 104 Mass. 178; *Sartwell v. Frost*, 122 Mass. 184; *Lovell v. Williams*, 125 Mass. 439.

The action was properly brought against the defendant, as he was a party to the contract from the time that he gave the order to the superintendent of the cemetery until the work was entirely completed; his authorized agent reporting to the defendant without any objection from him as the work progressed step by step.

Brigham v. Foster, 7 Allen, 419; *Bragg v. Boston & W. R. Corp.* 9 Allen, 54; 89 Vt. 78.

Silence of the defendant, with a knowledge of all the facts, makes him legally liable.

2 Met. 848; 26 Wend. 227; 8 Mass. 70.

Every act on the part of the defendant, from the time that he signed said order until the contract was completed, was a ratification of said contract in law.

Greenfield Bank v. Crafts, 4 Allen, 447; *Foster v. Rockwell*, 104 Mass. 167; *Matthews v. Fuller*, 123 Mass. 446; *Combs v. Scott*, 12 Allen, 498.

A ratification once deliberately made upon knowledge of the facts becomes at once obligatory, and cannot afterwards be revoked or recalled.

13 U. S. 9 Cranch, 158 (3 L. ed. 688); 16 Tex. 461; 44 N. H. 40; 11 Iowa, 293.

A principal, with the knowledge of the agent's acts, must give notice of his dissent within a reasonable time, or his assent or ratification will be presumed.

12 Johns. 300; 5 N. Y. 199; 7 Bush (Ky.), 384.

Morton, Ch. J., delivered the opinion of the court:

The written contract for the work which is sued for was signed by the son of the defendant; but, if the plaintiff can prove that in con-

tracting for the work the son was acting as the agent of the defendant, this action can be maintained. Whether he was so acting is a question of fact, for the jury, and we are of opinion that there was evidence at the trial which was properly submitted to them upon this issue.

It appeared that the defendant was seventy-three years old, and had been confined to his house for five years by rheumatism; that he was a man of considerable property; that he was the owner of the lot in the cemetery, on which the work was done; and that, before the work was begun, he signed an application for a permit to do it, addressed to the superintendent of the cemetery. There was evidence tending to show that the son had very little property; that he told the defendant of his contract with the plaintiff, and conferred with the defendant from time to time during the progress of the work; that he was an only son and his father's general agent for the transaction of all his business affairs; that the defendant, before he was taken sick, had in his mind the idea of putting curbing about his lot, and consulted with his wife about it; and that neither during the work, nor after it was complete, was anything said between the father and the son to show that it was intended by the latter as a gift to his father. The circumstances of the parties make it very improbable that he would or could make so large a gift. All the evidence points to the inference that the son was acting for his father, and that both so understood it; and we think the jury might fairly draw this inference, notwithstanding the testimony of the defendant and his son to the contrary. They saw the witnesses, and could best judge of the credit to which they were entitled.

Exceptions overruled.

Henry HUNT

v.

William BROWN, Admr.

1. In determining whether an act was dealt with by the parties to an oral agreement as a **consideration**, it is enough that the immediate effect of the act was an **abandonment** of an actual or supposed right, whatever the balance of advantages may be.
2. Where a party holding notes against another promised the maker that, if he would assent to a compromise of certain claims against third parties in which said maker was interested, he, the said promisor, would accept in full payment of his notes such percentage thereof as was received in settlement of the claim in which the maker was interested, the assent of the maker and **compromise** of his claim were sufficient **consideration** for the promise.
3. In an action brought upon the notes thereafter by the legal representative of the payee and promisor, the maker was not bound to plead the agreement in defense. A **breach of the agreement** was a substantial cause of action upon which the promisee might bring suit.

(Suffolk—Filed March 2, 1888.)

ON defendant's exceptions. *Overruled.*

This is an action of contract brought to recover back money paid on three notes, put in suit by the present defendant against the present plaintiff.

Suit was brought upon said notes in the superior court at the April Term, 1884, against Henry Hunt; said Hunt appeared and answered. At the October Term, 1884, said Hunt made an offer of judgment in the sum of \$1,754, which was accepted by William Brown, administrator; execution issued for the sum of \$1,754, and costs, and was paid.

This action is brought on said grounds to recover damages for the breach of an alleged agreement made prior to October 31, 1883, between the plaintiff and the defendant's intestate,—that the defendant's intestate would accept a smaller sum than the balance then due on said notes in full settlement thereof. The plaintiff testified that he had been requested by the executors of his father's will to assent to the settlement by them, at a discount, of a claim which they had as such executors against certain sureties in the State of Indiana, the effect of which settlement, if made, would be to reduce the amount to be paid by said executors to the plaintiff; that he had several interviews with Elijah Russell, the defendant's intestate, prior to his decease, which occurred November 21, 1883, no one but himself and said Russell being present; and that said Russell requested him to assent to such settlement, and promised that, if the plaintiff would assent to such settlement, he would accept, in full settlement of the balance due upon his said notes, whatever percentage the said executors should take in settlement of their claim.

It appeared in evidence that a settlement of the claim against said sureties for about 63 per cent of the amount claimed was made by said executors; that said settlement was assented to by said Hunt, and was wisely made, both for said Hunt and all interested in his father's estate.

The jury returned a verdict for the plaintiff in the sum of \$791.80.

At the trial the defendant asked the court to rule that this action could not be maintained, because it was founded upon a cause which was properly a defense in a prior action between the same parties, and should have been availed of there, and the judgment in that case was a bar to this action.

The defendant also asked the court to rule that no consideration for the alleged agreement had been shown.

The court declined so to rule upon either point, and the defendant alleged exceptions.

Mr. Nathaniel W. Ladd, for defendant:

This action is founded upon the same subject-matter—the balance due on the three notes—which was the cause of action in the prior suit between these same parties; and the alleged agreement which is the cause of action here might, and ought to have been, used as a defense in that prior suit.

By offering to be defaulted, and that judgment might be entered against him in that suit for the full amount of the claim, the plaintiff here has estopped himself from maintaining an action upon anything which might and ought to have been used as a defense in that prior suit.

Thatcher v. Gammon, 12 Mass. 268; *Norton v. Doherty*, 3 Gray, 872; *Sacket v. Loomis*, 4 Gray, 149; *Fuller v. Shattuck*, 18 Gray, 70; *Trask v. Hartford & New Haven R. Co.* 2 Allen, 331; *Goodrich v. Yale*, 8 Allen, 455; *Eastman v. Symonds*, 108 Mass. 569; *Foss v. Lowell Sav. Bank*, 111 Mass. 287; *Duncan v. Bancroft*, 110 Mass. 271; *Blackinton v. Blackinton*, 113 Mass. 234; *Folsom v. Clemence*, 119 Mass. 478; *Spaulding v. Arlington*, 126 Mass. 492.

An attempt is made in this case [to recover back 38 per cent of the amount of the former judgment].

An original action would not be allowed to recover back such payments, even though by some misfortune the defendant could not produce the evidence of them at the trial of the first action.

Marriott v. Hampton, 7 T. R. 269; *Loring v. Mansfield*, 17 Mass. 395.

Nor will deception and fraud prevent the former judgment from being a bar.

Homer v. Fish, 1 Pick. 439; *M' Rae v. Mattoon*, 13 Pick. 57.

By the theory of the law, a default is an admission of record of the existence and amount of the debt claimed. By such a judgment the debtor is estopped, and must therefore see to it that judgment is not recovered for more than what is due, because he would be bound by that estoppel.

Jordan v. Phelps, 8 Cush. 548; *Hanscom v. Hewes*, 12 Gray, 384.

The defense upon which it is now sought to found this action would have been perfectly competent and proper in the prior action.

Astley v. Reynolds, 2 Str. 915; *Wilkinson v. Kitchin*, 1 Ld. Raym. 89; *Moses v. Macferlan*, 2 Burr. 1005; *Merriam v. Woodcock*, 104 Mass. 326.

The agreement which is the cause of action in this case cannot be dissociated from the subject-matter of the former suit. It cannot be even stated in any form whatever without its leading right back to the balance due on those three notes. Thus it differs entirely from a set-off, which does not necessarily have any connection with the subject-matter of the original suit, and may therefore be the foundation of an independent action.

Jordan v. Phelps, 3 Cush. 547.

If the judgment be an adjudication between the same parties, and against the plaintiff, of issues which tend directly to disprove the allegations contained in the declaration, then it is admissible in evidence under an answer denying those allegations. A former judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action for the same cause of action between the same parties. The parties are concluded by the judgment, not only upon all the issues that were actually tried, but upon all issues which might have been tried, in the former action; so that a new action for the same cause of action, between the same parties, cannot be maintained or defended on grounds which might have been tried and determined in the former action.

Foye v. Patch, 182 Mass. 110.

The rule of estoppel by a former verdict and judgment between the same parties is not confined to matters appearing on the record, but extends to every fact which can be shown by 3 Mass.

evidence to be necessarily involved in the first adjudication. Where a conclusion is indisputable, and could only have been drawn from certain premises, the premises are equally indisputable with the conclusion.

Hooker v. Hubbard, 102 Mass. 242.

It must appear that, upon the question of fact presented, the party has had a day in court in which he either did, or ought to have, put it in issue.

Hooker v. Hubbard, 102 Mass. 245.

The conclusion of the former judgment was that the whole amount recovered was due. But the whole amount could not have been due, if the intestate had made a valid agreement, founded upon a good consideration, to take 62 cents on a dollar of his claim.

Shearer v. Dusenbury, 18 Gray, 292; *Sawyer v. Woodbury*, 7 Gray, 502; *Hawks v. Truesdell*, 99 Mass. 558; *Burlen v. Shannon*, Id. 200; *Com. v. Evans*, 101 Mass. 26; *Stockwell v. Silloway*, 113 Mass. 385; *Gorman's Case*, 124 Mass. 190; *West v. Platt*, 127 Mass. 372; *Morse v. Elms*, 181 Mass. 151.

A parol agreement to accept a part of a debt from the debtor in full satisfaction for the whole is not binding for want of consideration.

Howe v. Mackay, 5 Pick. 47; *Smith v. Bartholomew*, 1 Met. 278; *Harriman v. Harriman*, 12 Gray, 841; *Curran v. Rummell*, 118 Mass. 483.

The promise in this case was without consideration, and void.

Com. v. Scituate Sav. Bank, 137 Mass. 802.

A promise, in consideration of the promisee doing what he has already agreed to do, is without consideration.

Smith v. Bartholomew, 1 Met. 276; *Jennings v. Chase*, 10 Allen, 526.

There is no pretense that the promise was any gain to the promisor; and it certainly was no loss to the promisee, because he has only paid a just debt that was overdue; and the case itself finds that the settlement of the claim in favor of his father's estate "was wisely made, both for said Hunt and all interested in his father's estate."

Mr. H. M. Sheldon, for plaintiff:

This action is brought for the breach of an executory agreement for an accord and satisfaction of those notes. It was, in its principle, the same kind of action as has been sustained both by this court and in New York.

Smith v. Palmer, 6 Cush. 513; *Cobb v. Curtiss*, 8 Johns. 470.

The former judgment is an estoppel and a bar to further litigation, only upon those matters which were in issue.

Parker v. Brancker, 22 Pick. 40; *Whitcomb v. Williams*, 4 Pick. 228; *Gage v. Holmes*, 12 Gray, 428; *Foye v. Patch*, 182 Mass. 105; *Fairchild v. Lynch*, 99 N. Y. 359.

The plaintiff submits that the ground of this action could not have been set up in defense of the former action. It was an unexecuted accord,—an accord without satisfaction,—which is no bar to an action upon the original demand.

Makepeace v. Harvard College, 10 Pick. 298; *Tuckerman v. Newhall*, 17 Mass. 581; *Spring v. Lovett*, 11 Pick. 417; *Costello v. Cady*, 102 Mass. 140; *Clifton v. Litchfield*, 106 Mass. 84; *Blake v. Blake*, 110 Mass. 302.

It was an independent agreement, subsequent

to the notes held by Brown, going only to a part of their amount, and should properly be set up in an independent action, and not as a matter of recoupment.

Bowley v. Holway, 124 Mass. 395; *Bartlett v. Farrington*, 120 Mass. 284; *Hodgkins v. Moulton*, 100 Mass. 309; *Brighton Sav. Bank v. Sawyer*, 182 Mass. 185.

Accordingly, neither the existence nor the validity of the alleged agreement was, or could be, put in issue in the former suit; and the former judgment cannot be a bar to this action.

But even if this agreement could have been availed of as a defense *pro tanto* to the previous action, yet it could have operated only by way of recoupment; and this plaintiff, the then defendant, had his election whether to set it up in that action as a recoupment or to bring a separate suit upon it.

Morton, J., in *Perley v. Balch*, 23 Pick. 283, 287; *Cook v. Cushman*, 9 Cush. 266; *Austin v. Foster*, 9 Pick. 341; *Howard v. Ames*, 3 Met. 308; *Robbins v. Harrison*, 31 Ala. 160; *Freem. Judg.* § 277.

This agreement was not relied upon in defense of the former action, and could not have been, under the pleadings. An averment of payment is not an averment of an accord and satisfaction, or of any ground of recoupment.

Denham v. Bryant, 139 Mass. 110; *Grinnell v. Spink*, 128 Mass. 25; *Ulsch v. Muller*, 3 New Eng. Rep. 372, 143 Mass. 379.

The plaintiff, Hunt, has done exactly what was suggested by this court in *Star Glass Co. v. Morey*, 108 Mass. 570, 578. Desiring to recover full damages in his cross-action,—that is to say, in this suit,—he submitted to judgment in the original action, that of Brown against him, for the full amount remaining due upon the notes, and sought his redress by this action.

Star Glass Co. v. Morey, *supra*; *Dewey, J.*, in *Burnett v. Smith*, 4 Gray, 50; *Shaw, Ch. J.*, in *O'Connor v. Varney*, 10 Gray, 231; *Hoar, J.*, in *Stevens v. Miller*, 13 Gray, 288; *Colt, J.*, in *Merriam v. Woodcock*, 104 Mass. 826.

The action is brought for the defendant's breach of his executory agreement to make an accord and satisfaction, and might have been equally well maintained though Hunt had never paid the former judgment.

Davis v. Hedges, L. R. 6 Q. B. 687; *Smith v. Palmer*, 6 Cush. 518; *Bodurtha v. Phelon*, 13 Gray, 418; *Lilley v. Adams*, 108 Mass. 50; *Davenport v. Hubbard*, 46 Vt. 200.

Nor can the fact that the former judgment was rendered on an offer filed by this plaintiff make any difference. Having made up his mind to submit to judgment, both prudence and fair dealing required him to give his adversary an immediate judgment, on the doctrine of *Star Glass Co. v. Morey*, *supra*. And this point has been expressly decided in other States.

Hobbs v. Duff, 23 Cal. 596; *Kauff v. Messner*, 4 Brewster, 98.

In the California case the original defendant paid his money into court; in the Pennsylvania case, he confessed judgment for the amount sued for. Each afterwards brought his cross-action, and it was sustained.

There was a valid consideration for this agreement. "A damage to the promisee is as good a consideration as a benefit to the promisor."

Morton, J., in *Perley v. Balch*, 23 Pick. 283, 286.

Such an additional consideration is sufficient. If the accord had been executed, this consideration would have made it good.

Goodnow v. Smith, 18 Pick. 414; *Brooks v. White*, 2 Met. 283; *Bowker v. Childs*, 3 Allen, 434; *Guild v. Butler*, 127 Mass. 386.

No other question than the two already considered is open to the defendant. All the evidence is not reported; and no other rulings or instructions are stated, because no other objection was taken at the trial.

Khron v. Brock, 4 New Eng. Rep. 424, 144 Mass. 516.

Holmes, J., delivered the opinion of the court:

The plaintiff made three notes to Russell, the defendant's intestate. Afterwards, according to the plaintiff's evidence in the present case, Russell promised that if the plaintiff would assent to a compromise, by the executors of the plaintiff's father's will, of a claim in their hands against third persons, by which compromise the plaintiff's share of his father's estate would be diminished, Russell would accept, in full settlement of the balance due upon the notes, whatever percentage the executors should take in settlement of their claim. The executors then settled the claim for 62 per cent of the amount, with the plaintiff's assent; then Russell died, and suit was brought by his administrator, the present defendant, upon the notes against the present plaintiff. The latter pleaded a general denial and payment, and afterwards made an offer of judgment for the full amount of the notes, interest, and costs, which was accepted; and the sum was paid. The present suit is upon Russell's alleged agreement. The defendant asked a ruling that the agreement was without consideration, and also that the judgment in the former case was a bar. Both rulings were refused, and he excepted.

It is very plain that the jury were warranted in finding that the plaintiff's assent to the compromise was dealt with by the parties as a consideration,—that is, as the conventional inducement of Russell's promise,—and not merely as a condition precedent; and that, if it was so dealt with, it was sufficient. Evidence, or even an admission, that the compromise was for the plaintiff's advantage, would not alter the case. In determining whether or not an act was dealt with, by the parties to an oral agreement, as a consideration, the fact that its consequences were seen to be advantageous to the actor may be important; but, on the question of sufficiency alone, it is enough that the immediate effect of the act is an abandonment of an actual or supposed right, whatever the balance of advantages may be in the long run. It is hard to imagine any change of position, not made in pursuance of a previous duty, which may not be sufficient as a consideration, or which is not a detriment in a legal sense.

If Russell had received the 62 per cent as agreed, and the suit had been brought for the residue, the question would arise whether the acceptance of less than the sum due, upon a collateral consideration, could be distinguished from an acceptance of less before the notes fell due,

or, like that, constituted an accord and satisfaction (*Bouker v. Childs*, 3 Allen, 484, 486); and, if it was technically a satisfaction, whether, like a payment (*Fuller v. Shattuck*, 18 Gray, 70), it must not have been pleaded in the suit upon the notes if it was to be relied on at all, or whether there remained any contract unexecuted by the party satisfied, which he would break if he afterwards brought suit. But Russell did not accept the 62 per cent; so that the only question is whether his agreement in any other way extinguished the notes in whole or in part, since in that case the judgment might be a bar.

The agreement was not itself a satisfaction. It was not a new contract substituted for the notes and entitling the plaintiff to demand their surrender. Neither could it operate as a release of 88 per cent of the notes, when the percentage was fixed by the compromise referred to. Language sometimes has been used which suggests that an agreement for sufficient consideration might take effect by way of release, although not under seal. *Goodnow v. Smith*, 18 Pick. 414, 416; *Petty v. Allen*, 184 Mass. 265, 267; *Taylor v. Manners*, L. R. 1 Ch. 48. But the common law knows no such release. *Shaw v. Pratt*, 22 Pick. 805, 808. The consideration of the notes being executed, the agreement could operate only by way of accord and satisfaction. See *Cumber v. Wane*, 1 Smith, Lead. Cas. 7th Am. ed. *489, and notes; *Bragg v. Danielson*, 1 New Eng. Rep. 727, 141 Mass. 195, 196; *May v. King*, 12 Mod. 537, 538. The suggestions which we are considering, if stated in technical form, would have to be that Russell accepted the plaintiff's assent to the compromise which he desired in satisfaction of 88 per cent of the notes. But this is plainly a distortion of the evidence; according to which the assent was accepted, not as partial satisfaction of a debt, but as the consideration for a promise.

If, however, the jury might have been warranted in finding that the agreement and what was done under it had released or satisfied 88 per cent, they were warranted, at least equally, in finding that it was purely executory in purport as well as in form, viz., to accept a percentage in satisfaction when it was paid. The court could not rule, as matter of law, that the opposite construction was the true one, or assume the opposite construction as a foundation for its rulings. But it may be said that the contract must have been found to embrace the element that Russell would not sue for more than 62 per cent. And it may be argued that, if not technically a release, it ought to have been available in defense *pro tanto*, by way of estoppel or otherwise, in order to avoid circuity of action, upon the same principle that a covenant not to sue is allowed to enure as a release. The answer is that, whether available in this way or not,—whether or not such a defense would escape the objection that in substance it was accord without satisfaction,—the plaintiff was not bound to use the agreement in defense. For if, as we have tried to show, and as the suggestion under consideration assumes, Russell's agreement did not extinguish the whole or any part of the notes, but left them in full force, it also necessarily retained its independent character as a collateral con-

tract. See, further, *Costello v. Cady*, 102 Mass. 140; *Blake v. Blake*, 110 Mass. 202.

A breach of it was a substantive cause of action, upon which the present plaintiff might bring his own suit in his own way; and he was no more bound to plead it than he would have been bound to plead a set-off, fraud, or a breach of warranty. *Smith v. Palmer*, 6 Cush. 518, 521; *Cobb v. Curtiss*, 8 Johns. 470. See *Burnett v. Smith*, 4 Gray, 50, 52; *Davis v. Hedges*, L. R. 6 Q. B. 687.

When a defendant has the choice of setting up a matter in defense, or of suing upon it in another action, if he chooses not to set it up in defense, of course the judgment in that action is no bar to a subsequent suit by him. *Smith v. Palmer*, *supra*; *Star Glass Co. v. Morey*, 108 Mass. 570, 572; *Davis v. Hedges*, *supra*. Russell's agreement was not pleaded in the former action. Even if it had been executed, it would not have been admissible under a plea of payment. *Utch v. Muller*, 3 New Eng. Rep. 372, 148 Mass. 879; *Grinnell v. Spink*, 128 Mass. 25. The present plaintiff, not having set up the agreement, and having no other defense, very properly saved himself costs, and his antagonist delay, by submitting at once to the inevitable, and offering judgment. See *Riggs v. Burbridge*, 15 M. & W. 598.

Exceptions overruled.

Ellen C. RICE

v.

NEW ENGLAND MUTUAL AID SOCIETY.

1. Where an **assessment insurance corporation**, having received payment of an **assessment after** the same was **payable** by terms of the certificate of membership, levies subsequent assessments upon the dilatory member and accepts due payment thereof, it **waives** the **forfeiture** occasioned by failure to pay former assessments when due.
2. Where such corporation receives **payment of an assessment after** the same is **due, on condition** that the assured is in good health, such **condition** does not reach forward and **apply to later payments** upon subsequent assessments, made in ignorance that the assured was in ill health at the time of the former payment.
3. An **unconditional acceptance** of an assessment **waives** all former known grounds of **forfeiture**.

(Suffolk—Filed March 2, 1888.)

ON defendant's exceptions. *Overruled.*

This action was tried in the Superior Court before Bacon, J. It was upon a certificate of insurance issued by the defendant society, a corporation organized under the laws of Massachusetts, upon the life of Thomas G. Rice. Said Ellen C. Rice was the wife of said Thomas G. Rice, and the beneficiary named in said certificate. The defense relied on was that said certificate had lapsed, and become null and void under the circumstances hereinafter stated.

Said Ellen C. Rice has died since the date of the writ, and Henry G. Rice, her administrator, and the administrator *de bonis non* of said Thomas G. Rice, has been admitted as plaintiff in this action. Said Thomas G. Rice died December 17, 1885, and notice and proofs of his death were duly furnished the defendant. Said certificate was issued upon a written application, signed by said Thomas G. Rice, for membership in Class A of the defendant society, which contained the following covenant or words, viz.: "It is further understood and agreed as follows: That a printed notice, expiring thirty days from date and mailed within one day of the date thereof, shall be sufficient notice of any assessment levied." And the certificate contained the clause that if the member "shall omit or neglect to pay to said society, within thirty days of date of notice, the annual fee of \$5, the advance assessment, or any regular assessment of \$6.50 that may be made by said society upon him under this certificate, then, in every or either event above named, this certificate shall thereby become null and void."

It appeared that the defendant, in 1888, and again in 1885, by notices, notified said Thomas G. Rice that the assessments named in said notices made by the defendant on him under said certificate were overdue and unpaid, and that said certificate was lapsed, but that the defendant would renew the same if said assessments were promptly paid; and a certificate that he was in good health, signed by him, and duly witnessed, was furnished, as stated in said notices. But there was no evidence that such certificates were made by said member, except that the assessments were paid to and accepted by the company. It also appeared that in as many as nine instances, between August 9, 1888, and the time he became sick, as hereinafter stated, said Thomas G. Rice paid assessments more than thirty days after the date printed on the notices of such assessments, and upon such payments received in every instance a receipt on the face of which was plainly stamped the words: "This assessment is accepted on condition that the member is in good health." That the residence of said member was stated in said certificate as Cambridge, and that he in fact resided in that part of Cambridge called Cambridgeport, and that his postoffice address was Cambridgeport. There was evidence tending to show that on or before July 17, 1885, a regular assessment was made by said society upon the class in which said Thomas G. Rice held said certificate; that notices thereof were deposited in the postoffice at Boston on July 18, 1885, between two and four o'clock p. m. There was no evidence that among these notices was included one to Rice, but one was found in the pocket of said Rice on August 19, 1885. If a notice to said Rice was among those so mailed, it would, in due course of mail, have arrived at Cambridge July 19, and, that being Sunday, would not have reached the Cambridgeport postoffice until July 20 at about 9 o'clock a. m. That said Thomas G. Rice was not in good health on August 19, 1885, and died on December 17, 1885, of Bright's disease of the kidneys; that he probably had it on July 30, and August 17-19, 1885. There was no evidence that Rice ever knew the nature of his disease. On said August 19,

1885, said Henry G. Rice found in the pocket of said Thomas G. Rice the said notice of assessment dated July 17, 1885, and, without the knowledge of, and without any direction from, said Thomas G. Rice, sent said notice, with \$6.50, by a messenger, to the office of the defendant. That the defendant's cashier received said \$6.50 without inquiry or objection, stamped on said notice the words: "This assessment is accepted on condition that the member is in good health," and receipted for said sum on said notice; which notice so stamped and receipted was given to said messenger. That the money so paid was the money of said Henry G. Rice, and afterwards repaid to him by said Thomas G. Rice. That nothing was said to or by said messenger relative to the health of said Thomas G. Rice, nor did said messenger know anything about it. It also appeared that afterwards, and before the death of said Thomas G. Rice, six other assessments, made by the defendant upon said Rice under said certificate, were paid by the plaintiff, at the request of said Thomas G. Rice, to the defendant, in each instance within the thirty days intervening between the dates printed upon the third line of the notices of said assessments and the dates of expiration of the notices printed at the top margin thereof. These assessments were received unconditionally by the defendant; and, at the times of such last-named payments, the defendant made no inquiry concerning the health of said Thomas G. Rice, and no information was furnished to the defendant concerning said Rice's health; and there was no evidence that the defendant had any knowledge that said Rice was not in good health when the payment of August 19, 1885, and the said subsequent payment of assessments, were made, until after the death of said Rice.

Against the objection of the defendant, the court ruled, and instructed the jury, in substance, that the defendant company, having received said six assessments, made after the payment of the one paid on condition August 19, 1885, without making any inquiry to ascertain the facts concerning the health of said Thomas G. Rice, waived the breach of the certificate, if there was any at the time of said payment on August 19, 1885; that if the jury find that the defendant did receive, without inquiry, assessments subsequently to that received on August 19, 1885, and that they were paid by the plaintiff, that would amount to a waiver of any default or nonpayment at that date, August 19, 1885; that if the jury are satisfied that without inquiry the defendant did receive such subsequent payments, it would amount to a waiver of a default at that time, and it would make no difference that said six subsequent assessments were paid before they were due.

The defendant alleged exceptions.

Messrs. Ely, Gates, & Keyes, for defendant:

I. Upon the facts, the receipt by the defendant of said subsequent assessments was not a waiver of the breach of the certificate relied on by the defendant.

Hoxie v. Home Ins. Co. 83 Conn. 21; *Globe Mut. L. Ins. Co. v. Wolff*, 95 U. S. 836 (24 L. ed. 887); *Mobile L. Ins. Co. v. Pruett*, 74 Ala. 48; *Servicos v. Western Mut. Aid Co.* 67 Iowa, 86.

1. The doctrine of waiver, as asserted

against insurance companies to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel.

Globe Mut. L. Ins. Co. v. Wolff, *supra*.

2. In order to create an estoppel *in pais*, the declarations or acts relied upon must have been accompanied with a design to mislead.

Cambridge Sav. Inst. v. Littlefield, 6 Cush. 210; *Plumer v. Lord*, 9 Allen, 455; *Andrews v. Lyons*, 11 Allen, 349; *Turner v. Coffin*, 12 Allen, 401; *Page v. Wight*, 14 Allen, 182; *Zuchtman v. Roberts*, 109 Mass. 58.

3. It is said that the doctrine of estoppel has been introduced into our system of jurisprudence for the purpose of protecting the party from a loss arising from fraud or gross negligence of another in concealing his rights.

Cambridge Sav. Inst. v. Littlefield, *supra*.

4. If the law recognizes a doctrine of waiver by conduct, distinguished from that of estoppel *in pais*, the essential elements of such waiver are knowledge of the right claimed to be waived and intention to waive it; and these must be concurrent.

West v. Platt, 127 Mass. 367; *Oakes v. Manufacturers F. & M. Ins. Co.* 135 Mass. 248; *Holdsworth v. Tucker*, 3 New Eng. Rep. 499, 143 Mass. 369.

5. The six subsequent payments and receipts relate back to the condition of the receipts of August 19, 1885, and are as much controlled and affected by it as though the words of that condition were stamped on each of said subsequent receipts.

6. The evidence shows the utmost good faith and fair dealing on the part of the defendant: *a.* Each notice of assessment conspicuously shows at its top when it expired. *b.* The condition of good health on receipt of payment in arrear was invariably insisted on. *c.* The insured clearly knew his rights and risks.

II. The state of health of the insured was peculiarly within his own knowledge.

The acceptance and retention of the receipt of August 19, 1885, was an affirmation and representation that the insured was then in good health. The insured intended that the defendant should act on that representation, and it did act upon it. The plaintiff is therefore estopped from taking advantage of such acts of the defendant, to its prejudice.

Dewey v. Field, 4 Met. 381; *Osgood v. Nichols*, 5 Gray, 420; *Cartwright v. Bate*, 1 Allen, 514; *Audenried v. Betteley*, 5 Allen, 382.

Messrs. S. J. Thomas and C. P. Sampson, for plaintiff:

The payment of this assessment having been seasonably made, the defendant had no right to attach a condition to its receipt.

Lothrop v. Greenfield S. & Mut. F. Ins. Co. 2 Allen, 82.

The well-settled rule of law is that conditions in an insurance policy will not be extended beyond their clear import, and that equivocal expressions therein must be construed most strongly against the company.

Commercial Ins. Co. v. Robinson, 64 Ill. 265; *Rolker v. Great Western Ins. Co.* 4 Abb. App. 76; *Rann v. Columbus Home Ins. Co.* 59 N. Y. 387.

A construction is preferred which prevents avoidance of a policy.

3 MASS.

Holly v. Metropolitan L. Ins. Co. 7 Cent. Rep. 263.

It has been decided, in cases where mailed notices of an assessment were not received by the insured, that he did not forfeit his policy by not paying the assessment within the time named on the notice; and the ground of the decision is that the insured is entitled to information of the assessment.

Castner v. Farmers Mut. F. Ins. Co. 50 Mich. 273; *Home L. Ins. Co. v. Pierce*, 75 Ill. 426. See also *Mullen v. Dorchester Mut. F. Ins. Co.* 121 Mass. 171.

1. If there was failure to comply with the terms of the policy, it was waived by the acts of the defendant.

The provision for a forfeiture was solely for the benefit of the defendant, and might be waived, and was waived by frequently receiving payment after the dates named on the notices.

Och v. Homestead Bank & L. Ins. Co. 21 Pittsb. L. J. 98.

If the company so deals with the insured as to induce belief that a forfeiture clause will not be insisted upon, it will not be permitted to take advantage of a default thus encouraged.

Helme v. Philadelphia L. Ins. Co. 61 Pa. 107; *Home L. Ins. Co. v. Pierce*, 75 Ill. 426.

The terms of the policy may be waived by the custom of its office; in dealing with its insured.

Carroll v. Charter Oak Ins. Co. 10 Abb. Pr. N. S. 172; *Kolgers v. Guardian L. Ins. Co.* Id. 176; *Bouton v. American Mut. L. Ins. Co.* 25 Conn. 542; *Bodine v. Exchange F. Ins. Co.* 51 N. Y. 117; *Hanley v. Life Assn. of America*, 4 Mo. App. 258; *Dilleber v. Knickerbocker L. Ins. Co.* 76 N. Y. 567.

2. The defendants had full knowledge of the only essential fact,—viz., that thirty days since the date printed on the notice had elapsed,—when they received payment of the assessment on August 19. If the payment was late, they had a right to require evidence of the health of the insured, but could not enforce that right without notice to him that they would otherwise no longer continue to receive payments.

Buckbee v. United States Ins. A. & T. Co. 18 Barb. 541.

By receiving without inquiry the payment claimed to be overdue, the defendant waived its rights to claim a forfeiture.

Hodsdon v. Guardian L. Ins. Co. 97 Mass. 144; *Froehlich v. Atlas L. Ins. Co.* 47 Mo. 406; *Wing v. Harvey*, 5 De G. M. & G. 265; *Cotton States L. Ins. Co. v. Lester*, 62 Ga. 247; *Georgia Masonic Mut. L. Ins. Co. v. Gibson*, 52 Ga. 640; *Och v. Homestead Bank & L. Ins. Co.* 21 Pittsb. L. J. 98.

Whatever rights may have been reserved by the conditional receipt of the assessment on August 19 were waived by the unconditional acceptance of six subsequent assessments upon the policy.

Young v. Mutual L. Ins. Co. 2 Sawy. 825, and cases cited above.

The principle is the same as that in cases where answers to certain printed questions in an application are omitted, and a policy issued nevertheless. It is held that by thus issuing the policy the insurer waives the information called for by the unanswered questions.

Hall v. People's Mut. F. Ins. Co. 6 Gray, 191;

Liberty Hall Assn. v. Housatonic Mut. F. Ins. Co. 7 Gray, 261.

C. Allen, J., delivered the opinion of the court:

If it be assumed that the payment made on the 19th of August was too late, the question remains whether the company, by its subsequent acts, waived a right to avoid the policy or certificate of insurance on that ground.

Without expressing any opinion as to the effect of the retention of that money, we think the levy of the subsequent assessments, and the acceptance of the money paid upon them, amounted to such a waiver. When the time came for the levy of a new assessment, if Mr. Rice's policy was to be treated as still in force, he would properly be included in the assessment; otherwise not. Under this state of things six other assessments upon him were made by the company, all of which were seasonably paid. There was no determination by the directors of the company that, for the time being, Mr. Rice's policy should be treated as not in force, or suspended; but in making the new assessments, so far as appears, no pains were taken, and no intention was formed, to exclude him. No condition was in express terms annexed to the levy of these new assessments, or to the acceptance of the payments by the assured upon them. The company, however, contends that the condition of the former acceptance reaches forward and applies also to the later payments; and that it is not bound by later assessments which it made, and later payments which it received, in ignorance that the assured was in ill health at the time of the former payment. But it cannot be allowed in this way to imply a condition in favor of a forfeiture. It had knowledge that, on the former occasion, the payment had been made too late, and that the money had been accepted with a condition annexed. If, before levying a new assessment, the company wished to know the particulars as to Mr. Rice's health, and thus to determine whether the payment was valid or not, it was incumbent on it to make inquiry. Instead of doing so, instead of notifying him that it wished for some positive evidence or statement upon the subject, instead of imposing a further condition relating back to the time of the former payment, the company made an unconditional call upon him for the payment of the new assessment. It acted under no deception or misrepresentation, but with all the information which it could take the pains to acquire. We are unable to see how it can properly be held that the former conditional acceptance cuts down the effect of the later unconditional acceptance. The condition related to the former payment alone. Suppose the payment of the former assessment had never been made at all; and the company, without insisting upon the nonpayment as a ground of forfeiture, had levied new assessments upon the assured, which were all duly paid and accepted without condition,—could it be contended that there was no waiver? An unconditional acceptance of an assessment waives all former known grounds of forfeiture, and this effect is not waived or limited because an acceptance of a former assessment had been on condition and had not amounted to such a waiver. *Hodsdon v. Guar-*

dian L. Ins. Co. 97 Mass. 144; *Bouton v. American Mut. L. Ins. Co.* 25 Conn. 549; *Phoenix Mut. L. Ins. Co. v. Raddin*, 120 U. S. 188 (30 L. ed. 644).

Exceptions overruled.

Henry C. RICE, Admr.,

NEW ENGLAND MUTUAL AID SOCIETY.

1. The designation of a friend or creditor as beneficiary in the certificate of membership in an assessment insurance corporation is invalid.
2. An invalid designation of beneficiary in such a certificate does not render the whole contract invalid; and if the member survives all original or substituted beneficiaries, his membership shall go to his legal heirs.
3. The fact that the declaration avers that the action is brought for the benefit of a beneficiary who is not, under the statute, permitted to take, will not defeat an action, by the administrator of a deceased holder of a certificate of membership, to recover the amount due on such certificate.
4. If the administrator receives the money on the certificate, it will be a discharge to the company of its liability.
5. Where payment of an assessment due from the assured to the company is received after forfeiture, on condition that the assured continues in good health, the subsequent levy and receipt of assessments from the assured, without regard to such conditions, is a waiver of the forfeiture.

(Suffolk—Filed March 2, 1888.)

ON report. Judgment for plaintiff.

The action was tried in the Superior Court by Thompson, J., without a jury.

The court found that on the 7th day of July, 1888, Thomas G. Rice was indebted to Frederick H. Rindge, Clarissa H. Rindge, and Francis J. Parker, administrators of the estate of Samuel B. Rindge, in the sum of \$6,368, and on said date the defendant, a corporation duly established under the Acts of 1874, chap. 875, as amended by the Acts of 1877, chap. 204, issued a certificate or policy, wherein said administrators were made beneficiaries, as collateral security for the payment of said indebtedness. The word "reissue" on the face of the certificate refers to the fact that on November 7, 1879, on the application of Thomas G. Rice, a certificate was issued to him in which his wife, Ellen C. Rice, was named as beneficiary; and on the 7th day of July, 1888, this certificate was substituted therefor. In the certificate of organization made by the officers, and the certificate of incorporation issued by the secretary of the Commonwealth under the provisions of Acts 1874, chap. 375, § 4, the purpose for which said corporation was constituted was stated to be to render as

sistance to the widows, orphans, or other dependents of deceased members, and also to promote the cause of temperance.

Before the issuing of said policy or certificate the said Thomas G. Rice had made an application in writing therefor, which contained, among other things, the following: "I hereby covenant that a misstatement or concealment of any facts touching my health, or material to the question of longevity, or any omission or neglect to pay any of the assessments made by said society upon me or my certificate at the rate of \$5.25 per death, for a period of thirty days after notice,—that then, and in every or either event, the contract on the part of said society shall thereupon become null and void, and the society shall be absolutely released from any and every liability accruing to me or to my heirs, representatives, or assigns, by virtue of the certificate of membership which may be issued hereon, and all fees and assessments paid by me shall be forfeited to said society.

"Printed notices mailed thirty days in advance shall be sufficient notice of any assessment levied."

It appeared that said certificate was duly issued by the authority of the said corporation, if said corporation had power to issue the same for the benefit of the beneficiaries named in the said certificate.

Thomas G. Rice died on December 17, 1885, and Henry C. Rice, the plaintiff, was appointed administrator of his estate. Correct and satisfactory notice and proof of the death of said Thomas G. Rice were furnished the defendant more than sixty days before the beginning of this action.

An assessment upon surviving members for the death fund of said class amounted to the sum of over \$5,000, and such an assessment had been levied and received by said defendant before the death of Thomas G. Rice, and was then held by it to provide for the payment of the next legal claim by reason of the death of a member.

It was agreed that, if the plaintiff was entitled to recover in this action, he was entitled to recover \$5,000 and interest from the date of the writ.

After the passage of Acts 1885, chap. 183, the defendant did not reincorporate under said chapter; but, being then engaged in transacting the business of life insurance on the assessment plan under its certificate of organization hereinbefore mentioned, continued, and has continued to the present time, to exercise all rights, powers, and privileges conferred by said chapter and its articles of incorporation not inconsistent with said Act, the same as if reincorporated thereunder.

The secretary of the defendant company caused notices, dated July 17, 1885, of an assessment to be put into the mail in Boston on the afternoon of July 18, 1885, to the members of the company; a copy of the notice was mailed to Thomas G. Rice on that afternoon, addressed to him at "Cambridge, Mass.,"—which was the place of his residence,—and in the ordinary course of mail would be sent from Boston to the postoffice in Cambridge on Sunday, the 19th, reaching there about 9 A. M., and would be delivered at his residence by the carrier's delivery on Monday morning, the 20th.

On the morning of August 17, 1885, said Rice was taken violently ill, and for several days was too ill to attend to business of any kind. On the 19th of August, 1885, his son found the notice above referred to in his father's pocket, and sent it, with the amount of the assessment (\$5.25), to the office of the defendant, where it was receipted by the treasurer and handed back stamped: "This assessment is accepted on condition that the member is in good health." Nothing was said on either side as to the condition of Thomas G. Rice.

Said company subsequently levied six different assessments on said Thomas G. Rice, and accepted payment of the same unconditionally, without making any inquiry as to his health; and they knew nothing about it until after his death.

Prior to the month of August, 1888, some twenty assessments had been levied on said Thomas G. Rice by the defendant under this certificate, and had been paid by him. Some of these assessments were not paid until after they were due, and in each case said Rice gave to the defendant a certificate affirming that his health was good.

The court ruled that the certificate was forfeited by reason of nonpayment of the assessment called by the notice dated July 17, 1885, within thirty days from said July 17, 1885, and that there was no evidence to justify a finding of waiver of the forfeiture by the defendant, and found for defendant. The case was reported to this court. If either of the rulings was erroneous, judgment was to be entered for plaintiff, unless upon other facts he could not recover, in which case judgment to be entered for defendant.

Messrs. Hutchins & Wheeler, for plaintiff:

The company defended the action on the ground, (1) that the certificate was forfeited by nonpayment of an assessment when due; and (2) that the contract was *ultra vires* and void.

By the terms of the report, if there was no forfeiture, or if there was evidence of waiver, judgment is to be entered for the plaintiff, unless the defendant prevails on the ground that the contract was *ultra vires*.

1. There was no forfeiture.

By the terms of this contract between the parties, the payment being made thirty days from the date when Rice received notice of the assessment, it was in season, and there was no forfeiture. The certificate contains the condition that it shall be void if any assessment is not paid "within thirty days of date of notice." The date of notice to a person is the date he receives notice. The thirty days run, therefore, not from any date that may be printed on the instrument containing the notice, nor from the date such instrument may have started on its way, but they run from the time the member receives notice.

May v. Rice, 108 Mass. 150.

The defendant relies on this provision in the application: "Printed notices mailed thirty days in advance shall be sufficient notice of any assessment levied."

The only meaning that the words seem to us to be capable of is, that a notice mailed thirty days in advance of the levy of an assessment

shall be sufficient to fix the liability of the member to pay the assessment. This has nothing to do with the forfeiture.

If it did not mean what it says, but that the policy was to be forfeited if an assessment was not paid within thirty days from the time the notice was mailed, then it would be inconsistent with the provision in the certificate that the policy was to be forfeited if the assessment was not paid within thirty days from the time the notice was received. By which of these provisions is the member to be governed? In determining when he must pay, on which instrument is he to rely? The application, which is in the hands of the company, and which he has not seen since he signed it; or the certificate itself, which is in his own possession and from which he would understand that his thirty days in which to pay the assessment ran from the time he received the notice? He is justified in relying on the provisions of the certificate.

A provision in a contract, working a forfeiture, will be construed strictly against the party for whose benefit it is made, and to avoid a forfeiture if possible.

May, Ins. §§ 170, 367; *North Berwick Co. v. New England F. & M. Ins. Co.* 52 Me. 386.

2. If the court shall be of opinion that there was a forfeiture, there was evidence that it was waived by the subsequent conduct of the defendant.

The forfeiture is claimed to have taken place on August 17, 1885. After that date, and after the conditional receipt of August 19, the defendant levied six different assessments upon this certificate, and, as appears by the report, accepted payment of them "unconditionally," without making any inquiry as to Rice's health.

These assessments the defendant has retained and never offered to return.

The acceptance of premiums after knowledge of a forfeiture has repeatedly been held to be a waiver, and an election to continue the policy in force, as matter of law.

Hodson v. Guardian L. Ins. Co. 97 Mass. 144; *Wing v. Harvey*, 5 De G. M. & G. 265; *Southern L. Ins. Co. v. McCain*, 96 U. S. 84 (24 L. ed. 658); *Bevin v. Connecticut Mut. L. Ins. Co.* 28 Conn. 244; *Mutual L. Ins. Co. v. French*, 30 Ohio St. 240; *North Berwick Co. v. New England F. & M. Ins. Co.* 52 Me. 386; *Keenan v. Dubuque Mut. F. Ins. Co.* 18 Iowa, 375; *Buckley v. Garrett*, 47 Pa. 204.

The breach of a condition subsequent in a policy is waived by any act done by the company afterwards, implying that the insurance is to continue.

Oakes v. Manufacturers F. & M. Ins. Co. 135 Mass. 248.

"Of course, however," says the court in that case, "if the act thus relied on as an indirect election be shown to have been done in ignorance of the breach of condition, it will not continue the insurance, unless in the exceptional case where the insurer has acted with indifference to what the facts might be, and has assumed to act with equal effect however they might turn out."

As to the contention that the condition attached to the receipt of August 19 reaches forward and attaches to the subsequent receipts, we submit that this is expressly negatived, as a mat-

ter of fact, by the statement in the report that the payment of these later assessments was accepted unconditionally by the company. It is the case put by the court in *Oakes v. Manufacturers F. & M. Ins. Co.* where the company "has acted with indifference as to what the facts might be, and has assumed to act with equal effect however they might turn out."

The fact of the levy and the receipt of these premiums unconditionally, and the failure of the company at any time since to offer to restore them, were evidence which would have justified a finding of a waiver; and as the court ruled that there was no such evidence, the ruling was erroneous, and, in accordance with the terms of the report, judgment should be entered for plaintiff.

8. Although the contract may have been *ultra vires* when made in 1883, yet Act 1885, chap. 183, gave the defendant company power to make it; and having treated the contract as in force since Act 1885, chap. 183, was passed, the company ratified the contract when it had acquired power so to do, and cannot now object to being held liable upon it.

"The power to make all such contracts as are necessary and usual in the course of business, or are reasonably incident to the objects for which a private corporation is created, is always implied where there is no positive restriction in the charter."

Morville v. American Tract Society, 123 Mass. 129, 186.

"Such transactions as are customary or usual in the prosecution of a business of the kind in which a corporation is engaged, are impliedly authorized by its charter."

Morawetz, Priv. Corp. 1st ed. § 189.

By levying and receiving payment of these assessments, the company recognized this certificate as a valid contract, and, having then acquired power to make it, these acts operated as a ratification, and it thereupon became binding upon them.

Where a contract was made in the name of a corporation which was then in process of formation, but had not at that time taken all the steps made necessary by law to entitle it to begin business, but after having taken those steps acted upon the contract as though it were binding, it was held that the company was liable upon it. The court said: "But it is said the corporation at the date of these letters was forbidden to do any business, not having then filed its articles of association as required by the statute. To this objection there are several answers. The corporation subsequently ratified the contract by recognizing and treating it as valid. This made it in all respects what it would have been if the requisite corporate power had existed when it was entered into."

Whitney v. Wyman, 101 U. S. 393 (25 L. ed. 1050); *Kelley v. Newburyport & A. Horse R. Co.* 2 New Eng. Rep. 383; 141 Mass. 496.

It cannot be objected that, if the contract was *ultra vires* when made, it is incapable of ratification; for cases are by no means infrequent where a contract that was *ultra vires* when made has been afterward ratified by the Legislature, and has thereafter been held to be binding upon all parties.

Shaw v. Norfolk County R. Co. 5 Gray, 162, 179, 180; *Whitewater Valley Canal Co. v. Valletti*.

63 U. S. 21 How. 414 (16 L. ed. 154); Morawetz, Priv. Corp. 1st ed. § 80, note 1.

4. Even if Act 1885, chap. 188, had not been passed, the defendant is liable on the certificate, as the contract has been completely performed on the plaintiff's part by the payment of all the premiums.

The contention of the defendant is not that the certificate is void because there was any legislative provision forbidding it to make such a contract, but because Act 1877, chap. 204, only gives the society power to insure for the benefit of widows, orphans, or other dependents of deceased members, and there was no power given it to insure for the benefit of a creditor.

The case therefore comes within the rule that when a contract is not prohibited by statute or good morals, and has been executed on one side, and the sole defect is a want of authority on the part of the corporation to make the contract, the defendant is not permitted to set this up as a defense.

Slater Woolen Co. v. Lamb, 3 New Eng. Rep. 443, 143 Mass. 420; *Chester Glass Co. v. Dewey*, 16 Mass. 94; Morawetz, Priv. Corp. §§ 100, 103, 108.

"The plea *ultra vires* should not as a general rule prevail, whether interposed for or against a corporation, where it would not advance justice, but, on the contrary, would accomplish a legal wrong."

Whitney Arms Co. v. Barlow, 63 N. Y. 62.

In Sedgwick on Statutory and Constitutional Law, at p. 78, the following statement is made: "Where it is a simple question of authority to contract, arising either on a question of regularity of organization, or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted, in an action founded upon it, to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract the benefit of which he retains."

This language has been quoted with approval by the Supreme Court of the United States.

Union Nat. Bank v. Matthews, 98 U. S. 621 (25 L. ed. 188); *Pine Grove Twp. v. Talcott*, 86 U. S. 19 Wall. 668 (23 L. ed. 227).

In *Slater Woolen Co. v. Lamb*, 3 New Eng. Rep. 443, 143 Mass. 420, the court, in deciding that the plaintiff corporation could recover in an action for goods sold by it, even if the contract of sale was not within the powers conferred upon it by its charter, says: "We are not required to determine whether an action can be maintained to recover the price [as distinguished from the value of goods], as no exception has been taken to the measure of damages."

"If the statute does not declare a contract made in violation of it to be void, and if it is not necessary to hold the contract void in order to accomplish the purpose of the statute, the inference is that it was intended to be directory and not prohibitory, of the contract."

Bowditch v. New England Mut. L. Ins. Co. 2 New Eng. Rep. 238, 141 Mass. 292.

5. The certificate is under seal, and is an agreement with Thomas G. Rice to pay to his beneficiaries the amount insured; hence the plaintiff, who is the administrator of Rice, is the proper party to maintain this action.

Flynn v. North American L. Ins. Co. 115 Mass. 449.

When recovered, he will hold the amount in trust for the persons entitled thereto.

Legion of Honor v. Perry, 1 New Eng. Rep. 715, 140 Mass. 590.

Messrs. Ely, Gates, & Keyes, for defendant:

1. The defendant had no power or authority, under the laws of Massachusetts or its certificate of incorporation, to issue the certificate declared on in this action; and said certificate never had any validity.

Stat. 1874, chap. 375; Stat. 1877, chap. 204; Pub. Stat. chap. 115, §§ 2, 8; Stat. 1882, chap. 195; *Legion of Honor v. Perry*, 1 New Eng. Rep. 715, 140 Mass. 590; *Daniels v. Pratt*, 3 New Eng. Rep. 490, 143 Mass. 216; *Briggs v. Earl*, 139 Mass. 473; *Davis v. Smith Organ Co.* 181 Mass. 258.

2. Stat. 1885, chap. 188, did not affect the validity or invalidity of the certificate declared on in this action.

If such be not the true interpretation of the statute, it is unconstitutional.

King v. Dedham Bank, 15 Mass. 447; *Com. v. Essex Co.* 18 Gray, 239.

By the receipt of assessments by the treasurer of the defendant from Thomas G. Rice after the passage of Stat. 1885, chap. 188, the defendant is not estopped to deny that he was still a member.

Burbank v. Boston Police R. Assn. 4 New Eng. Rep. 241, 144 Mass. 484; *Webster v. Buffalo Ins. Co.* 2 McCrary, 848.

3. The certificate issued on November 7, 1879, to Thomas G. Rice for the benefit of his wife, Ellen C. Rice, was a settlement in trust for her benefit, which he could not revoke without her consent. The case does not find that he reserved to himself any power of revocation or of changing the beneficiary. The defendant is therefore not liable on the certificate declared on in this action.

Pingrey v. National Life Ins. Co. 4 New Eng. Rep. 229, 144 Mass. 874.

If such power of revocation had been reserved, it would not affect the validity of the trust unless it was exercised according to the terms in which it was reserved.

Stone v. Hackett, 12 Gray, 227.

4. The assessment, notices of which were dated July 17, 1885, was legal and valid.

Stat. 1880, chap. 196, § 8; *Crossman v. Massachusetts Ben. Assn.* 3 New Eng. Rep. 517, 143 Mass. 485.

5. If the insured omitted or neglected to pay said assessment within the time limited by the certificate, said certificate thereby became null and void.

Pitt v. Berkshire L. Ins. Co. 100 Mass. 500; *Bigelow v. State Mut. L. Assur. Assn.* 123 Mass. 113; *Crossman v. Massachusetts Ben. Assn. supra*; *New York L. Ins. Co. v. Statham*, 98 U. S. 24 (23 L. ed. 789); *Globe Mut. L. Ins. Co. v. Wolff*, 95 U. S. 827 (24 L. ed. 887); *Klein v. New York L. Ins. Co.* 104 U. S. 88 (26 L. ed. 662).

Even sickness accompanied by delirium does not excuse nonpayment.

Carpenter v. Centennial Mut. L. Assn. 68 Iowa, 453; *Klein v. New York L. Ins. Co. supra*;

Thompson v. Knickerbocker L. Ins. Co. 104 U. S. 252 (26 L. ed. 765); *Wheeler v. Connecticut Mut. L. Ins. Co.* 82 N. Y. 548.

6. Said assessment was not paid within the time limited by said certificate.

The plaintiff and said member, by accepting the conditional receipt, admitted that the assessment was paid after it was due.

7. The conduct of the parties clearly shows that prompt payment of assessments was strictly required.

Of twenty assessments ten were received when in arrear, but in every case on condition that insured was in good health. Of these one was paid on the thirty first day from the date printed in the notice.

If an agreement be obscurely expressed, the acts and conduct of the parties are the best expositors of it.

Cambridge v. Lexington, 17 Pick. 230; *Stone v. Clark*, 1 Met. 878; *Howard v. Fessenden*, 14 Allen, 124; *Stevenson v. Erskine*, 99 Mass. 387; *Morris v. French*, 106 Mass. 326; *Lovejoy v. Lovett*, 124 Mass. 270.

8. The acceptance of the assessment on August 19, 1885, on condition that Thomas G. Rice was in good health, he not being then in good health, did not reinstate him as a member.

Bissell v. American Tontine L. Ins. Co. 2 Bigelow, L. & A. Ins. Rep. 150; *Harris v. Equitable L. Assur. Soc.* 64 N. Y. 196; *Servoss v. Western Mut. Aid Co.* 67 Iowa, 86.

Even if the acceptance had not been conditional, it would not have been a waiver of the forfeiture.

Mowry v. Home L. Ins. Co. 9 R. I. 346; *Mobile L. Ins. Co. v. Pruett*, 74 Ala. 487; *Globe Mut. L. Ins. Co. v. Wolff*, 95 U. S. 827 (24 L. ed. 387).

9. Six assessments subsequently levied were paid, but they were paid before or when they were due. At the time of said payments the defendant had no knowledge of the breach of the condition of the receipt of August 19, 1885, or that Thomas G. Rice was not in good health. Upon these facts, the receipt by the defendant of said subsequent assessments did not reinstate said Thomas G. Rice as a member.

Hoxie v. Home Ins. Co. 32 Conn. 21; *Globe Mut. L. Ins. Co. v. Wolff*, 95 U. S. 326 (24 L. ed. 387); *Mobile L. Ins. Co. v. Pruett*, 74 Ala. 487; *Servoss v. Western Mut. Aid Co.* 67 Iowa, 86.

The defendant is not thereby estopped from insisting upon the condition on which it accepted the assessment called by notice of July 17, 1885.

The state of health of the insured was a fact peculiarly within his own knowledge.

The acceptance and retention of the receipt of August 19, 1885, was an affirmation and representation that the insured was then in good health. The insured intended that the defendant should act upon that representation, and it did act upon it. The plaintiff is therefore estopped from taking advantage of such acts of the defendant to its prejudice.

Dewey v. Field, 4 Met. 381; *Osgood v. Nichols*, 5 Gray, 420; *Cartwright v. Bate*, 1 Allen, 514; *Audenried v. Betteley*, 5 Allen, 382.

10. The defendant is not estopped from making this defense because it has never offered to repay the amount of any of said assessments. The defendant is authorized to retain them by the terms of the certificate.

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If these amounts are wrongly in the possession of the defendant, it is by the fault of the plaintiff or of the insured, and they have never been demanded of the defendant.

Adams v. O'Connor, 100 Mass. 515.

The failure to return the assessment after the death of the insured, and after the insurance company had notice that the plaintiff intended to collect the policy, is not a ratification of the payment.

Busby v. North America L. Ins. Co. 40 Md. 572.

C. Allen, J., delivered the opinion of the court:

The designation of beneficiaries in the policy or certificate of membership is invalid, as the statutes under which the defendant corporation was organized did not authorize it to grant insurance for the benefit of friends. *Daniels v. Pratt*, 8 New Eng. Rep. 480, 148 Mass. 221. But an invalid designation of beneficiaries does not render the whole contract invalid. The contract in terms recognizes that there may be a change or substitution of beneficiaries, and there is a provision that, if the member shall survive all original or substituted beneficiaries, then his membership shall be for the benefit of his legal heirs. This provision is within the authority of Stat. 1882, chap. 195, § 1, heirs being included under the head of relatives; and if there is no other legal designation, this may take effect. *Daniels v. Pratt*, *supra*. By an amendment, the action is now prosecuted in the name of the administrator of the estate of the assured, and he is the proper party to maintain the action. *Bailey v. New England Mut. L. Ins. Co.* 114 Mass. 177, and cases cited; *Flynn v. North American L. Ins. Co.* 115 Mass. 449; *Unity Mut. L. Assur. Assn. v. Dugan*, 118 Mass. 219. This is not controverted; but the defendant contends that the declaration avers that the action is brought for the benefit of Rindge, and therefore that the action cannot be maintained. This objection cannot be supported. If the plaintiff receives the money, it will be a good discharge to the defendant of its liability; and the defendant will not be responsible for the proper application of the money by the plaintiff. It is to be assumed, at this stage of the proceedings, that he will dispose of the funds properly; and he may be compelled to do so by judicial proceedings to which the defendant would not be a necessary party. *Gould v. Emerson*, 99 Mass. 154; *Bailey v. New England Mut. L. Ins. Co.* 114 Mass. 177. The averment that the action is brought for the benefit of Rindge is unnecessary, and may be disregarded.

Since the action is now prosecuted by the proper plaintiff, we need not consider the effect of Stat. 1885, chap. 188, which the plaintiff relies on as enlarging the effect of the defendant's contract.

The other objections to the plaintiff's recovery depend on the same facts which were considered in the case of Rice against this same defendant, *ante*, p. 813, where it was held that the defendant must be deemed to have waived the forfeiture.

According to the terms of the report, the entry must be—

Judgment for the plaintiff.

Abram H. GRANGER, Admr.,

v.

BOSTON & ALBANY R. R. CO.

George W. CHIPMAN, Admr., v. SAME.

1. **Railroads** have the right to exclusive use of **grade crossings** when their trains are passing, and it is their duty to give suitable **warning** of such passing trains to travelers upon the highway.
2. Where a **traveler, disregarding a suitable warning** from a railroad company that its train is about crossing a highway, insists upon crossing the track, without sufficient excuse, he does so at his own risk.
3. It is **negligence** for a traveler to enter upon a railroad track when he is warned that the company requires the exclusive use of the **crossing** for the purposes of its business.

(Suffolk—Filed March 2, 1888.)

ON defendant's exceptions. *Sustained.* These actions were tried together. The cases went to the jury upon the second and third counts of the declaration; the second charged negligence on the part of the defendant.

Plaintiffs' intestates, passing along Cambridge Street, near Alston Station, in Brighton, came to the defendant's crossing after the gates were shut down and the signal lanterns hung up thereon. It was nearly dark, and about ten minutes after the time for a freight train to pass, and the crossing-time for an express train. The intestates went by the end of the gate on to the track, crossed the freight track from fifteen to thirty feet in front of the engine of the freight train, and were caught on the third track by the express train and killed. The bell of the express engine was ringing, the headlight burning, and the train running at its regular speed of between thirty and thirty-five miles an hour.

The defendant requested the court to rule and instruct the jury:

1. That the plaintiffs cannot recover upon the second counts of their declarations.
2. That there was no evidence that the plaintiffs' intestates were in the use of due care.
3. That there was no evidence of the negligence or carelessness of the defendant corporation.
4. The defendant and its servants had a right to suppose that the plaintiffs' intestates would use due care, and were not bound to make any provision against persons who were not in the use of due care, nor to give such persons any notice of existing dangers.
5. If the plaintiffs' intestates entered upon the defendant's tracks carelessly and without the use of due care, and in a hurried manner, to escape a freight train which they saw, and did not look to see whether a passenger train was approaching upon another track, the plaintiffs cannot recover.

The court refused so to rule, to which refusal the defendant excepted.

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To the rulings of the court, so far as they are inconsistent with defendant's prayers for rulings, the defendant excepted.

The jury found for the plaintiff in each action, upon the second counts of their declarations, and the defendant alleged exceptions.

Mr. Samuel Hoar, for defendant:

1. Where a railway line crosses a highway at grade, the relative rights and obligations of the railroad corporation and of travelers on the highway are reciprocal; but it is the privilege of the railroad that its trains shall have the right of way, and that all persons on the highway shall yield precedence to the trains.

Continental Imp. Co. v. Stead, 95 U. S. 161 (24 L. ed. 408).

It is submitted that in the case at bar there is no evidence of negligence on the part of the railroad corporation.

With precautions to guard its crossing and exclude the public therefrom, and to warn the travelers on the highway of the approach of its trains, the jury would not be justified in saying that a speed of thirty-five miles an hour was unreasonable. The very purpose of locomotion by steam upon railways being the accomplishment of a high rate of speed in the movement of passengers and freight, it is only at crossings which are unprotected by gates or flagmen that a railroad is obliged to run its trains at a very low rate of speed.

Reading & U. R. Co. v. Ritchie, 102 Pa. 425; *Patterson, R. Acc.* § 157.

The railroad corporation having exclusive right to its whole location on the crossing, and having given ample notice to the travelers on the highway of its exclusive occupation of said location by the closing of the gates, it cannot be held to be negligence on the part of the corporation to have more than one train on the crossing at the same time.

Stubley v. London & N. W. R. Co. L. R. 1 Exch. 18; *Skelton v. London & N. W. R. Co.* L. R. 2 C. P. 681; *Pnce v. Chicago, R. I. & P. R. Co.* 63 Iowa, 746.

The express train was on time, but the freight train was some ten minutes late; its coming on the crossing at that time was due to the servants of the defendant, and not defendant; but negligence on the part of the corporation cannot be established by showing negligence on the part of its servants or agents.

Com. v. Boston & M. R. Co. 183 Mass. 388.

Therefore the third and fifth requests for instructions ought to have been given.

2. But if it should be held that there was evidence of negligence on the part of the defendant corporation, which was properly submitted to the jury, it is clear that there was no evidence of due care on the part of the plaintiffs' intestates.

The obligations, rights, and duties of railroads and travelers upon intersecting highways are mutual and reciprocal, and no greater degree of care is required of the one than of the other.

Continental Imp. Co. v. Stead, 95 U. S. 165 (24 L. ed. 406).

A railroad crossing is a place of danger, and common prudence requires that a traveler on the highway, as he approaches one, should use the precaution of looking to see if a train is approaching. If he fails to do so, the general

knowledge and experience of men at once condemns his conduct as careless.

Morton, J., in *Allyn v. Boston & A. R. Co.* 105 Mass. 77; Field, J., in *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 702 (24 L. ed. 544).

It is accordingly held, with entire unanimity, that one is equally guilty of negligence, whether he knowingly attempts to cross in front of an approaching train (*State v. Maine Cent. R. Co.* 76 Me. 357; *Tully v. Fitchburg R. Co.* 184 Mass. 499; *Chicago, R. I. & P. R. Co. v. Bell*, 70 Ill. 102; *Baltimore & O. R. Co. v. Mali*, 66 Md. 53; *Barnes v. Old Colony R. Co.* 8 New Eng. Rep. 746, 148 Mass. 585), or goes upon the track of a railroad without looking and listening for it (*Butterfield v. Western R. Co.* 10 Allen, 532; *Wright v. Boston & M. R. Co.* 129 Mass. 440; *Gaynor v. Old Colony & N. R. Co.* 100 Mass. 208; *Allyn v. Boston & A. R. Co.* 105 Mass. 77; *Stubley v. London & N. W. R. Co.* L. R. 1 Exch. 13; *Skelton v. London & N. W. R. Co.* L. R. 2 C. P. 631; *Reading & C. R. Co. v. Ritchie*, 102 Pa. 425; *Chicago & A. R. Co. v. Gretener*, 46 Ill. 74; *Pence v. Chicago, R. I. & P. R. Co.* 63 Iowa, 746).

It is submitted that, whatever view may be taken of this evidence, it furnishes positive proof of negligence on the part of Murray and Granger. They were negligent in crossing the first track in full view of the approaching freight train, without waiting to ascertain whether the other tracks were clear of danger; they thereby took upon themselves all the risks.

Pence v. Chicago, R. I. & P. R. Co. 63 Iowa, 746; *Stubley v. London & N. W. R. Co.* L. R. 1 Exch. 13; *Skelton v. London & N. W. R. Co.* L. R. 2 C. P. 631; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697 (24 L. ed. 542).

They were negligent in not looking, after clearing the first track, while crossing the seventeen feet between the first and third tracks (*Tully v. Fitchburg R. Co.* 184 Mass. 499; and cases cited above); or in rashly and negligently putting themselves into a position where they were unable to look and listen for the express train, or avoid it if they saw it.

The true proposition is, that the plaintiff was bound to use reasonable care to avoid getting into a position in which he could not escape a collision.

Tyler v. New York & N. E. R. Co. 137 Mass. 242.

The defendant, however, has not the burden of proving contributory negligence on the part of the plaintiffs; it is for the plaintiffs to show by positive proof that their intestates were in the exercise of due care, and a mere scintilla of evidence of due care is not enough.

Butterfield v. Western R. Corp. 10 Allen, 532.

Mr. A. H. Briggs, for plaintiffs:

There can really be but one question on these exceptions, to wit, Was the evidence sufficient, upon questions of due care on the part of the plaintiff's intestates and want of it on the part of the defendant corporation, to justify the presiding judge in submitting it to the jury?

And this question is not directly raised, but only incidentally; for the first, second, and third requests, as they appear in the exceptions, could not have been intended.

The first one asks a ruling "that the plaintiffs cannot recover on the second counts of their declarations."

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Are the second counts not sufficient? If not, the defendant should have demurred. He could not raise this question by his request for ruling. It is difficult to see any other reason for the first request.

The second request could hardly have been expected of the presiding judge in that form; for that was really a request to take the cases from the jury and send them to this court on report.

And so with the third request.

The fourth, fifth, and sixth requests for rulings were fully given by the presiding judge.

The question as to whether the verdicts were contrary to the evidence would seem to come before this court on a motion for a new trial, on a full report of the testimony. But perhaps it must necessarily be somewhat discussed; and will certainly be sufficiently discussed in the only real question that seems impliedly raised, as above named,—as to the justification of the presiding judge in submitting the case to the jury at all.

1. What is due care, is a question for the jury.

French v. Taunton Branch R. Co. 116 Mass. 537; *Craig v. New York, N. H. & H. R. Co.* 118 Mass. 431; *Hinckley v. Cape Cod R. Co.* 120 Mass. 257; *Gaynor v. Old Colony & N. R. Co.* 100 Mass. 208, 212, 214; *Wheelock v. Boston & A. R. Co.* 105 Mass. 208; 112 Mass. 43, 47, 112, 79, 82; *Chaffee v. Boston & L. R. Co.* 104 Mass. 115, 108; 126 Mass. 61; 125 Mass. 62.

2. Plaintiff must show due care. But it may be inferred from facts and circumstances; and, if there is nothing found in the conduct of the plaintiff to which negligence may be fairly imputed, the mere absence of fault may justify the jury in finding due care.

Mayo v. Boston & M. R. Co. 104 Mass. 137, and cases above cited.

Any carelessness of a railroad which takes away a sense of danger is a circumstance sufficient to warrant a finding of due care in the plaintiff.

Elkins v. Boston & A. R. Co. 115 Mass. 190.

In *French v. Taunton Branch R. Co. supra*, plaintiff was driving with care in the daytime; saw train, but saw no flagman (plaintiff being hurt by a detached car). At a point forty-six feet from the crossing, plaintiff could see forty-six feet in the direction from which car was coming. At thirty feet from crossing plaintiff could have seen the track more than half a mile. But plaintiff did not look in that direction. Plaintiff did not suppose that one train would follow another so soon. Held, question of due care was for jury. And jury found for plaintiff, that there was due care.

Craig v. New York, N. H. & H. R. Co. 118 Mass. 431.

In *Hinckley v. Cape Cod R. Co.* 120 Mass. 257, cited above, plaintiff was killed instantly at a crossing. At crossing he was seen before he reached the track, and after he was struck, but was not seen when he stepped on the track. Held, by majority of the court, that plaintiff could not recover, having failed to produce evidence of due care. But the dissenting judges held that other facts which appeared in evidence, as to the speed of the cars, position of track and station, conduct of deceased before he stepped on the track,—were sufficient to

warrant a jury in finding due care at the time of the injury.

Defendant was guilty of negligence in running a train over a diagonal crossing at the rate of thirty miles an hour at 5.10 P. M. in the month of November, and at the same time another train at the rate of thirty-five miles an hour in the same direction, without blowing their whistle, and without having a gate to close the sidewalk or a man to give warning.

- 1. Plaintiffs' intestates were in the use of such care as ordinary men would take under such circumstances.
- 2. They had no cause to fear danger.
- 3. There were three of them.
- 4. The danger was covered up by careless acts of the defendant corporation.
- 5. There was absence of fault on their part.

Morton, Ch. J., delivered the opinion of the court:

In each of these cases the undisputed evidence shows that the plaintiff's intestate was guilty of negligence which contributed to his injury.

The accident happened at a grade crossing, the plaintiffs' intestate being struck by a passenger express train running on its usual time. It appears that before he reached the track the defendant's gateman had lowered the gates, with signal lanterns attached, across the traveled part of the highway, and the only conclusion which can be reached from the evidence is that the party injured saw that they were lowered. Railroads, from the necessity of the case, have the right to the exclusive use of the grade crossings when their trains are passing, and it is their duty to give suitable warning of such passing trains to travelers upon the highway. If they do this, and the traveler disregards the warning, and, without sufficient excuse, insists upon crossing, he does so at his own risk. In this case the plaintiff's intestate was warned by the lowered gates that it was unsafe for him to cross the track. It was his duty to wait till the gates were raised; he voluntarily entered upon the track, notwithstanding the warning, and without any excuse. This was negligence on his part, which caused the accident, and the consequences of his rashness cannot be cast upon the defendant. It is not an answer to say that he may have supposed that the gates were down because the freight train was passing, and he was willing to take the risk of getting safely by that. He had no right so to suppose. It was negligence for him to enter upon the track when he was warned that the railroad required the exclusive use of the crossing for its proper business. As this is decisive of the case, it is not necessary to discuss the question whether the evidence shows any negligence on the part of the defendant.

Exceptions sustained.

Georgianna WHALL

v.

James W. CONVERSE, Trustee.

1. The heirs at law of a testator are those who answer the description at the time of his death.

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2. One who has acquired all possible interest in a trust fund is entitled to a decree terminating the trust and ordering the trustee to convey the property to him.

(Suffolk—Filed March 2, 1888.)

ON reservation. Decree for plaintiff.

This case came on to be heard before Hon. Charles Allen, J., on the bill, answer, replication, and affidavit of Mrs. Whall, which was not controverted, and which was found to be true; and thereupon, by request of the parties, the same was reserved for the determination of the full court.

The suit is brought to terminate certain trusts created under the will of Joseph H. Whall, and to require the trustee to pay over the trust fund to the plaintiff.

The testator died in November, 1858, and his will was proved in the Probate Court, Suffolk County, November 29, 1858; and the question is whether the plaintiff, who was his wife, has acquired all rights in and to the principal and income of the trust fund of \$20,000, created by this will, which can, under any circumstances, be asserted.

The testator, by his will, gave to John Field and James W. Converse \$20,000 in trust to pay the net income therefrom to his wife during her life, or until and not longer than she should marry again, and, upon her decease, or upon her being married again, to dispose of the principal thereof as follows, viz.: To continue to hold the same in trust for the equal benefit of his children, and to pay to his daughter \$3,000 at any time when, after she should have attained the age of eighteen years, she should in writing request; and, until such payment, to pay the net income therefrom in equal shares to or for the use of his son and daughter, or the survivor of them, during their, his, or her lives or life; and, after such payment, to pay the net income from \$7,000 of said principal to his daughter, and from \$10,000 of said principal to his son, to her and to his own use during his and her lives. If either of his children should die before his wife, leaving no issue living, then the whole of said income should go, as aforesaid, to his surviving child; and if either or both of his children should die before his wife, and should leave issue living, such issue should take the share or shares of its deceased parent or parents of said income during the life of his wife. Upon the decease of his children respectively, their several shares of the principal, then in trust for their benefit, should, after the decease of his wife, go to their issue respectively, if they should die leaving issue living; and, if either of them should die leaving no issue living, his or her share, as aforesaid, should be held still in trust for the benefit, as above provided, of the survivor, until his or her decease, and should then go, after the decease of his wife, to his or her issue, or, in default of issue, to his, the testator's, heirs at law. In case his wife should survive both of his children and their issue, if any, the said principal should go and be disposed of, at her decease, in accordance with her last will, or any instrument in writing signed by her in the nature of a testamentary disposition of property; or, in default of a last will or other instrument as aforesaid, then to his, the testator's, heirs at law.

The testator also, in and by his will, ordered and required that all the estate and property other than income (excepting only the \$3,000 which she might receive upon her written request) which should, under his will, come to his daughter, should not be paid over to her to her own use; but should be retained or placed in trust for her benefit, so that she should during her life receive the net income therefrom, and, upon her decease, the principal thereof should be paid over, appropriated, and disposed of in accordance with the provisions of her last will, or any instrument in writing signed by her in the nature of a testamentary disposition of property, or, in default of such will or other instrument, to her heirs at law.

The testator left a widow (the plaintiff), and, as his only heirs at law and next of kin, two children, Grace H. Whall and Joseph H. Whall.

Mr. Field and Mr. Converse qualified as trustees, and Mr. Converse, who is the surviving trustee, is the defendant. The trust fund consists of personal property.

The wife has not married again.

The bill alleged that Joseph H. Whall died testate, never having been married, and without issue, on the 8d day of February, 1876, at Boston, being at that time between thirty-one and thirty-two years of age, and Joseph H. Whall in and by his last will and testament, which was proved and allowed by said probate court on the 6th day of March, 1876, gave, devised, and bequeathed all the estate, real and personal, of which he should die seised or possessed, or to which he should be entitled at the time of his death, unto Janet Cumston Lord, now Janet Cumston Moody; whereby there became vested in said Janet Cumston Moody whatever rights or interest he, said Joseph H. Whall, had, or could have by any possibility or under any circumstances or under any contingency, in the principal or income of said trust fund.

That said Janet Cumston Moody, by her assignment in writing, bearing date on the 6th day of October, 1886, conveyed and assigned unto the plaintiff, her executors, administrators, and assigns forever, all her, said Janet Cumston Moody's, right, title, interest, estate, and claim, whether contingent or otherwise, in and to the principal or capital of said trust fund or estate now held by said Converse, surviving trustee, and in and to the property composing the same, and in and to all income therefrom; and all right, title, interest, estate, and claim which the said Janet Cumston Moody may be entitled to, upon and after the marriage of the plaintiff, if she shall marry again, in and to the income from the said trust fund or estate; and all right, title, interest, estate, and claim which the said Janet Cumston Moody may be entitled to upon the death of the plaintiff, in and to the principal or capital of said trust fund or estate, in case said plaintiff shall die without having disposed of said principal by her last will or by any instrument in writing, signed by her, in the nature of a testamentary disposition of property.

That said Grace H. Whall was born on the 29th day of August, 1853, and died intestate and without issue on the 7th day of September, 1861, never having been married, being at the time of her death a minor between eight and nine years of age, and leaving surviving her,

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her mother, the plaintiff, and her brother, the said Joseph H. Whall; and there became vested in said Joseph H. Whall and the plaintiff all property and rights which said Grace H. Whall had, including whatever rights or interest she had, or could have by any possibility or under any circumstances or under any contingency, in the principal or income of said trust fund.

That by the death of said Grace H. Whall and Joseph H. Whall, each without issue, and said assignment from said Janet Cumston Moody, the plaintiff has become entitled to the income of said trust fund in case she shall marry again, and has become entitled to the principal of said trust fund even in case she shall fail to dispose of the same by her last will or an instrument in writing, signed by her, in the nature of a testamentary disposition of property.

The bill prayed that the trusts be decreed to be terminated; and that the trustee be ordered and decreed to pay, transfer, and deliver to plaintiff said trust fund, principal, and income, and all property representing the same, discharged of all trusts.

Mr. Joshua D. Ball, for plaintiff:

The plaintiff has become possessed of all rights in said income, even if she marries again; and this, whether said income would fall into the residuum in that contingency or go as intestate estate. The result would be the same in either case; she owns all possible rights in said income if that contingency should occur.

The general rule is that all estate not otherwise devised or bequeathed falls into the residuum.

Thayer v. Wellington, 9 Allen, 295; *Allen v. White*, 97 Mass. 506; *Firth v. Denny*, 2 Allen, 468; 2 Redf. Wills, pp. 442, 454.

The plaintiff, then, being entitled to the income of this trust fund in case she marries again, we will proceed to consider the title to the principal of the trust fund.

The wife has survived both of the children, and neither of them had any issue.

The provision of the will in that case is as follows, viz.: "In case my wife shall survive both my children and their issue, if any, the said principal shall go and be disposed of, at her decease, in accordance with her last will, or any instrument in writing signed by her in the nature of a testamentary disposition of property, or, in default of a last will or other instrument as aforesaid, then to my heirs at law."

This power of disposition is not contingent upon her not marrying again; but, even if it was, it would not be material in this case, because she has acquired all the rights of the testator's heirs at law in the principal.

The heirs at law of the testator were his two children, and they were to take the principal of this trust fund in the absence of a will or testamentary disposition of it by the wife. The daughter died, as before stated, September 7, 1861, intestate and without issue, being then a minor between eight and nine years of age, and her heirs and next of kin were her mother (the plaintiff) and her brother, Joseph H. Whall. The mother thus acquired one half of her deceased daughter's possible interest, and the brother the other half. He died testate, having devised and bequeathed all his property to Janet Cumston Lord, afterward Janet Cumston

Moody, and she afterwards, on October 6, 1886, conveyed to the plaintiff whatever interest she had in either the principal or income of this trust fund.

The plaintiff has thus become possessed of every possible interest in the principal or capital, and in the income of the trust fund.

A person's heirs at law are those entitled to take at the time of his death. They are to be ascertained at that time, and not at a later time.

Dove v. Torr, 128 Mass. 40; *Abbott v. Bradstreet*, 8 Allen, 587; *Minot v. Tappan*, 122 Mass. 585-587; *Bullock v. Downes*, 9 H. L. Cas. 1; *Mortimer v. Slater*, L. R. 7 Ch. Div. 322.

The word "then" relates to the contingency in which the property is to vest in his heirs at law, and not to the time when his heirs at law are to be ascertained.

Bullock v. Downes; *Mortimer v. Slater*; and *Dove v. Torr*, *supra*.

The words "heirs at law" are to be construed according to the general rule, and to mean those who, at the time of the death of the testator, answer to that description,—unless it clearly appears by the will that the testator intended otherwise.

The case of *Knowlton v. Sanderson*, 2 New Eng. Rep. 100, 141 Mass. 323, is not in conflict with this. In that case the intention of the testator clearly appeared to the contrary.

It makes no difference, in the construction of these words, that the particular persons who answered to that description at the death of the testator died before the happening of the contingency, and that the contingency upon the occurrence of which the property was to go to the heirs at law was to happen upon the death of these very persons themselves.

Abbott v. Bradstreet; *Bullock v. Downes*; and *Mortimer v. Slater*, *supra*.

Where the plaintiff has, as in this case, acquired all possible interests in the principal and income of the trust fund, she is entitled to a decree terminating the trusts, and ordering the trustee to convey the property to her.

Inches v. Hill, 106 Mass. 575; *Bonditch v. Andrew*, 8 Allen, 341; *Smith v. Harrington*, 4 Allen, 569; *Stone, Petitioner*, 188 Mass. 476; *Parker v. Converse*, 5 Gray, 836; *Taylor v. Huber*, 13 Ohio St. 290; 2 Perry, Tr. § 920; *Cheaman v. Cummings*, 2 New Eng. Rep. 350, 142 Mass. 69.

Whatever may have been the interest of the son and daughter either in the principal or income of the trust fund,—however contingent may have been their interest,—it was nevertheless assignable, transmissible, and descendible.

1 Redf. Wills, pp. 391, 392; *Winslow v. Goodwin*, 7 Met. 377-379; *Putnam v. Story*, 132 Mass. 210, 211; *Fay v. Sylvester*, 2 Gray, 171; *Whipple v. Fairchild*, 139 Mass. 262, 265.

If the words "heirs at law" mean those answering to that description at the time of the death of the testator, then all persons having, or who can have, any possible interest either in the principal or income of the trust fund, are before the court. The only persons in interest are the defendant, holding the naked legal title, and the plaintiff, holding the entire equitable title.

If, however, these words mean those who shall be the heirs at law of the testator at the time of the happening of the contingency (viz., 8 Mass.

the death of the plaintiff without making a testamentary disposition), then it is impossible now to ascertain who they will be, and hence impossible to make them parties to this suit, and they are not necessary parties.

Giffard v. Hort, 1 Sch. & Lef. 407, 408, 410, 411; *Gaskell v. Gaskell*, 6 Sim. 643; *Story*, Eq. Pl. §§ 144, 146; *Troy v. Sargent*, 132 Mass. 408. Mr. W. H. Orcutt for defendant.

Holmes, J., delivered the opinion of the court:

The general rule is settled that in case of an ultimate limitation, like that of the fund in question, to the testator's heirs at law, the persons to take are those who answer the description at the time of the testator's death. *Abbott v. Bradstreet*, 8 Allen, 587; *Minot v. Tappan*, 122 Mass. 535, 537; *Dove v. Torr*, 128 Mass. 38, 40.

The reasons for this rule are that the words cannot be used properly to designate anybody else; that such a mode of ascertaining the beneficiary implies that the testator has exhausted his specific wishes by the previous limitations, and is content thereafter to let the law take its course; and, perhaps, that the law leans toward a construction which vests the interest at the earliest moment. There is nothing to take this case out of the general rule, and it requires no discussion beyond what will be found in the decisions cited.

It follows, without further construction of the words "heirs at law," and whether or not any part of the income or principal in any event would fall into the residuum or pass as property undisposed of by the will, that the plaintiff and the testator's son and daughter took the whole fund among them. The plaintiff has now acquired the son's and the daughter's interests (*Whipple v. Fairchild*, 139 Mass. 262, 265; *Welsh v. Woodbury*, 4 New Eng. Rep. 256, 144 Mass. 542, 545, and cases cited), and therefore has the equitable title to the whole fund, and the right to terminate the trust (*Inches v. Hill*, 106 Mass. 575; *Underwood v. Boston Sav. Bank*, 2 New Eng. Rep. 80, 141 Mass. 305, 306).

Decree for plaintiff.

Catherine ALLERTON, Admx.,

v.

BOSTON & MAINE RAILROAD.

1. A passenger by a railway train, who has reached his destination, alighted from the train, and taken a position upon the sidewalk of the highway, has ceased to be a passenger.
2. One who starts to cross a railroad track without looking for approaching trains, unless he has a good reason for not looking, is not in the exercise of proper care.
3. Where a passenger by a railway train, having alighted at her destination, as soon as the train moved on, without waiting for the street gates to be raised, and without looking to see whether a train was approaching, undertook to pass along a street leading

over the double tracks of the railway, and was struck by a train coming into the station at the rate of five or seven miles an hour, with its brakes on and about to make the stop, there was no evidence to warrant a finding that she was in the exercise of due care.

4. Where, in an action for death resulting from negligence of a railroad company, brought under Pub. Stat. chap. 112, § 212, the declaration does not allege that the accident occurred at a crossing, or that the injury was caused by collision with an engine or car of the defendant company, there can be no recovery under § 212 of the statute.

(Suffolk—Filed March 2, 1886.)

ON plaintiff's exceptions. *Overruled.*

This is an action of tort, duly brought by the administratrix of the estate of Sarah Maria Lawrence to recover damages for her death. The declaration contains two counts. The first alleges the intestate was a passenger on one of the defendant's trains; the second, that she was not a passenger nor in the defendant's employ; and both allege that she was in the exercise of due care, and was killed on March 5, 1886, at the station at Malden, through the negligence of the defendant and the gross negligence of its agents and servants. The declaration likewise alleges as specific acts of negligence: (1) the making of improper, unsafe rules, regulations, and timetables, for the running and management of its trains; (2) the establishment and maintenance of dangerous crossings, platforms, gates, and station accommodations; (3) the neglect to ring the bell or sound the whistle at the crossing; (4) the gross negligence and carelessness of its agents and servants.

The answer is a general denial.

There was evidence tending to show that the intestate was a passenger from Wyoming to Malden on one of the defendant's inbound trains; that she alighted at Malden, either on defendant's platform near Pleasant-street crossing, or on said crossing, and was killed at a place about the middle of said crossing, by an outward train.

The railroad is double-tracked, and runs about north and south, outward trains using the eastern track, Pleasant Street, which crosses at about 10 degrees less than a right angle, is about 60 feet wide, and the crossing is planked between the tracks the full width of the street. There are platforms on both sides of the tracks on each side of the street; the platforms south of the crossing being each about 200 feet long, and north of the crossing being each about 250 feet long. Summer Street likewise crosses the tracks, and at the northern end of the northern platform, and at an angle of about 30 degrees. Both are grade crossings. There are rising and falling gates at each crossing, at the end of and on a line with the outside of the platforms on the westerly side of the tracks, and at a similar distance from the tracks on the easterly side. These gates, consisting of a single bar, when lowered, close the highway. There are no gates at the ends of the platforms, nor barriers to prevent passengers from walking off upon the crossing.

The platform where the intestate left the train is on the western side of the tracks, is about 11 feet wide, and slants gradually down to the crossing. A horse-car track crosses the railroad tracks through the centre of said Pleasant Street, at right angles with said tracks. There was evidence tending to show that the intestate, after alighting from the train, walked off the platform upon the Pleasant-street crossing, inside the gates, and stood there, just at the end of the platform, until the train on which she came started out. As soon as it started, she attempted to cross the track in a hurry, and, without looking for approaching trains, was struck and killed by an outbound train from Boston, moving at from five to seven miles an hour, with brakes on, and about to make the stop at the station.

The court directed a verdict for defendant. Plaintiff alleged exceptions.

Mr. Charles G. Fall, for plaintiff:

If Mrs. Lawrence remained a passenger till she was killed, she was not obliged to be in the exercise of due care.

If the bell was not rung nor whistle sounded, as required by law, at street crossings, the plaintiff may recover, unless Mrs. Lawrence was guilty of gross or willful negligence. The burden is on the defendant to prove this, and it matters not whether Mrs. Lawrence was or was not a passenger when killed.

Pub. Stat. chap. 112, §§ 163, 212.

She was in the exercise of due care.

If either of these points is sustained, the plaintiff is entitled to a new trial, provided the defendant was negligent or its servants grossly negligent.

1. Mrs. Lawrence was a passenger. A station, in the general use of the word, is a stopping-place for the convenience of passengers. Webster defines it as "a resting-place on a railroad, at which a halt is made to receive or let down passengers or goods." The chief elements of a station are a waiting-room and platforms or places for passengers to take and leave the cars. These exist at Malden. This Pleasant-street crossing has been made by the defendant a part of its station.

Without doubt, Mrs. Lawrence was a passenger when she alighted from the train at Malden. Did she cease to be a passenger then?

If she alighted on the street, as one witness says, and went directly towards the place of her intended destination, did she retain the rights of a passenger while on premises then in the exclusive use of the defendant?

If she alighted on the platform, as another witness says, did she possess the same rights while on said premises?

The defendant must provide its passengers a safe passage to and from its trains.

Brassell v. N. Y. Cent. & H. R. R. Co. 84 N. Y. 241.

A person is a passenger from the time he enters the premises of a railroad station, with a bona fide intention of buying his ticket, till he has left the premises of the station of his destination, while going directly to the place of taking the train at the first station, and going directly from the place of leaving it at the other.

2 Wood, R. R. Law, pp. 1087-1049, § 268. See *Johnson v. Boston & M. R. Co.* 125 Mass. 73, 78. *Moreland v. Boston & P. R. Co.* 1 New Eng.

Rep. 909, 141 Mass. 81; *Warren v. Fitchburg R. Co.* 8 Allen, 227; *Com. v. Boston & M. R. Co.* 139 Mass. 500, 501; *McKimble v. Boston & M. R. Co.* 139 Mass. 542; *Keefe v. Boston & A. R. Co.* 2 New Eng. Rep. 660, 142 Mass. 251.

1. There is no doubt that, if she were on the defendant's premises for the purpose of taking a train, she would possess the rights of a passenger.

Being on the carrier's premises, with a bona fide intention of becoming a passenger, entitles one to the rights of a passenger.

Gordon v. Grand Street & N. R. Co. 40 Barb. 546; *Allendar v. Chicago, R. I. & P. R. Co.* 87 Iowa, 264; 2 Wood, R. R. p. 1037, § 298.

Why should she not possess the same rights when crossing for the purpose of leaving, as when crossing for the purpose of taking a train?

2. Had she, in leaving the train, been crossing from one wooden platform to another, she would have still possessed the right of a passenger.

See *Johnson v. Boston & M. R. Co.* 125 Mass. 75, 78.

If the sides of the track, in line with the platforms, are constructive platforms, she was likewise crossing from one platform to another.

3. Had she left the train on the left-hand side and been killed while leaving the defendant's premises, she would have still possessed the rights of a passenger.

McKimble v. Boston & M. R. Co. 139 Mass. 542; *S. C.* 2 New Eng. Rep. 48, 141 Mass. 463; *Moreland v. Boston & P. R. Co.* 1 New Eng. Rep. 909, 141 Mass. 81.

She was a passenger while leaving the defendant's premises, though a distinction has been drawn in the degrees of negligence to be proved.

Moreland v. Boston & P. R. Co. supra.

Mrs. Lawrence was not obliged, as a matter of law, upon leaving the train, to take the shortest practicable course to her destination.

Keefe v. Boston & A. R. Co. 2 New Eng. Rep. 660, 142 Mass. 251, 256.

II. Pleasant Street was a grade crossing with gates.

Upon proof that no bell was rung or whistle sounded, the burden is thrown upon the defendant to prove that Mrs. Lawrence was guilty of gross or willful negligence. This burden rests there, whether she was or was not a passenger.

Pub. Stat. chap. 112, §§ 163, 213.

She was not guilty of gross or willful negligence, because she could not see the approaching train, and could not hear the bell or whistle, when neither was sounded.

III. She was in the exercise of due care.

If neither of these points is well taken, the plaintiff still can recover, if Mrs. Lawrence was in the exercise of due care.

The exceptions find that she alighted at Malden,—one witness says on the street; another, on the western platform.

If on the street, the gate, consisting of a single bar, was in a line with the outside edge of the platform, so that, if she stepped upon the crossing, there was a space of the width of the platforms purposely left, to allow her to step out upon. This was used, and designed by the defendant to be used, while trains were stopping there, as a platform. It was, in point of fact, a landing-place and platform; and, un-

less the court see fit to make it in point of law a constructive platform, should not a jury be allowed to pass upon the facts tending to prove this? The crossing was planked by the defendant for the use of its passengers and the public.

Crossing a track without looking to see if a train is coming is not conclusive proof of want of care. The circumstances are to be considered.

Warren v. Fitchburg R. Co., 8 Allen, 227, 281; *Baltimore & O. R. Co. v. State*, 60 Md. 449; *Brassell v. N. Y. Cent. & H. R. R. Co.* 84 N. Y. 241.

Not only could she not see the approaching train till too late to turn back, but, such was the noise of the outgoing train, she could not hear it. Neither could she hear the bell or the whistle,—a warning she had a right to rely upon,—for neither was sounded.

Besides, another train had passed from Boston within sixty seconds,—a train that left one minute before this one and made no more stops, and she was not called upon, in the exercise of due care, to expect this one to follow so dangerously soon. Even if the gate was down behind her, behind where the defendant had invited her to land; even if she saw it or could have have seen it,—had she not, in the exercise of reasonable care, a right to suppose it was only down till the outgoing train had got fully out of the station? Ought not this fact to be left to the jury?

IV. The defendant was negligent.

The defendant was negligent in maintaining so dangerous a grade station; negligent in building its waiting-room so near Pleasant Street as to compel itself, as business increased, to build its other platforms across the street, to use the public street as a part of its station accommodations; negligent in building its gates on a line with the outside of its platforms (thereby making platforms of that part of the crossing by the side of its tracks), without putting gates on the end of its wooden platforms (11 feet wide), to prevent its passengers, while trains are passing, from walking off on to its crossing; negligent in allowing two trains to leave Boston within sixty seconds, both making the same stops to Malden; negligent in allowing three trains to pass through Malden within sixty seconds of each other.

Its agents and servants were grossly negligent.

McKimble v. Boston & M. R. Co. 139 Mass. 542. See *Armstrong v. N. Y. Cent. & H. R. R. Co.* 66 Barb. 437; *S. C.* 64 N. Y. 635.

Even if she might have escaped by turning back, she is not guilty of contributory negligence, if, for the purpose of escaping impending danger, she went forward. She is not expected to possess *post facto* wisdom.

The City of Paris, 76 U. S. 9 Wall. 638 (19 L. ed. 753.)

Mr. Justice Swayne says in this case: "The acts complained of were done in the excitement of the moment and *in extremis*. Whether they were wise, it is not material to inquire. If unwise, they were errors, not faults. In such cases the law, in its wisdom, gives absolution."

See also *Western Metropolis*, 3 Blatchf. 212; *The Ella B.* 19 Fed. Rep. 794; *R. & Corp. L. J.* 872.

Messrs. S. Lincoln and W. J. Badger, for defendant:

This action cannot be maintained, because: 1. At the time the plaintiff's intestate was killed, she was not a passenger within the meaning of Pub. Stat. chap. 112, §212. Not being a passenger, she was not in the exercise of due care. 2. Upon the pleadings, it is not open to show that she was killed maliciously, or by such gross and reckless carelessness and misconduct of the defendant or its agents as is in law equivalent to malice. But even if such claim were admissible, there is no evidence to support it.

At the time the plaintiff's intestate was killed, she had ceased to be a passenger upon the defendant's railroad.

The evidence shows that she had arrived at her destination, Malden; that she had passed in safety from the train along the station platform to the highway; that she had left the premises of the defendant and become a traveler upon the highway.

The defendant had afforded her an "opportunity, by safe and convenient means, to leave the train and roadway of the corporation," which was all that it was required to do.

Com. v. Boston & M. R. Co. 129 Mass. 500, 501.

Its duty towards the deceased as a passenger was not enlarged either by any actual invitation of the defendant's servants to cross the tracks, or by any invitation resulting by implication from a peculiar construction or use of its road and machinery.

Ormesbee v. Boston & P. R. Co. 14 R. I. 102, and cases cited.

No express invitation was given to the deceased to cross. In fact, the evidence shows that she was warned against crossing by the defendant's gateman and by others.

No invitation to cross could be implied from the arrangement of the tracks and platforms, nor from the use of the premises at the station, and the evidence discloses no peculiarity of construction or use of tracks or station by which she could infer that it was expected she would cross the tracks as she did, or that it was safe to do so. On the contrary, the gates were down, and kept down; and this, so far from being an invitation, was a distinct warning not to cross the tracks.

If it be claimed that the deceased retained her rights as a passenger even after she was safely delivered upon the highway, the answer is that she forfeited them by her conduct.

She attempted to cross the track in utter disregard of the warnings given her by the defendant, and without looking up and down the track or taking any precautions for her safety. In so acting she was not using the premises properly and rightfully, and thus ceased to be a passenger by her own act.

A passenger upon a railroad is bound to comply with the rules and orders of the company or its agents, as much when going from the cars to a place of safety beyond the railroad track as when actually on board the train.

Warren v. Fitchburg R. Co. 8 Allen, 282.

Closing the gates was, in effect, an order not to pass, and this order the plaintiff's intestate failed to observe; and, failing to observe it, she was not properly using the defendant's prem-

ises, and therefore ceased to be a passenger by her own act.

Warren v. Fitchburg R. Co. supra; McKimble v. Boston & M. R. Co. 189 Mass. 549; *Wheelwright v. Boston & A. R. Co.* 185 Mass. 230; *Bancroft v. Boston & W. R. Co.* 97 Mass. 275.

The case at bar is to be distinguished from those in which a passenger has been misled by some act or omission of a railroad company or its agents, or by the arrangements and use of its premises. Such are—

Warren v. Fitchburg R. Co. supra; Gaynor v. Old Colony R. Co. 100 Mass. 208; *Mayo v. Boston & M. R. Co.* 104 Mass. 187; *Chaffee v. Boston & L. R. Co.* 104 Mass. 106; *Wheelock v. Boston & A. R. Co.* 105 Mass. 203; *Orsig v. New York, N. H. & H. R. Co.* 118 Mass. 481.

If the plaintiff's intestate was not a passenger, this action cannot be maintained, because she was not in the exercise of due care.

The evidence, so far from affirmatively proving due care, conclusively shows negligence.

Butterfield v. Western R. Co. 10 Allen, 532; *Wright v. Boston & M. R. Co.* 139 Mass. 440; *Warren v. Fitchburg R. Co.* 8 Allen, 287; *Bancroft v. Boston & W. R. Co.* 97 Mass. 275; *Wheelwright v. Boston & A. R. Co.* 185 Mass. 225-230; *Chaffee v. Boston & L. R. Co.* 104 Mass. 115; *Mayo v. Boston & M. R. Co.* 104 Mass. 141-148; *State v. Maine Cent. R. Co.* 71 Me. 588; *Ormesbee v. Boston & P. R. Co. supra.*

Nothing appears in evidence which would justify her in relying entirely upon the care and prudence of others, or excuse her from the exercise of care on her own part, of ordinary caution, and of the simple use of her senses.

Wheelwright v. Boston & A. R. Co., and Ormesbee v. Boston & P. R. Co., supra; Butterfield v. Western R. Co. 10 Allen, 532; *Gorton v. Erie R. Co.* 45 N. Y. 660; *Havens v. Erie R. Co.* 41 N. Y. 296; *Chicago & A. R. Co. v. Fears*, 53 Ill. 115.

Knowlton, J., delivered the opinion of the court:

The plaintiff's intestate had ceased to be a passenger before the accident which caused her death. She had reached her destination, had alighted from the train, had taken a position upon the sidewalk of the highway, and thence had started to cross the track along the street, not upon her way to the defendant's station, but to some other place which she had in mind. Was there any evidence at the trial that she was in the exercise of due care? It is well-established law in this Commonwealth, and elsewhere, that one who starts to cross a railroad track without looking for approaching trains, unless he has a good reason for not looking, is not in the exercise of proper care. And this rule has been repeatedly applied to persons crossing a double-track railroad, who have started immediately after the passage of one train without looking for the approach of another. *Bancroft v. Boston & W. R. Co.* 97 Mass. 275; *Mayo v. Boston & M. R. Co.* 104 Mass. 141; *Warren v. Fitchburg R. Co.* 8 Allen, 287; *Wheelwright v. Boston & A. R. Co.* 185 Mass. 225.

There is nothing in the case at bar to relieve the plaintiff from the operation of this rule. The gates upon the highway were down, as a warning that the tracks were in use and that it was not safe to cross. As soon as the train

from which the plaintiff's intestate had alighted passed on, she started to cross, without waiting for the gates to be raised, and without looking to see whether a train was approaching upon the other track. The evidence shows that, if she had looked after the first train passed, she could not have failed to see that by which she was afterwards struck. The latter train, when it met the former one, was going at the rate of five to seven miles an hour, with its atmospheric brake on, about to make the stop at the station. She must have known that this was a double-track railroad, upon which trains running in each direction were always to be expected. There was no express or implied invitation to her to cross, nor any excuse for her crossing without looking for a coming train. There was no evidence in the case to warrant a finding that she was in the exercise of due care.

The declaration contains two counts: the first alleging that the plaintiff's intestate was a passenger, and claiming under that part of Pub. Stat. chap. 112, § 212, which makes a railroad corporation liable when the life of a passenger is lost through its negligence or the gross negligence of its servants or agents; and the second claiming under that part of the same section which creates a liability when the life of a person in the exercise of due diligence, and not a passenger, is lost by reason of such negligence. This last count contains all the allegations appropriate to a claim under this branch of the statute, and no others.

Section 213 of the same chapter creates a liability in a particular class of cases, where a person is injured by collision with the engines or cars of a railroad corporation at a crossing of a highway or town way at grade, and it appears that the corporation neglected to ring the bell or blow the whistle as required by law, and such neglect contributed to the injury. In such cases the person injured may recover unless it appears that he was at the time guilty of gross or willful negligence, or was acting in violation of law, and that such negligence or unlawful act contributed to the injury. The declaration does not contain the allegations necessary to bring the case within this section. It is nowhere alleged in it that the accident occurred at a crossing of a highway or town way, or that the injury was by collision with an engine or car of the defendant. On the contrary, the averments of both counts follow the precise language of those parts of § 212 under which they were respectively brought. Under the last count there are certain specifications of negligence which do not change the character of the count, nor contain the allegations material to a claim under § 213. The suit must therefore be deemed to have been brought under § 212, and the plaintiff could not hold the defendant to answer under the provisions of § 213.

Wright v. Boston & M. R. Co. 129 Mass. 440. The superior court has ample power to allow amendments in all cases pending therein; and if the plaintiff at the trial had thought her action maintainable under that section of the statute, and had desired to avail herself of its provisions, she should have applied for leave to amend her declaration. In the opinion of a majority of the court, the entry must be—

Exceptions overruled.

Weld SPALDING

v.

Edmund B. CONANT.

Where **personal property** is sold with warranty, and bill of sale is made, which is afterwards amended so as to express the warranty, and delivered and received as a binding contract, an **action for breach of the warranty** may be maintained thereon.

(Middlesex—Filed March 2, 1888.)

ON defendant's exceptions. *Overruled.*

Action of contract to recover the price paid for a horse, on the ground of a breach of the warranty of soundness.

There were a number of interviews between the parties during the negotiation for the horse, before the day on which the bargain was concluded; and at the several interviews the defendant said the horse was sound, and he would warrant him sound, save as to the swelling of the ankle, which was obvious and known to both parties; and that he was kind and would make a good family horse.

On the day the bargain was concluded, nothing was said by either party about the horse, the conversation being principally in reference to its price, the plaintiff offering a less sum than the defendant had before asked, which offer the defendant finally accepted.

The plaintiff then paid for the horse, and the same was thereupon delivered to him, and at the same time the defendant signed and delivered to the plaintiff a bill of sale without warranty.

There was evidence tending to show that the defendant had previously agreed to give a written warranty of soundness of the horse, with the exception of the ankle; and that the son of the original plaintiff, when the paper was handed to him, noticed that it did not contain such a warranty, but thought it made no difference, and took it without objection, saying "Never mind," or something of that sort; and that two or three days afterward he went to the defendant, and told him that he had offered to give a written warranty of soundness of the horse, and asked him to write it into the bill, and that the defendant then wrote in the bill the following words, to wit: "This horse is warranted sound with exception of before-mentioned ankle." The defendant admitted in testimony that he wrote the warranty upon request, as claimed by the plaintiff; and there was no evidence that he made any objection to so doing.

There was no new consideration for such warranty of soundness.

Some five or six weeks after the sale, the plaintiff, with a view of rescinding the contract on account of the alleged breach of warranty of soundness, made tender of the horse to the defendant and a demand for the money paid therefor.

The plaintiff did not claim to recover on any other ground than the breach of the warranty so written into the bill of sale after its delivery, and there was no evidence of any other breach.

There was evidence for the jury upon all the matters referred to in the instruction hereinafter excepted to.

The defendant asked the court to rule: (1) the warranty of soundness contained in the bill of sale, and written therein after the horse had been sold, paid for, and delivered, in the absence of any new consideration, is void; (2) the plaintiff can only recover upon showing a breach of the warranty contained in the bill of sale at the time the same was signed and delivered,—which rulings the court refused to give, and ruled, in substance, that the amended bill of sale, if delivered and received as a valid contract, was binding upon the defendant.

The jury found for the plaintiff. To all of which rulings and refusals to rule the defendant excepted.

Mr. J. N. Marshall and John Davis, for defendant:

The rulings requested by defendant should have been given. The writing, as originally given by the defendant to the plaintiff, was not a mere receipt or bill of parcels, which could be contradicted or varied by parol; but it was, in terms, a clear and express contract.

Davis v. Ball, 6 Cush. 506; *Chapman v. Searle*, 8 Pick. 88; 1 Chitty, Cont. pp. 150, 151, and note c.

This writing constituted the contract as finally agreed upon and established by the parties. All oral negotiations and stipulations preceding or accompanying the execution of this writing are to be regarded as merged in it; and by its terms, in the absence of fraud, the rights and liabilities of the parties were definitely and conclusively fixed.

Bassett v. Percival, 5 Allen, 845; *Niles v. Culver*, 8 Barb. 205; *Randall v. Rhodes*, 1 Curt. C. Ct. 90; *Kain v. Old*, 2 Barn. & C. 627; *Story, Sales*, § 860.

If the defendant had, during the negotiation for the horse, orally agreed to warrant him sound, then, when the bargain was reduced to writing and accepted, the defendant ceased to be liable on such agreement, as fully and completely as if he had never made any. The position of the defendant was as though he had never offered or undertaken to warrant. A warranty is a collateral undertaking, and must be upon the sale, and one of the terms of the contract of sale as finally concluded.

Hogins v. Plympton, 11 Pick. 97; *Vincent v. Leland*, 100 Mass. 482; 1 Chitty, Cont. 646.

A contemporaneous agreement of warranty cannot be engrafted, by oral evidence, on a written instrument.

Boardman v. Spooner, 18 Allen, 861; 1 Pars. Cont. 472.

The warranty here relied upon, written into the contract two or three days after the sale had been completed, was void for want of consideration. The consideration given was exhausted by the transfer of the horse and the obligations assumed by the defendant in the original writing, and there was nothing to support this subsequent agreement to warrant.

Williams v. Hathaway, 19 Pick. 387; *Benj. Sales*, 1st Am. ed. § 611, and note c; *Roscorla v. Thomas*, 3 Q. B. 234; 3 Bl. Com. 166.

The rulings of the court were inappropriate, misleading, and erroneous.

Palmer v. Sawyer, 114 Mass. 9; *Clough v. Whitcomb*, 105 Mass. 482.

Messrs. F. T. Greenhalge and Frederick Lawton, for plaintiff:

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The warranty written into the bill of sale was not an additional stipulation, but was simply inserted to make the writing a correct representation of the genuine contract between the parties. The defendant's second request for a ruling was rightly refused, because (the horse having been delivered, accepted, and paid for in full) the sale was fully executed on both sides before the writing in question was delivered.

Bucknam v. Nash, 12 Me. 474.

The writing was not an essential part of the transaction. Evidence of an oral warranty in addition to the warranty against interfering was therefore admissible (*Browne*, Fr. 4th ed. §§ 115 a, 116, and cases there cited), and was admitted. That part of the writing which was made, at the request of the plaintiff, a few days after the sale, was, however, further evidence as to the oral warranty, being in the nature of an admission in writing by the defendant that he had warranted the horse at the time of the sale.

Tuttle v. Brown, 4 Gray, 457; *Dickinson v. Robbins*, 12 Pick. 74; *Skirine v. Elmore*, 2 Camp. 407; *Benj. Sales*, 1st Am. ed. § 205.

If the sale was an executed contract, and if the oral contract of warranty would have been valid without the giving of any writing, "if * * * circumstances will as effectually perfect the sale as a writing would, it is not easily to be seen how the writing can actually constitute the contract merely because a writing happens to exist."

Bird v. Munroe, 66 Me. 337, 342; *Smith v. Fisher*, 8 New Eng. Rep. 824, 59 Vt. 53; *Edwards v. Marcy*, 2 Allen, 486, 490.

The first request was rightly refused. The memorandum was not completely executed on the day of the sale, and it is well settled that it may be executed at any time subsequent to the formation of the contract, and before action brought.

Parton v. Crofts, 10 C. B. N.S. 11; *Bird v. Munroe*, *supra*; *Williams v. Bacon*, 2 Gray, 391; *Marsh v. Hyde*, 3 Gray, 331; *Lerned v. Wannemacher*, 9 Allen, 412; *Davis v. Moore*, 13 Me. 424; *Idle v. Stanton*, 15 Vt. 690; *Gale v. Nison*, 6 Cow. 445; *Browne*, Fr. 4th ed. § 852 a.

The evidence as to the circumstances under which the writing was given and received on the day of the sale, and its contents at that time, show that it was, in the intent of the parties and in law, merely a receipt for the money.

Bradford v. Manly, 18 Mass. 139; *Hogins v. Plympton*, 11 Pick. 97; *Wallace v. Rogers*, 3 N. H. 506; *Hersom v. Henderson*, 21 N. H. 224; *Hazard v. Loring*, 10 Cush. 267; *Hildreth v. O'Brien*, 10 Allen, 104; *Boardman v. Spooner*, 18 Allen, 853; *Atwater v. Clancy*, 107 Mass. 309.

But even if we grant, what the defendant apparently claims, that the writing, as given on the day of sale, was either a common-law contract in writing or a writing required by the Statute of Frauds, the plaintiff still may recover on showing a general warranty made orally, and a breach thereof, though such warranty be not expressed in that writing.

Carr v. Dooley, 119 Mass. 204; *McCormick v. Cheevers*, 124 Mass. 262.

C. Allen, J., delivered the opinion of the court:

In this case it must now be assumed that the

bill of sale as originally delivered did not contain the whole of the bargain actually made between the parties, and, upon attention being called to the omission, the defendant, for the purpose of making the writing conform to the actual agreement, inserted the warranty upon which the action is brought. The defendant's counsel now contends that the plaintiff had accepted the bill of sale without this warranty; and that, having done so, he could not have maintained an action upon the oral warranty, because the bill of sale would have been treated as showing the whole of the contract; and that therefore the warranty inserted in the bill of sale must be treated as a new contract, which was invalid for want of a new consideration to support it. There is, however, no rule of law which prevents parties who discover that their contract has not been correctly expressed in the written instrument from correcting the writing by mutual consent, so as to make it conform to their actual agreement, thus doing voluntarily what might be compelled in equity, on a bill to reform the contract. The instructions were correct.

Exceptions overruled.

Joseph WEHRLE
v.
Silas GURNEY.

1. A notice of proceedings to obtain a certificate for the arrest of a judgment debtor is returnable on the day fixed in it for his appearance; and if a return of *non est inventus* is then made upon the notice, the avoidance is complete, and a suit may be immediately brought upon his bail bond.
2. The return made upon such notice by the officer is competent and sufficient evidence.

(Suffolk—Filed March 2, 1888.)

ON defendant's exceptions. *Overruled.*

This was an action of *scire facias* against bail, without a jury.

The principal, J. H. Mapleson, was arrested on mesne process, on January 16, 1886, in an action brought against him by this plaintiff, and bail given with this defendant as surety.

Judgment against Mapleson in said action was obtained November 1, 1886, the defendant having appeared therein by counsel and filed answer.

Execution on said judgment issued November 5, 1886. On November 8, a certificate, under provisions of Pub. Stat. chap. 162, § 19, was duly issued by a proper magistrate, and was placed in the hands of a deputy sheriff of Suffolk County for service.

At this trial the following facts were either proved or admitted: That defendant duly executed said bail bond as surety on January 16, 1886, in action of *Wehrle v. Mapleson*; that judgment in *Wehrle v. Mapleson* was obtained against defendant on November 1, 1886; that execution thereon issued November 5, but no return of any officer appears upon it; that said

execution was presented on November 8 to a proper magistrate, who, on said November 8, duly issued a certificate, under provisions of Pub. Stat. chap. 162, § 19, returnable November 12, 1886, at 11 o'clock A. M.

The officer's return upon the said certificate was as follows:

I have made diligent search for the within-named judgment debtor, but was unable to find him, or any last and usual place of abode, tenant, agent, or attorney of his, within my precinct, and could make no service of the citation upon him.

Thos. Fee, Jr.,
Deputy Sheriff.

This return was offered in evidence by the plaintiff, and admitted against defendant's objection, and defendant excepted thereto.

On November 12, 1886, this action was brought.

The defendant offered no evidence, but claimed that the action could not be maintained upon above evidence and admitted facts, and requested the court so to rule as matter of law, and also claimed and asked the court to rule that the action had been prematurely brought, and therefore could not be maintained, and to find upon this ground for the defendant.

But the court declined to rule as requested, and ruled that the action had not been prematurely brought, and found for the plaintiff.

To these rulings defendant excepted.

Messrs. Edw. Avery and George M. Hobbs, for defendant:

1. There was no evidence that the execution was "altogether unsatisfied."

2. The return of the officer upon the citation was inadmissible to bind the defendant: (1) because it is made upon a process in which the defendant is not a party; (2) because it is not made returnable to the court in which the present suit is pending, but to a magistrate or *quasi* court which had no jurisdiction or control over the defendant; (3) because it is no part of the process or writ of execution issuing from this court, upon which the defendant's liability is made to depend; (4) because, upon the papers submitted in the case, the return is not true, in that they show an attorney of the principal within the officer's precinct, and that he made no inquiry of him; and so he cannot have made diligent search; (5) because it must be shown as a fact what search was made, and the return is no evidence of it (*Smith v. Randall*, 1 Allen, 456; *Wright v. Quirk*, 105 Mass. 44), because an officer's return can be conclusive and binding only between parties to the proceeding.

3. *Scire facias* is a judicial writ, which can only issue from the court having possession of the record on which it is founded.

Gray v. Thrasher, 104 Mass. 378.

4. The action was prematurely brought. The bail had the right to the full time expressed in the writ of execution, before being liable to *scire facias*.

Niles v. Field, 2 Met. 828; *Rowland v. Seymour*, 2 Met. 590; *Adams v. Cummiskey*, 4 Cush. 420.

There is nothing in the Statute of 1881, chap. 264, § 1, to show that he is liable any sooner,—on the contrary, the language of the statute is: "Bail shall become liable as provided by Gen.

Stat. chap. 125, § 7;" or any intention to "alter and enlarge the responsibility of bail."

Rev. Stat. chap. 91, § 5; Gen. Stat. chap. 125; § 7; Pub. Stat. chap. 164, § 7.

Changes in earlier statutes did not intend to increase the liability of bail (*Stevens v. Bigelow*, 12 Mass. 436; *Lane v. Smith*, 2 Pick. 281), but carefully guarded their rights (*Ibid.*).

Messrs. George L. Huntress and Homer Albers, for plaintiff:

Without insisting that the officer's return was admissible in evidence even if the Public Statutes do not authorize the action, it is enough to say that if the statutes do authorize the action, the return was properly admitted, being proper in form and made in pursuance of law.

Murfree, Sh. r. §§ 866, 868, and cases cited.

And if authorized under Pub. Stat. chap. 163, § 3, such return becomes the ordinary return of *non est inventus* upon an execution, and is conclusive evidence of avoidance, so as to charge the surety.

Winchel v. Stiles, 15 Mass. 280.

And the fact that such return shows that no tenant, agent, or attorney of said Mapleson could be found, while it proves that fact, does not affect its admissibility. The words: "I have made diligent search for the within-named judgment debtor, but was unable to find him, or any last and usual place of abode * * * within my precinct, and could make no service of the citation upon him," are the only material averments of said return; all the words as to tenant, etc., may be rejected as surplusage.

Hyde v. Malley, 121 Mass. 388.

The fact that said Mapleson did, or did not, have any tenant, agent, or attorney within the officer's precinct, could not, in any way, affect the officer's duty or the liability of this surety.

It was no part of his duty to find any such tenant, agent, or attorney; and he had no authority to serve the notice upon such, even if he had discovered any.

Without insisting that the court below could not, under defendant's answer, rule that the action had been prematurely brought,—considered simply as to the time of bringing it (*Reed v. Scituate*, 7 Allen, 141),—it is sufficient to suggest that such a request, to have had any force, must have been regarded as a request to rule that the action had been wrongly or improperly brought, and was unauthorized by said statute; and, so regarded, this exception becomes at once a part of the third exception.

Plaintiff submits that, under the Public Statutes, the return day of the execution has nothing whatever to do with cases like the present,—as the statute clearly shows, and as the successive legislative Acts upon the subject conclusively demonstrate.

The authority for the present action is based, not upon any return upon the execution, which is an impossibility since the Act of 1877 (hereinafter discussed), but, as the statute clearly provides, upon "a return of the notice."

The history of legislation upon the matter is important.

The Revised Statutes (1836) in relation to liability of surety, etc., provided: "In case of the avoidance of the principal, and a return on

the execution that he is not found, his bail shall be obliged to satisfy the judgment," etc.

In Acts 1857, chap. 141 (Commissioners' Report), the same language was used, and afterwards incorporated, without change, into Gen. Stat. 1860, chap. 125, § 7; and under this statute of 1857 was tried *Rhodes v. Brooks*, 16 Gray, 170, which decided that the return of *non est inventus* upon an execution would not support *scire facias* against surety on bail bond, unless a certificate authorizing arrest was attached to such execution.

This statute of 1857 remained without change until the Act of 1877, chap. 250. This Act of 1877 changed entirely the old method of arrest on execution, and provided substantially that a magistrate should not grant a certificate authorizing defendant's arrest, until notice had been first served upon him to appear and submit to an examination.

Under this Act, therefore, it was impossible to bring *scire facias* against sureties in bail bond of a defendant who was *ex re.*, because the General Statutes still provided that, to support *scire facias*, there must be a return of *non est inventus* on the execution; and *Rhodes v. Brooks* had held that a return of *non est inventus* on an execution which did not have upon it a certificate of arrest was invalid, and was not properly *non est inventus*.

So, in 1882, the law was again changed, and put into its present shape, which provides that either a return of *non est inventus* upon the execution, or the same return upon the notice, will support *scire facias*.

But defendant now claims that there is something irregular, because no return appears upon the execution. No return could be made upon it, for it was never in the hands of any officer for service. The execution bears, however, the magistrate's memorandum of the notice. But the notice, with the officer's return thereon, was attached to execution, and both returned to court.

It is necessary, in order to constitute a legal avoidance, not that the debtor shall be proved to be out of the Commonwealth, but that an officer after diligent search cannot find him; and there is no breach of the bond, no matter where the debtor may be, until an officer has made return that he cannot find him; this is a breach of condition in which action will lie, and the breach itself (*i. e.*, the officer's return) is the proof of the breach. Whether this be upon this execution or the notice is immaterial under the statute. Either is conclusive that he cannot be found, and this is the breach on which action is brought.

Knowlton, J., delivered the opinion of the court:

It is provided in Pub. Stat. chap. 163, § 7, in relation to suits upon bail bonds, that "in case of the avoidance of the principal and a return on the execution that he is not found, or a return on the notice mentioned in chap. 163, § 19, that, after diligent search by the officer serving the notice, the principal is not found, his bail shall be obliged to satisfy the judgment," etc. The defendant contends that, after such a return on the notice, suit cannot be brought on a bail bond until the expiration of sixty days from the date of the execution.

But no foundation for his contention is found in the language of the statute, or in the history of the legislation from which it is compiled. The first alternative named in the section, "the avoidance of the principal and a return on the execution that he is not found," cannot occur until the expiration of sixty days from the date of the execution; for until then the execution is not returnable (*Niles v. Field*, 2 Met. 328; *Adams v. Cumiskey*, 4 Cush. 420), nor unless a certificate authorizing an arrest is attached to the execution (*Rhodes v. Brooks*, 16 Gray. 170).

Upon the passage of Stat. 1877, chap. 250, requiring notice to the debtor, and a hearing by a magistrate, before a certificate for arrest could be attached to an execution, except in certain cases of fraud, it resulted that, when a debtor could not be found and notice could not be served upon him, no certificate for arrest could be obtained, and no effective return of *non est inventus* could be made upon the execution; and consequently *scire facias* could not be brought against the bail. To provide for such a case, the Statute of 1881, chap. 268, § 4, was passed, which is incorporated in Pub. Stat. chap. 168, § 7, to the effect that, upon an avoidance of a debtor, and a return on the notice that, after diligent search by the officer serving the notice, he is not found, his bail shall become liable. The reason why sixty days must elapse before suit can be brought on account of an avoidance upon an execution with a certificate of arrest attached is because until then the execution cannot be returned, and the avoidance is not complete. No such reason applies to an avoidance upon proceedings to obtain a certificate for arrest. The notice in such a case is returnable on the day fixed in it for the debtor's appearance. If a return of *non est inventus* is then made upon it, the avoidance is complete, the language of the statute is satisfied, and a suit may be immediately brought upon the bail bond. The officer's return admitted in evidence was competent and sufficient. That part of it which referred to a "tenant, agent, or attorney," of the debtor was immaterial, and did not affect its validity.

Exceptions overruled.

Armine W. LITTLEFIELD

v.

BOSTON & ALBANY R. CO.

1. Where a town meeting referred to the selectmen the matter of "authorizing the selectmen to sell" certain lands mentioned in an article of the warrant, authority was conferred upon that board of selectmen, not merely to determine what should be done, but to do it; and a deed made in pursuance thereof by a subsequently elected board of selectmen was without authority, and conveyed no title.
2. Neither the equitable right of a railroad company, nor that of its predecessor, to land outside of a located and established railroad, will prevent the acquisition of title by the long-continued adverse possession of another.

(Middlesex—Filed March 2, 1888.)

ON tenant's exceptions. *Overruled.*

This was a writ of entry to recover a parcel of land in that part of Newton known as Auburndale, situated on the northwest corner of Rowe (formerly Elm) Street and the Boston & Albany Railroad, adjoining on the south the premises of said railroad and on the north those of the demandant.

The southerly line of the demanded premises is a straight line 14 feet 6 inches northerly of the centre line between the two present middle tracks of the tenant's railroad, at the westerly end of the demanded premises, and 15 feet 6 inches northerly of said centre line at the easterly end of said premises.

The demanded premises were a part of what was once known as the poorhouse farm of the town of Newton, which farm was on both sides of the Boston & Worcester Railroad, as said railroad was first constructed. The demandant proved, and it was not controverted, that she purchased in 1877, from her father, the premises in Auburndale, on the northwest corner of Rowe Street and the Boston & Albany Railroad, and had since that time continued to own the same; that she had lived there from 1865 to 1877 with her father, who then owned said premises; that when she went there to live in 1865 the southern boundary of the premises was indicated by a picket fence with turned posts, the whole of which fence remained standing until 1880, and a portion until 1883; that the tenant destroyed a portion of said fence in 1880, and the remainder in 1883, and has since those dates occupied the demanded premises north of the portions so destroyed.

The demandant proved, and it was not denied, that said fence was erected in 1852 by Martin Adams, who then owned the premises purchased by her in 1877. The demandant testified that the line of said fence was coincident with the southern boundary of the demanded premises.

The demandant introduced the deposition of Joshua Washburn, who testified that the premises owned by the demandant were once part of the poorhouse farm of Newton; that said poorhouse farm was bounded both on the east and west by land formerly of said Washburn; that the eastern boundary of said poorhouse farm was some 150 feet east of the easterly side line of Rowe Street, and that the picket fence, with turned posts, which formerly stood on the southerly line of demandant's estate, and between it and the premises of the tenant, stood on the southerly line of the demanded premises.

The demandant then, without objection on the part of the tenant, put in a deed from the town of Newton to William Jackson, dated May 5, 1847, conveying said poorhouse farm; and proved by successive conveyances a chain of title, from said Jackson to Martin Adams, who purchased in 1851, of a lot of land on the northwesterly corner of said Rowe (formerly Elm) Street and the Boston & Worcester Railroad, which was the same lot purchased by the demandant in 1877; and the demandant also proved by successive conveyances the chain of title of said lot from Adams to herself.

In the deed from Newton to Jackson, in the description of the third parcel, which is bound-

ed east and west on land of Joshua Washburn, occurred the following words: "Reserving and excepting, nevertheless, so much of this parcel of land as belongs to the Boston & Worcester Railroad Corporation, whose road runs through the same; this third parcel of land, containing, exclusive of the railroad, 15 acres 2 quarters and 22 rods."

The demandant contended, and it was not denied, that said fence was erected in 1852; that she and those persons through whom she claimed, since 1852 had occupied, for agricultural and other purposes, the land adjoining the railroad and running southerly as far as the line of said fence.

The tenant offered evidence tending to show that in 1833 it paid the town of Newton the sum of \$300, which was received by said town, and took from the selectmen of said Newton a deed of said town, dated September 25, 1833, conveying a strip of land, running through said poorhouse farm; that the records of the town of Newton showed a copy of a warrant, dated October 23, 1838, for a town meeting, to be held November 12, 1838, article 4 of which was as follows: "To see if the town will authorize the selectmen to sell so much land on each side of the Worcester Railroad near the poorhouse as will make the line straight,"—and the record of said meeting of November 12, 1838, contained the following action under article 4, to wit: "Article 4 was referred to the selectmen." That, on the 1st day of October, in the year 1839, the selectmen of Newton made, executed, and delivered a deed, for the consideration of \$18, to the Boston & Worcester Railroad Corporation, of two parcels of land through said poorhouse farm, which, together with the land that the corporation had previously purchased by the deed of 1833 above referred to, made a strip of land 56 feet wide and about 46 rods in length.

A civil engineer testified, for the tenant, that between April, 1871, and December, 1873, he took certain measurements in Auburndale, by which he got the position of the picket fence with the turned posts, hereinbefore referred to, adjoining the Littlefield property; that he measured from the centre line between the two existing tracks of the railroad, to said picket fence, which was situated northerly of said centre line, and distant from said centre line 27 $\frac{1}{8}$ feet on Rowe Street, and 17 $\frac{1}{8}$ feet at the other end thereof; that those distances were measured from the centre between the two existing tracks out to the fence; that he also measured from the centre line to where certain fences then were on the southerly side of the railroad opposite the picket fence; and that the measurement to the westerly side of Rowe Street was 27 $\frac{1}{8}$ feet.

Another civil engineer of the company testified that the retaining wall, which was built in 1833 upon the demanded premises, was built upon a line parallel with and 28 feet northerly from the centre line, between the centre tracks, which were in the same position as the tracks which existed there in 1873; and that said wall was placed upon the line which he obtained from the deed dated October 1, 1839; and that the southerly line of a strip of land 56 feet wide would agree with the fences on the south side of the railroad; and that, to get a strip of land 56 feet wide, measuring from the present fence against Kimball's land, it would be necessary to

come out as far as the face of the retaining wall on the northerly side of the railroad; and that he located the line of the retaining wall from the deed dated October 1, 1839.

The northernmost line of the railroad land, as shown by the above deeds, is a line 28 feet northerly from the centre line between the two present middle tracks of the tenant's railroad, and running parallel with said centre line.

On June 6, 1843, the selectmen of the town of Newton made, executed, and delivered to the Boston & Worcester Railroad Corporation a deed of a strip of land, containing 18 square rods, adjoining said last-mentioned land upon the north, and being a strip of land about three quarters of a rod wide.

The tenant admitted that a mistake had been made in the application of said deed of 1843, in assuming that the eastern boundary of the poorhouse farm was the easterly side line of Rowe Street, whereas, in fact, said boundary was, as appeared by said deposition of Joshua Washburn, 147 feet to the eastward of said side line; and that a strip of the demanded premises, of the width conveyed by said deed and 147 feet long, had through said mistake been wrongfully enclosed by the tenant.

The Boston & Albany Railroad Company was the successor of the Boston & Worcester Railroad Corporation.

No attempt or offer was made by the tenant to locate the premises described in the deed of 1833.

It did not appear that any portion of the land described by the deed of 1843 was occupied by the railroad prior to 1868, and it appeared that the whole of the premises described by said deed of 1839 were not occupied by the railroad until 1868.

The tenant asked the court to rule and instruct the jury as follows:

1. That the vote of the town of Newton, of November 12, 1838, under article 4 of the warrant, authorized the selectmen to sell so much land of the poor farm as would make the line straight.

2. The deed of the selectmen of Newton, dated October 1, 1839, and the receipt of the consideration thereof by the town, if proved as facts, established the boundary of the land of the town and the railroad company; and the town of Newton and persons claiming through or under it are bound thereby.

3. On the evidence in this case the demandant has shown no title to any part of the strip of land the northerly side of which is parallel with, and 28 feet northerly from, the centre or base line of the railroad.

4. The deed of September 25, 1833; the deed of October 1, 1839; and the deed of June 6, 1843, to the railroad corporation,—if the jury shall find that the town of Newton received the consideration of said deeds,—determine the extent of the exception of the deed from the town of Newton to William Jackson: and the jury are authorized upon the evidence to find that, when said town conveyed to Jackson its poor farm, it did not convey to him any of the land described in said first-mentioned deeds, but that the same then belonged to the railroad corporation.

But the court declined to rule as requested.

To which refusals to rule, and to the rulings given, as far as they are inconsistent with the above requests, the tenant excepted.

The jury found that the tenant had disseised the defendant of so much of the demanded premises as lay north of said centre line at the westerly end of the demanded premises, which was the line of said fence as placed by the tenant's witnesses; and tenant alleged exceptions.

Mr. Samuel Hoar, for tenant:

In construing town records, evidentiary of the action of the town, the words used are to receive their ordinary and popular signification, rather than their technical meaning.

Lane v. Embden, 72 Me. 354; *Adams v. Mack*, 3 N. H. 493, 499.

Especially where the town has received the full benefit of the act whereof the record is evidence should this liberal rule of construction be applied.

Williston v. Morse, 10 Met. 17.

The record of the town of Newton showed a copy of a warrant dated October 23, 1838, for a town meeting to be held November 12, 1838, article 4 of which was as follows: "To see if the town will authorize the selectmen to sell as much land on each side of the Boston & Worcester Railroad, near the poorhouse, as will make the line straight;" and the record of said meeting of November 12, 1838, contained the following action, under article 4, to wit: "Article 4 was referred to the selectmen."

Under this article, the town might have given specific authority and instruction to the selectmen to make the sale; or it might have left the whole matter to the discretion of the selectmen to effect the sale or not, as they should think best; and it is submitted that the latter course was the one adopted by the town.

By "article 4" must be understood the subject-matter of, or all matters which could be properly acted upon under, that article. It is referred to the selectmen, the general executive officers of the town, the usual recipients of all discretionary power which the town does not care to exercise itself, and the committee specially designated in this article of the warrant for effecting the proposed sale.

There is no limitation put, by the vote of the town, on the power of the selectmen to deal with matter of sale; and it is submitted that this record of the vote is sufficient, under the liberal rule of construction to be given to town records, to authorize the selectmen to make the sale.

The records of the town of Newburyport show a copy of a warrant dated March 8, 1827, for a town meeting to be held March 15, 1827, article 12 of which was as follows: "To see if they will authorize the necessary repairs to the several town clocks,"—and the record of said meeting of March 15, 1827, contained the following action under article 12, to wit: "Voted, to refer the 12th article in the warrant to the selectmen." The selectmen employed Simon Willard to repair one of the clocks. Willard, the town having refused to pay for the repairs, brought an action of assumpsit against the town for his services. It was proved that half of the work on the clock was nearly or quite made new, and that a minute hand had been added, there having been originally only an hour hand. The defendant contended that the selectmen had no authority, from the votes

of the town, to make such repairs; but the court decided that they had. *Willard v. Newburyport*, 12 Pick. 227. Shaw, Ch. J., who delivered the opinion of the court, says, at page 232: "Another objection was that the selectmen were not duly authorized to make the large and extensive repairs which were made on this clock. It appears to us that this objection is answered by the vote of the town of the 15th of March, 1827, by which the town referred it to the selectmen as well to determine what repairs should be made on the several town clocks as to have them made. * * * If the town intended to impose any restrictions upon the authority of the selectmen, as to cost or otherwise, they should have been expressed in the vote."

This opinion was rendered November 12, 1831; 12 Pickering Reporter was published in 1834; the vote of the town of Newton was passed on November 12, 1838. In the light of this, then recent, decision of the Supreme Judicial Court of the Commonwealth, can it be doubted but that the selectmen of Newton, on October 1, 1838, were justified in concluding that they had authority, by the vote of November 12, 1839, to convey to the Boston & Worcester Railroad Company so much of the poorhouse farm as would make the line straight, and that they were empowered to decide how much land on each side would be required to straighten the line? It is the law of 1839 that is to be applied to this case. It seems clear that they had such authority; and therefore the first request for instructions ought to have been given.

See also *Palmer v. Haverhill*, 98 Mass. 487.

The general rule is, that when land is transferred by an agent, it must be by deed, in the name of the principal; but it has long been settled that there is a difference in this respect between grants of an individual and those of the public; and that land belonging to the Commonwealth, to towns, and to other bodies politic, may be conveyed by a deed executed in the name of a duly authorized agent or committee.

Ward v. Bartholomew, 6 Pick. 409; *Osfan v. Cockran*, 5 N. H. 458; *De Zeng v. Beekman*, 2 Hill, 489.

Moreover, this is the form of deed which is authorized by our statutes. The language of the statute is not that the inhabitants may convey lands by their deed, or the deed of the town executed by its committee or agent, but by "a deed of their committee or agent."

Rev. Stat. chap. 15, § 11 (Pub. Stat. 27, § 9); *Abbott v. Chase*, 75 Me. 83.

The deed of 1839, expressed to be "for the inhabitants of Newton, * * * in behalf of said inhabitants," is valid, although one of the selectmen did not sign it. Where an authority is vested in a public organized body, for public purposes, the act of the majority is the act of the body.

Sprague v. Bailey, 19 Pick. 436; *Haven v. Lowell*, 5 Met. 35; *Jenkins v. Doughty Falls Union School Dist.* 39 Me. 230; Rev. Stat. chap. 2, § 6, cl. 3 (Pub. Stat. chap. 3, § 2, cl. 5).

It is submitted, therefore, that the deed of the selectmen, dated October 1, 1839, gave a good title to the land described therein; and that the second request for instructions ought to have been given. It is also submitted that the

third request for instructions ought to have been given.

Stat. 1861, chap. 100 (Pub. Stat. 112, § 815).

It is a well-settled principle of law that, where a grantee enters into possession of part of the premises described in a deed, claiming title under the deed, his occupation and seisin extend to all the land described in the deed, even though it conveyed no title. The description in the deed defines the extent and limits of the possession acquired by entry under the deed.

Marston v. Hobbs, 2 Mass. 493; *Kennebeck Purchase v. Springer*, 4 Mass. 416; *Milton v. First Cong. Parish*, 10 Pick. 447; *Blood v. Wood*, 1 Met. 528; *Bellis v. Bellis*, 122 Mass. 414.

The deed of October 1, 1839, purports to convey lands on both sides of and adjoining the land of the corporation through the poorhouse farm, so called; and the limits of said deed were shown to cover the land claimed by the corporation, from the ancient fence on the southerly line of its location to the embankment wall on the northerly side, as established in 1838. Therefore, although there was no direct evidence that the whole of the premises described in said deed were occupied by the railroad until 1839, yet the existence of the ancient fence south of the railroad, between the granted premises and land of Kimball, was evidence from which the jury must find that the railroad had entered into possession of part of the premises described in said deed. If the railroad corporation had taken possession of part of the premises described in said deed, that possession and occupation, according to the rule of law above stated, must be extended to the whole of the premises described in said deed, in the absence of any evidence that the town occupied or laid claim to any part of the land.

The case is much strengthened, both as to the time and the extent of the actual occupation, by other evidence in the case. In the deed of September 25, 1833, the town of Newton covenanted with the railroad corporation to make, keep, and maintain, at all times, a good and sufficient wall or walls, fence or fences, on the boundary line between its own land and the granted premises, "which fences or walls shall be forever kept, maintained, and made" at the expense of the town. Immediately after the delivery of this deed of 1833, in which the consideration is stated to be \$18, we have the entry in the treasurer's books of the town of Newton:

1840, Jan. 1.

Cr. Cash of Boston & Worcester Railroad for additional land and removing fences, \$30.66.

But the proof of possession of real estate raises a presumption of title therein—is *prima facie* evidence of title.

Jayne v. Price, 5 Taunt. 326; *Teller v. Lorillard*, 10 Johns. 388; *Murray v. Denn*, 5 Cow. 200; *Towne v. Butterfield*, 97 Mass. 105.

Therefore, on the question of whether the railroad owned, in 1852, the premises described in deed of 1839, it is submitted that, apart from the deed of 1839, there was some evidence which ought to have been submitted to the

jury; and that the ruling that "no title to that piece of land passed to the Boston & Worcester Railroad Company, and that, if the jury should find that the demandant, and those under whom she claims, have had open, exclusive, and adverse possession of the demanded premises from 1832 to 1860, then, so far as is necessary to obtain a title by adverse possession, the demandant has shown herself to come within the rule,"—was erroneous.

The defendant having put in evidence of its occupation and seisin, prior to 1852, of the premises described in the deed of 1839, a presumption arises, as has been shown, that it owned the fee; and such a presumption is sufficient to prove its title, unless the plaintiff can show a better title. How does the plaintiff meet this *prima facie* case? By showing a subsequent adverse possession for twenty years. But this clearly does not meet the defendant's case. It is submitted that there was evidence that this parcel of land belonged to the railroad corporation in 1852, in which case, no occupation, adverse or otherwise, which began in 1852, would, under Stat. 1861, chap. 100, approved March 28, 1861 (see Pub. Stat. 112, § 215), ripen into any title by reason of any length of adverse occupation against the railroad company.

It is submitted, furthermore, that the words "land belonging to a railroad corporation," in the Statute of 1861, chap. 100, do not mean simply land of which the railroad corporation has a perfect title in fee simple, but rather land from which it has a right to exclude intruders. As to the land described in the deed of 1839, the defendant had paid the town of Newton the purchase money, had paid for removing fences separating it from their original location, had entered into possession and erected new fences, had taken a deed of it from the selectmen of Newton; and these statements are partly true of the deed of 1843. It therefore became entitled, in equity, in 1847 and 1852, to a conveyance, from the town of Newton, of the legal title of the land described in one or both of these deeds, if it should be decided by the court that those deeds were insufficient to convey the legal title.

Potter v. Jacobs, 111 Mass. 82.

And it is submitted that the words of the statute "belonging to" include, cover, and protect such a title and interest in the railroad corporation; and, on those grounds, that the third request for ruling ought to have been given.

The fourth prayer for instructions should have been given in substance; for, from the evidence of the delivery to the railroad corporation of the deeds of 1833, 1839, and 1843; from the evidence of the payment of the purchase money, and of the occupation by the railroad of the lands described in all or any of said deeds; of the removal and erection of fences—the jury would have been justified in finding that, when the town of Newton, in 1847, undertook to convey to William Jackson the whole of said poorhouse farm, reserving and excepting therefrom so much of said poorhouse farm as belongs to the Boston & Worcester Railroad Corporation, the lands reserved in said deeds belonged to the railroad corporation; in which case, the plaintiff could, under Stat. 1861, chap. 100, gain no title by adverse possession begun in 1852.

The fifth request for instructions should have been given. The recital, in the deed of Newton to Jackson,—excepting therefrom whatever then belonged to the Boston & Worcester Railroad Corporation,—taken in connection with the fact that the deeds of the selectmen to the company, purported to convey the property on which the railroad then existed and was in operation, might be taken by the jury as an admission by the town that those deeds conveyed title to the company; and, as the demandant introduced in evidence the deed from Newton to Jackson as the first deed in her chain of title, it was competent for the tenant to rely upon the exceptions and reservations of that deed to control such testimony of adverse occupation as she subsequently introduced.

Messrs. Edmund M. Parker and J. G. Thorp, Jr., for demandant:
This was a writ of entry.

Certain requests for rulings made by the tenant were refused by the court; to which refusal exception was taken. Certain rulings were made by the court; to which rulings, as far as they are inconsistent with the above requests, exception was taken. Therefore, there is no question before this court as to the correctness of the instructions actually given, unless the court shall find that one or more of the rulings prayed for should have been given.

Curry v. Porter, 125 Mass. 94; *Dwyer v. Fuller*, 4 New Eng. Rep. 338, 144 Mass. 420.

There remain, then, the requests for rulings which were refused; and these we will take up in their order.

1. To maintain, as the first request for ruling does, that a reference to a committee, by a legislative body, of any question, is a passing upon such question in the affirmative,—is a perversion of language, the statement of which is its best refutation.

The only deed mentioned in the bill of exception, whose date is less than five years from the date of this meeting, is that of October 1, 1889. But this deed is not that of the town of Newton; does not straighten any line, or purport to do so; nor are the persons who gave it, nearly a year after the vote, shown to have been the selectmen to whom the question propounded by article 4 was referred; and no others could have executed the deed, if any, authorized by that vote.

2. The second instruction was also properly refused.

Without special authority, the selectmen have no authority to sell or convey town land. They are not clothed with the general powers of the corporate body for which they act. They can only exercise such powers and perform such duties as are necessarily and properly incident to the special and limited authority conferred on them by their office. They are special agents, empowered to do only such acts as are required to meet the exigencies of ordinary town business."

Smith v. Cheshire, 13 Gray, 318.

Under this doctrine, it has been held that selectmen have no power *virtute officii* to contract on behalf of the town for the hiring of a building for town meetings (*Goff v. Rehoboth*, 12 Met. 26); to issue negotiable orders on the town treasurer (*Smith v. Cheshire, supra*); to contract for the construction of highways ordered by

the county commissioners (*Bean v. Hyde Park*, 3 New Eng. Rep. 345, 148 Mass. 245).

It is clear that, in view of the limited nature of the powers of selectmen, as established by the above decisions, that of conveying the town's land cannot be possessed by them *virtute officii*.

The deed of 1889 was not the deed of the town, but is the private deed of the grantors named therein.

Towns may convey their land in either of two ways: (1) by vote (Colony Laws, chap. 96, Anc. Char. p. 195; *Springfield v. Miller*, 12 Mass. 415, 417; Rev. Stat. chap. 15, § 11; Pub. Stat. chap. 27, § 9); (2) by deed of their committee or agent (Rev. Stat. chap. 15, § 11; Pub. Stat. chap. 27, § 9).

It is fundamental law, and long recognized and upheld in this Commonwealth, that the deed of an agent will not be operative to bind the principal, unless it is in form the deed of the principal and executed in his name.

Combes's Case, 9 Coke, 76; *Frontin v. Small*, 2 Ld. Raym. 1418; *Fowler v. Shearer*, 7 Mass. 14, 19; *Eluell v. Shaw*, 16 Mass. 42; *Brintley v. Mann*, 2 Cush. 337.

And the case of a town is no exception to this rule.

Damon v. Granby, 2 Pick. 345, 351, 352.

Applying this rule to the case at bar, the deed of 1889 is not the deed of the town of Newton, but the private deed of the persons named as grantors therein.

They state that "we give, grant," etc.; that "we have hereunto set our hands and seals;" and they acknowledge the instrument as "their free act and deed."

The same is true of the deed of 1843. These deeds are those of the individual grantors, and would pass whatever title they had in the premises.

Snow v. Orleans, 126 Mass. 453.

There was no evidence of any receipt of consideration, and any instruction to the jury which assumed that it had been proved as a fact was properly refused. The date of the deed was October 1, 1889, and it was acknowledged the same day. It states the consideration as \$18.

On January 1, 1840, the Boston & Worcester Railroad paid the town of Newton \$30.66 for additional land and for removing fences. This does not, in any way, tend to show that the \$18 mentioned in the deed of three months before was paid to the town then.

If the deed, when given, was not the deed of the town, it did not convey the land of the town; and no receipt of the consideration by the town, either then or at any subsequent period, would make it the deed of the town and operative to pass the title to the town's land.

Burrell v. Burrell, 11 Mass. 294; *Liverpool Wharf v. Prescott*, 7 Allen, 494.

3. As the demandant had shown by clear and uncontroverted evidence that she and her predecessors in title had, for thirty years prior to the disseisin, been in open, peaceable, and undisputed possession of a portion of that strip of land, viz., that portion lying north of the red fence, which fence, even on the statement of the tenant's witnesses, was, throughout its whole length, nearer than 28 feet to the centre line of the railroad, the third instruction was also properly refused.

Not only was there evidence that the demandant had title to such portion, but the evidence of such title was clear, and its truth admitted.

Unless, then, there be something in the circumstances of this case or in the law to be applied thereto, which places an imperative bar to acquisition by the demandant of title to any portion of that strip, her title thereto must be conceded.

Denny v. Williams, 5 Allen, 1, 4; *Reed v. Deerfield*, 8 Allen, 522, 524; *Forsyth v. Hooper*, 11 Allen, 419, 421.

The wording of the Statute of 1861, chap. 100, is carefully limited. It is: "If the owner or occupant of any land adjoining any railroad * * * has taken or shall take into his enclosure any part of the land belonging to said railroad, as located and established, * * * or has occupied or shall occupy * * * any land belonging to, or included within, the location of any such railroad, no continuance of any such enclosure * * * shall create in such adjoining owner * * * any right to the land belonging to such railroad so enclosed or occupied."

There are two cases in which the statute operates to deprive the adjoining owner of the right which the common law gives him:

1. Where such owner may have taken into his enclosure land "belonging to the railroad, as located and established."

2. The second case is where such owner may have occupied land "belonging to or included within the location of any such railroad."

To extend the operation of this statute to land not included within the location of the road would be a direct violation of this rule of construction.

Dwelly v. Dwelly, 46 Me. 377; *Gibson v. Jenney*, 15 Mass. 205, 206.

The rule stated by Tindal, *Ch. J.*, in *Parker v. Great Western R. Co.* 13 L. J. C. P. Div. 105, 112, is exactly applicable to this case.

"Acts passed (conferring great privileges upon companies, for which they profess to give the public certain advantages in return) should be construed strictly against the parties obtaining them, but liberally in favor of the public."

The argument of the court in *Fisher v. New York & N. E. R. Co.* 135 Mass. 107, 109, supports this contention.

In deciding that the statute of 1861 was no bar to the acquisition, by adverse enjoyment for more than twenty years, of a private way, the court says: "Under other statutes in force at the time when this statute was passed, every railroad corporation was required to file the location of its road with the county commissioners, defining the courses, distances, and boundaries thereof, and to furnish a plan of land taken to the owner; but there was no statute requiring railroads to be fenced, except under special circumstances, and in obedience to a positive direction or demand (Gen. Stat. chap. 68, §§ 18, 40, 43, 45). The statute of 1861 was passed with reference to this state of things, when fences might not be built at all, or, if built, might not be placed on the line of the land taken or bought by the railroad company, and when other adequate means were provided for fixing with certainty and of record the precise limits of such land.

4. The proposition involved in the fourth request is, shortly stated, as follows: That the

premises described by the three deeds of 1833, 1839, and 1848 were not conveyed by the town to William Jackson in 1847; and the jury are authorized to find, upon the evidence, that the said premises then belonged to the railroad company.

Unless the premises described in these three deeds belonged to the railroad, they were conveyed to Jackson; and if they did not belong to the railroad, the jury would not be authorized to find that they did.

We have, therefore, to consider simply whether those premises belonged to the railroad at that date.

We concede that the premises conveyed by the deed of 1833 belonged to the railroad company; and this strip sufficiently satisfies the language of the exception.

But the railroad was unable to locate those premises, and hence could not contend that any portion of the demanded premises were included in that description.

As to the deeds of 1839 and 1848, it has been shown already that those deeds conveyed no title to the company; and hence the premises therein described did not at that time belong to the company, and could not, therefore, be brought within the wording of the exception.

The receipt of the purchase money for a parcel of land would not even bind the owner to convey the land.

Glass v. Hulbert, 103 Mass. 24.

Still less would it operate to convey the land.

There was not sufficient evidence on which to base a finding that the town received the consideration of the deed of 1839, and there was not a fragment or a suggestion of evidence that the town received the consideration of the deed of 1848.

5. The fifth instruction was properly refused. It assumed as a fact that the deeds to the company purported to convey the property on which the railroad then existed and was in operation. This assumption was false.

But even assuming the existence of that fact as to the purport of the deeds, and assuming further, as must be done in order to support the tenant's contention, that the excepting from a conveyance "the land which belongs to X" will operate as a conveyance to X of land which did not then belong to him, and which, but for those words, never would have belonged to him,—and the admission, if such, was made without authority, and would not bind the town.

The instructions actually given were correct. There was no evidence from which the jury could have found that the railroad had ever been in possession of any portion of the demanded premises; and if it had had such possession, that fact would have been immaterial, as it could not have had it for twenty years prior to the enclosure of the premises by the defendant's predecessor in title, and possession for any less time would have amounted to nothing (*Greshole v. Newman*, 88 U. S. 21 Wall. 481, 487, 23 L. ed. 471); and it would have lost whatever rights it had by failure to assert them against demandant's title for nearly thirty years (Rev. Stat. chap. 119, § 1; Gen. Stat. chap. 154, § 1; Pub. Stat. chap. 196, § 1).

The statement that, if the demandant and those under whom she claims had had open.

exclusive, and adverse possession of the demanded premises from 1852 to 1880, so far as was necessary to attain a title by adverse possession, the demandant had shown herself to have come within the rule, was a correct statement of the ordinary rule governing the acquisition of title by adverse possession.

Brattle Square Church v. Bullard, 2 Met. 363.

Knowlton, J., delivered the opinion of the court:

The evidence at the trial tended to show, and the jury must have found, that, from the year 1852 to the year 1880, the demandant occupied openly, adversely, exclusively, and continuously so much of the demanded property as was described by the jury in their record. The tenant did not contradict this evidence, but rested its defense solely upon certain deeds and accompanying evidence, under which it claimed an early title, and upon Stat. 1861, chap. 100, which prevented the acquisition of titles by adverse possession against railroad companies in certain cases. If it showed such an ownership of any part of the land as to make this statute applicable, the verdict must be set aside; otherwise it must stand. To support its claim, the tenant introduced three deeds to the Boston & Worcester Railroad Corporation, to whose rights it had succeeded, made by the selectmen of Newton, and purporting to convey portions of the land of said town,—one dated September 25, 1888, another dated October 1, 1889, and the third dated June 6, 1848. There was no evidence that the first carried any part of the demanded premises, nor that the third was ever authorized by said town or recognized by it in any way. The second included, in its description, a part or all of the land in controversy. If, under this deed, the land described in it belonged to the railroad, and came within the meaning of the language referring to lands of railroads, in Stat. 1861, chap. 100, the passage of that statute prevented the acquisition afterward of a title to the property by adverse possession; and, the previous possession relied on by the demandant having been for less than twenty years, her case was not made out.

Three objections were made to the validity of this deed: (1) that the language of the note of the town under which the selectmen acted was not broad enough to authorize a sale; (2) that, if authority to sell was given by the vote, it was to the board of selectmen then existing, and not to that of the next year; and (3) that the deed was not properly executed to convey the interest of the town.

The first and last of these it is unnecessary to consider; for, if we assume, as was decided in *Willard v. Newburyport*, 12 Pick. 227, in regard to a similar vote, that a reference of this subject to the selectmen conferred upon them authority, not merely to determine what should be done, but to do it, we think the authority was not intended to extend to other boards of selectmen, who might be elected in subsequent years. The subject of the vote was a proposed sale of certain land, and the question was whether the town would authorize it. In respect to the answer to be given, it was a question which looked to the present, and not to the future. If the language of the vote is

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construed as a reference of the whole matter to the selectmen, with power to act, it implied that they were to deal with the question presently, and decide it finally without unreasonable delay. The authority was conferred upon an existing board of public officers. The vote was passed in October, 1888; and, as the law then was, the term of office of all these officers would expire in the following spring, and a new board would then be chosen. It must be presumed that, in giving this authority, the voters considered the membership of the existing board, and that they did not intend to allow the question to be postponed and afterwards determined by a board of selectmen that might be elected the next or any subsequent year. We think, therefore, that the deed made in October, 1889, was without authority of the town, and that the railroad companies acquired no title under it.

There was no evidence which would warrant the jury in finding that the Boston & Worcester Railroad Corporation, or the tenant, had actual possession of any part of the premises described in the verdict, prior to the year 1880; and even if the Statute of 1861, chap. 100,—the language of which is very different from that in the substituted Statute of 1874, chap. 372, § 107 (Pub. Stat. chap. 112, § 215),—could be held to apply to land outside of a located or established railroad; and if the evidence in this case would warrant a finding that the town of Newton received a consideration for this land,—we do not think the equitable right of the tenant or of its predecessor, if either of them had any, would prevent the acquisition of a title by the long-continued adverse possession of another.

It follows that the Statute of 1861, chap. 100, has no application to this case, and that there was nothing to control the effect of the adverse possession proved at the trial. All the requests for instructions to the jury were either in conflict, in some particular, with the law as we have stated it, or were immaterial; and there was no error in the instructions given.

Exceptions overruled.

Mary A. SLATER *et al.*

v.

Charles R. HURLBUT *et al.*

Where the whole beneficial interest in a testator's estate has become, under his will, vested in the beneficiaries, and they are *sui juris*, a trust or executorship in reference thereto will not be continued merely for the purpose of continuing the compensation of the executor-trustee.

(Worcester—Filed March 3, 1888.)

APPEAL by petitioners from a decree of a single justice reversing a decree of the probate court. *Reversed.*

The petition was filed by Mary A. Slater, N. Catharine Emerson, and Elizabeth A. Slater, as residuary legatees under the will of Luther Slater, deceased, against Charles R. Hurlbut, executor, and Ella S. Slater, a devisee named

in said will, to obtain a construction of the will.

The material portions of the will were as follows:

I devise and bequeath to my beloved wife Ella S. Slater the use, income, and improvement of my two dwelling-houses * * * to have and to hold the same to her for and during her natural life,—she to keep said dwellings in good repair and insured for a reasonable amount, and to pay all taxes on the same; also, one half of all the personal estate which I shall possess at the time of my decease; to have and to hold the same to the said Ella S. Slater, her heirs and assigns, to her and their use and behoof forever.

I devise and bequeath to my three sisters, N. Catharine Emerson, Elizabeth A. Slater, and Mary A. Slater, the reversion or remainder of said dwelling-houses, * * * from and after the decease of my said wife; to them and their use and behoof forever. I also give to my said sisters all the furniture of mine which they may have now in their possession.

All the rest and residue of my estate, real, personal, or mixed, of which I shall die seized and possessed, or to which I shall be entitled at the time of my decease, I give, devise, and bequeath to my said three sisters, N. Catharine Emerson, Elizabeth A. Slater, and Mary A. Slater, as joint tenants, share and share alike. Should either of my sisters die before me, then the surviving sisters shall receive the share of the deceased sister, to be divided equally. In case of the death of two of my sisters before my death, then I direct that the surviving sister shall have and receive the whole of the residue of my estate.

I do nominate and appoint Charles R. Hurlbut, of Worcester, to be the executor of this my last will and testament. I hereby request my said executor to keep all my buildings insured for a reasonable amount and to keep said buildings in proper repair; and I further request my said executor not to sell any of my real estate unless my sisters, or the survivors or survivor of my said sisters, shall request in writing such sale to be made; and I hereby authorize and empower my said executor or whoever shall execute this will, if in the performance of the duties of that trust it becomes necessary or expedient to sell any or all of my real estate, and my said sisters, the survivors or survivor of my said sisters, shall so request in writing, then I give to my said executor, or whoever shall execute this will, power and authority to sell any of my real estate at auction or private sale, and to execute and declare good and sufficient deeds to convey the same.

I hereby devise and desire that my said executor shall have and receive a commission of 5 per cent on all the rent which he shall collect and receive for the use of my real estate, and shall have the use of the house he now occupies, free from rent, while he shall act as my executor, which said commission of 5 per cent and the free use of the house he now occupies shall be payment in full as executor of this will and for all his services as executor.

I further direct my said executor to collect the rents monthly, to pay all taxes upon my said estate, and to reserve from each monthly payment of rent one twelfth of the amount due for

taxes, and to pay the balance of the rents, after deducting his commission of 5 per cent, to the persons who shall be legally entitled to have and receive the same by this will.

The petition alleged that the personal estate had been distributed and paid over, with the exception of certain bonds and papers deposited by the testator in the bank, whence they were stolen and never came to the hands of the executor; that more than two years had elapsed since the filing of the executor's bond, and that the estate had been fully settled. It also alleged that the executor claimed the right to continue to act as executor until said bonds and papers were recovered, and also the right to carry out certain trusts under the will; but it claimed that the executor had already performed all the duties imposed by the will, and prayed to have the trust, if such there was, forthwith terminated, and all the estate devised to petitioners delivered to them.

The probate judge, Thayer, J., decreed that no trust was created which would not terminate upon distribution of the personal estate, and that the duties of the executor would then cease. This decree having been reversed by Gardner, J., petitioners appealed.

Mr. Charles A. Merrill, for petitioners, appellants:

The testator did not intend that the executor should pay insurance, repairs, and taxes out of the rents belonging to the residuary legatees, upon the life estate of the widow, after expressly enjoining that she should pay them herself.

Amory v. Lowell, 104 Mass. 266, 272.

The general principle of interpretation, where there is an apparent repugnancy, is to construe the will in harmony with the general intent, giving effect to every word without change or rejection, provided an effect can be given to it not inconsistent with such general intent.

1 Jarm. Wills, § 472, note 1.

The construction that the life tenant should pay taxes, insurance, and repairs on the life estate, and the executor on the residue, is the only way to harmonize these provisions with the general intent of the testator.

The direction to the executor is not that he shall sell, and is not imperative, but to sell upon the written request of these petitioners, confining him to the execution of a mere power, exercisable only at their instance. It is not discretionary in any sense.

Shelton v. Homer, 5 Met. 462; *Fay v. Fay*, 1 Cush. 98, 105.

It is evident from the cases of *Smith v. Harrington*, 4 Allen, 566; *Bowditch v. Andrew*, 8 Allen, 389; and *Inches v. Hill*, 106 Mass. 575, 578, that the court may declare trusts terminated on bill brought by parties beneficially interested, either by decreeing conveyances by the trustee to *certainis que trust*, or otherwise, where the trustee has the legal title. But where the legal and equitable estates are both in the same persons, there is no occasion for a conveyance or consent of a trustee, which is tantamount to a renunciation by him.

See *Willmott v. Jenkins*, 1 Beav. 401, 405.

An executor is regarded in some sense as a trustee, but he cannot, like a trustee, be discharged, even by the court, from his executor-

ship. When the funeral and testamentary expenses, debts, and legacies have been satisfied, and the surplus has been invested upon the trusts of the will, the executor then drops that character, and becomes a trustee in the proper sense, and may then be discharged from the office, like any other trustee.

Lewin, Tr. 8th Eng. ed. p. 673.

The estate of the petitioners in the Cambridgeport houses is a vested, and not a contingent, remainder.

Pike v. Stephenson, 99 Mass. 188, 190, and cases there cited.

Mr. W. S. B. Hopkins, for appellees:

If there be no trust, properly so termed, created by this will, with the execution of which the executor is charged, the titles created by the devisees are nevertheless limited by powers and functions of management vested in him. The express appointment by the testator of a person as agent to manage his property will have effect given to it in a court of chancery; and nothing short of misconduct will defeat the interest thus vested, unless its continuance be made, by the testamentary provision, terminable at the pleasure of another.

Hibbert v. Hibbert, 8 Meriv. 681; *Williams v. Corbet*, 8 Sim. 349; *Belaney v. Kelly*, 19 W. R. 1171; *Tenney v. Moody*, 3 Bing. 3, approved in *Fay v. Taft*, 12 Cush. 449.

This will uses words fully adequate to create a trust and an interest in favor of the executor. "Wish and request," "authorize and empower," "devise and desire," not to add the word "direct," in especial connection with collecting rents, have all been adjudicated apt to create trusts.

Pierson v. Garnet, 2 Bro. C. C. 38; *Foley v. Parry*, 2 Mylne & K. 144.

It is difficult to fix any rule, but the clause must always be read in connection with all the rest of the will.

Perry, Tr. § 112; *Warner v. Bates*, 98 Mass. 274.

Trusts arise by implication from the provisions of a will, in order to carry out the testator's intention, where there is no corpus given to the trustee.

Walker v. Whiting, 23 Pick. 818; *Braman v. Stiles*, 2 Pick. 460; *Fay v. Taft*, 12 Cush. 449.

C. Allen, J., delivered the opinion of the court:

The question in this case is whether, under the terms of the will, the executor is entitled, against the wishes of the residuary devisees, to continue in the management and care of the real estate left by the testator, and to receive the compensation provided in the will for such service.

So far as the personal estate of the testator is concerned, the executor has performed his duties and discharged his trust; unless hereafter the stolen bonds or some of them shall be recovered. There is nothing to show any probability of his receiving anything from this source. Two years have expired since the filing of his bond, and full distribution has been made of all the personal property in his hands. It is not contended, in argument, that the fact of the outstanding bonds furnishes any reason for his continuing in the care of the real estate.

The real estate of the testator was disposed of 3 Mass.

in this manner: Certain of it was given to his wife for her life; and all the residue, including the remainder of that given to his wife for life, to his sisters. There was a provision that his wife should keep the dwellings upon the land devised to her for life in good repair and insured, and should pay all taxes on the same. But the executor contends that the later provisions of the will have the effect, by implication, to vest in him an estate in trust in the whole, or a part, of the real estate, by conferring powers and imposing duties in respect to the same, which cannot otherwise be properly executed and performed. *Fay v. Taft*, 12 Cush. 448.

In respect to the estate devised to the testator's wife for life, it is not to be supposed that he intended that the executor should exercise the powers and duties which are mentioned; because, in the first place, the testator imposes on her the duty of paying for repairs, insurance, and taxes, and gives to her certain personal property wherewith she may be able to do it; and, moreover, the executor would have no means with which to pay these expenses, except from the residuary estate, unless it could be supposed that the testator meant that his wife should furnish to the executor the money for these purposes. Besides, the testator authorizes the executor, by the request in writing of his sisters, under certain circumstances, to sell the real estate; and if he intended to include in this authority the land given to his wife for life, it would seem probable that he would have required her consent also. It must be considered that the testator did not intend to give his executor authority over the estates devised to his wife for life, although, in terms, the language includes all of his real estate. This conclusion is more easily reached, because the whole will shows a considerable lack of accuracy in the use of language.

In respect to the residuary estate devised to the testator's sisters, the question is certainly far from clear, and it must be conceded that it is not easy to account for the various provisions, by assuming that the testator inserted them merely in order that his executor should have the charge and management of the estate during the time required for the discharge of the ordinary duties of an executor. They seem to be more extensive and permanent than would naturally be expected for such a limited purpose. But, on the other hand, various considerations lead to the contrary inference. There is no express devise to him in trust; the devise to the testator's sisters are absolute and unqualified in their terms; their age is not given, but, at any rate, it is assumed that at present they are all of age and *sui juris*. The will discloses no reason for the creation or permanent continuance of a trust in respect to their estates, unless for the purpose of benefiting the executor. There is no language necessarily implying that the executor was to perform duties or exercise powers which implied the vesting of a trust estate in him; he was not to sell the property unless by the written request of the testator's sisters. The other provisions were mostly in the nature of requests to the executor, and are susceptible of the construction that the testator was seeking to furnish assistance to his sisters in the care and

management of the property in case they should need it; the final direction to collect rents and pay taxes may have been on the assumption that this should be done if his assistance should be needed, and not otherwise; and, on the whole, and especially in view of the absolute character of the earlier provisions, wherein the residue is given to the testator's sisters without qualification, we do not find in the later provisions a clear intent to cut down the estates so devised, by subjecting them to a trust. Moreover, even assuming that a trust was created, it is plain that the trustee would take no larger estate than was necessary for the proper execution of the trust. *Fay v. Taft*, 12 Cush. 448. The whole beneficial interest in this portion of the estate being vested in the testator's sisters, no other person has an interest to maintain or continue the trust, unless the trustee himself; and a decree for the termination of the trust might properly be entered. *Sears v. Choate*, post, p. —. We have not been referred to any case where a trust has been continued merely for the purpose of continuing the compensation of the trustee; and we should be slow to do it, unless such clearly was the intention of the founder of the trust. We find no such intention in the present case.

The result is that, in the opinion of a majority of the court, the decree appealed from must be reversed, and the decree of the judge of probate affirmed.

Decree accordingly.

Henry D. SMITH, *Petitioner for Review*,
v.

John O'BRIEN.

Where the petitioner, on paying respondent's attorney part of respondent's judgment against him, made an oral agreement with the attorney to pay the balance upon a day specified, upon the attorney's agreeing to refrain from enforcing the execution until that day, the agreement was founded upon a valuable consideration, and was a waiver of petitioner's right to treat the judgment as voidable.

(Suffolk—Filed March 2, 1886.)

ON respondent's exceptions. *Sustained.*

The petition for review herein was heard in the Superior Court by Thompson, J., without a jury. The only evidence in the case was the testimony of the petitioner and of the clerk of the Municipal Court of the City of Boston for Civil Business, and was uncontradicted.

It appeared that the original action was tried on Monday, May 16, 1887, after which the court announced its decision in the presence of the petitioner, and found for the plaintiff in the sum of \$69; that the petitioner then notified his counsel of his intention to appeal; that the said municipal court finished the business of that term at noon, or soon after, on Thursday, May 19, and then, instead of adjourning for the term, at once continued it till one minute past nine o'clock of the next day, Friday, in order, as testified to by the clerk, but not

stated to the petitioner, to give parties who desired to appeal, the whole of that day for the purpose; and that more than 5,000 cases are disposed of in said court annually; that petitioner made no attempt to perfect his appeal till the following day, Saturday, May 21, when he went, with his bond prepared, to the door of the office of the clerk of said court, about twenty minutes or more before nine o'clock in the morning, and found it closed, where he remained waiting for the door of the clerk's office to be opened, and trying it from time to time to see if it was open; that the office hours of the clerk's office were from nine in the morning till five o'clock in the afternoon; that on that Saturday morning the door was unfastened at exactly nine o'clock, and about two minutes after, the petitioner went in, with his sureties and bond, for the purpose of perfecting his appeal, and so announced to the clerk in attendance, who then looked at the clock and informed the petitioner that he was two minutes late.

The terms of said court begin on each Saturday morning, and end whenever during the week the court orders; and the term in question ended, by order of the court, at nine o'clock and one minute past on Friday morning, when the judgment in question and other judgments for the term were entered.

It also appeared that judgment was entered in said action May 20, and execution issued May 21; that May 25 petitioner informed respondent's attorney of his intention to obtain a review and *superedeas* of the judgment and execution; that respondent's attorney immediately informed him that the execution would be placed in an officer's hands for levy on petitioner's property; that during this conversation an officer came into the attorney's office to receive the execution for that purpose, and the petitioner was so informed, and payment of the execution was demanded, and thereupon the petitioner paid respondent's attorney the sum of \$25 in part payment of the execution, and promised to come to the attorney's office and pay the balance the following Tuesday, and also paid the officer \$1 for his trouble; whereupon the attorney agreed to refrain from enforcing the execution till the said Tuesday. It also appeared that said petition was sworn to by the petitioner the same day that he made the said part payment of \$25, and that it was filed and *superedeas* issued the next day.

The respondent prayed the court to rule as follows, to wit:

"1. If the court is satisfied, from the record and from petitioner's own testimony or other evidence in the case, that petitioner paid a part of the judgment sought to be reviewed on the 25th day of May, 1887, the same day on which he made oath to his petition, and before the same was filed, and before a *superedeas* was issued, and at the same time promised to pay the balance of the judgment the following week, then the court must rule that, in law and by statute, the petitioner has waived his right to a review, and is not entitled thereto."

The court declined to rule as requested, and found, as matter of fact, that the petitioner was entitled to his review, and so ordered.

To the said refusal to rule, and to the said finding, the respondent excepted.

Mr. Sanford H. Dudley, for respondent:

1. There was no evidence that the office hours of the clerk of the municipal court were unreasonable, or that the adjournment of the court from Thursday noon, when its business was finished for the term, till one minute after nine o'clock Friday morning, was unreasonable or any disadvantage to the petitioner.

This is not a case, then, that appeals either to the sympathy or discretion of the court, even if such sympathy or discretion could in this case be properly exercised in petitioner's behalf. *Curia diligentibus non dormientibus subvenit.*

2. This is not a case of bringing forward an action when the court may be of "opinion that there is sufficient cause for a review."

Pub. Stat. chap. 187, § 17.

Nor was it a suit against an absent defendant.

Pub. Stat. chap. 187, § 21.

Nor does it come within Pub. Stat., chap. 187, § 22.

The only statute authority for the review is found in Pub. Stat. chap. 187, § 25, where it is provided that the superior court "may grant reviews of judgments rendered before a * * * municipal court in any case in which a review might be granted if the judgment had been rendered in the superior court."

Could the superior court, after a fair trial of the case, properly grant a review of the judgment in question, had it been a judgment of its own, on the mere failure of the petitioner, by mistake or inadvertence, to comply with a statutory requirement in order to avail himself of a strictly technical right?

Not under § 17; for the judgment was satisfied in part, both before the petition was filed, and likewise before the hearing and order thereon.

Nor under either of the other statutes cited, nor because of any error or injustice to petitioner: for none appears except that of the petitioner himself.

8. The petitioner has clearly waived his right to a review.

On the day when he made oath to his petition, he voluntarily paid and satisfied a part of the judgment, and promised to pay the balance on a day certain.

If he made the payment before he signed and swore to his petition,—as he did before he filed it, because he did not file it till the next day,—then he ratified the judgment; and he is estopped from afterwards attempting, by filing his petition or otherwise, to undo his own act.

If he made the part payment after he signed and swore to his petition, such act was wholly inconsistent with the contention that the judgment was erroneous, or that he should continue to prosecute his petition for review. It was a distinct waiver of any rights thereunder, and rendered the act of afterwards filing his petition nugatory.

But the petition became a cause pending in court only when filed, and there should have been no order of court till it was filed. When the petition was filed, the judgment had been affirmed by the petitioner by his voluntary act in partly paying and satisfying it.

Messrs. Ranney & Clark, for petitioner: The petition is brought under Pub. Stat. chap. 187, § 25; and the provisions of § 17 of that chapter have no application here.

The facts stated in the bill of exceptions are proper ground for granting review.

Keene v. White, 186 Mass. 28.

1. The court, having found as matter of fact that petitioner was entitled to a review, necessarily found, as a further fact, that part payment was not a waiver; and to findings of fact no exception lies.

Boston v. Robbins, 116 Mass. 818.

A waiver is an intentional, unconditional surrender of a right; and this part payment, in order to constitute a waiver of right of review, must plainly appear to be made for that purpose. But the only fair inference to be drawn from the evidence reported in the bill is that petitioner made this part payment to save his property from threatened levy; and therefore it was no waiver, because not intended as such.

Baker v. Copeland, 1 New Eng. Rep. 491, 140 Mass. 842.

He could have been compelled to pay it if he had not filed a bond and obtained a *supersedeas*, even while his petition for review was pending.

Pub. Stat. chap. 187, § 89.

And, if the judgment were afterward set aside, he could have recovered back all he had so paid.

Stevens v. Fitch, 11 Met. 248.

* Waiver is usually a question of fact, and, it is submitted, is so in this case.

Fox v. Harding, 7 Cush. 516, and cases cited; *Nashua & L. R. Co. v. Poige*, 185 Mass. 145.

2. It is submitted that the matters embraced in the second exception are matters of fact, and not open to exception.

Boston v. Robbins, *supra*.

Knowlton, J., delivered the opinion of the court:

Assuming that the petitioner could have maintained a petition for a writ of review when he entered the office of the respondent's attorney, May 25, he there made an agreement, for a valuable consideration, which was inconsistent with the continuance of his right to have a *supersedeas* and set aside the judgment upon a review. As soon as he informed the attorney that he intended to obtain a *supersedeas* and a review, he was told that the execution would be immediately enforced by a levy upon his property, and, upon the officer's coming to get it for service, he gave the attorney \$25 in part payment of the judgment, paid the official \$1 for his trouble, and made an oral contract with the attorney to pay the balance of the execution the following Tuesday, upon the attorney's agreeing to refrain from enforcing it until that time.

By this arrangement the respondent's right to secure his execution by an immediate levy upon property was released, and the petitioner's right to treat the judgment as voidable was waived and given up. The respondent's first prayer for a ruling must be considered in connection with the fact that his attorney, as a part of the transaction referred to in the prayer, agreed with the petitioner to refrain from enforcing the execution until the following Tuesday; and the court should have ruled as therein requested.

Exceptions sustained.

Jesse ROGERS, Jr.,

v.

Thomas P. ELLIOTT.

1. The right to make a noise in the use of one's property for a proper purpose must be measured in reference to the degree of annoyance which others may reasonably be required to submit to.
2. Whether such noise will be a private nuisance to the occupant of premises near by depends upon the natural and probable effect of the sound upon ordinary persons on such adjacent premises.
3. The ordinary ringing of a church bell which so affects a person in a house near by as to aggravate his disease and increase his suffering is not sufficient cause of action for damages.

(Barnstable—Filed March 2, 1888.)

ON plaintiff's exceptions. *Overruled.*

Tort to recover damages for pain and suffering sustained by plaintiff in consequence of the defendant's persistence in causing the bell on the church property, of which he was the authorized manager, to be rung.

The church was located upon a public street in a thickly settled part of the town. The plaintiff was sick in a house in the same street with, and directly opposite, the church. He was suffering from a sunstroke which had resulted in congestion of the brain, and when the bell rang it threw him into convulsions. After the first ringing of the bell in the morning, the plaintiff's physician called on the defendant, and stated to him the plaintiff's condition and the effect which the ringing of the bell had upon the plaintiff, and asked the defendant to refrain from having the bell rung again that day; defendant refused, and the bell was rung four or five times that day, the effect of which upon the plaintiff was to produce convulsions.

At the close of the evidence in the superior court, before Staples, J., a verdict was directed for the defendant, and plaintiff alleged exceptions.

Mr. H. M. Knowlton, for plaintiff:

This is an action of trespass on the case. To maintain it the plaintiff relies upon the following propositions: 1. The bell was under the control of the defendant. 2. In consequence of its proximity to the plaintiff, its loud, sharp sound, and his physical condition, the ringing of it greatly damaged him. 3. The defendant knew it was liable to damage the plaintiff, and yet caused it to be rung. 4. The ringing of the bell was not necessary to the reasonable and full use by the defendant of his property. It was only a convenience to the worshippers, that might have been dispensed with without serious damage to anyone. 5. The ringing of the bell therefore, under the circumstances, being unnecessary, was unreasonable, wanton, injurious, and is a tort for which action will lie.

"Noise which constitutes an annoyance to a person of ordinary sensibility to sound, such as materially to interfere with the ordinary comfort of life, and impair the reasonable enjoyment of his habitation, is a nuisance to him."

Davis v. Sawyer, 133 Mass. 289, 290; *Wesson*

v. Washburn Iron Co. 13 Allen, 95, and cases cited.

But it is apparent that the expression in the rule above quoted, "annoyance to a person of ordinary sensibility to sound," is to be taken with reference to all the circumstances of each particular case. The significance of the rule lies in the relation which the circumstances of the noise bear to the circumstances of the sensibility affected. Noises are sometimes necessary. Then no amount of noise would be a nuisance. On the other hand, the sensibilities of ordinary persons are sometimes necessarily acute. Then noises otherwise lawful become a nuisance. It falls to the lot of all to be ill, and the ordinary sensibilities of a sick man are very acute; but they are as much entitled to be regarded as the ordinary sensibilities of a well man. The defendant's contention that he is only bound to consider the sensibilities of well persons is wholly unreasonable. The defendant is entitled to the credit of the courage of his convictions; for he testified on cross-examination that he would have ordered the bell rung if it killed the man by doing it.

This question of the due relation between the noise and the sensibility under the circumstances is for the jury, under proper instruction from the court. The plaintiff does not rely upon any evidence of express malice on the part of the defendant. But he claims that, under all the circumstances of the case, the law would imply malice on his part.

Mr. J. J. McDonough, for defendant:

To maintain his action plaintiff must prove that the ringing of the defendant's bell was a nuisance. When a person exercises a common right without negligence or malice, to render such action a nuisance, and therefore to hold him liable, it must be such an act in itself as to be a nuisance to all, or to a majority of the persons living in the neighborhood, and not simply by exceptional circumstances, to one person.

See Bill of Rights, art. 2, § 11.

The law does not undertake to compel men to perform towards one another offices of mere charity. A reasonable use of a right is not a nuisance though it be the annoyance of another.

1 Com. Dig. 429; Wood, Nuis. 16.

Liability cannot be attached to the bare exercise of a legal right, if the party injuring confine himself strictly to such exercise, and if the hurt done could not be avoided except by abandoning the right.

Whart. Neg. 2d ed. 782; Am. & Eng. Ency. of Law, 179, and cases there cited.

The real test as to whether a noise is a nuisance in a particular locality, and to a particular person, in the enjoyment of his property and health, is whether it is of such a character as would be likely to be physically annoying to a person of ordinary sensibility to sound, or whether the noise was made at such unreasonable hours as to disturb the repose of persons dwelling within its sphere.

Wood, Nuis. 586; Bigelow, Lead. Cas. Torts, 470, and cases cited; *Davidson v. Isham*, 9 N. J. Eq. 186; *Ray v. Whitman*, 100 Mass. 76; *Davis v. Sawyer*, 133 Mass. 289.

The present case differs materially from *Soltan v. De Held*, 9 Eng. L. & Eq. 104, and from *Harrison v. St. Mark's Church*, 3 Week. N. C. 384, and from *Davis v. Sawyer*, *supra*.

Knowlton, J., delivered the opinion of the court:

The defendant was the custodian and authorized manager of property of the Roman Catholic church used for religious worship. The acts for which the plaintiff seeks to hold him responsible were done in the use of this property, and the sole question before us is whether or not that use was unlawful. The plaintiff's case rests upon the proposition that the ringing of the bell was a nuisance. The consideration of this proposition involves an inquiry into what the defendant could properly do in the use of the real estate which he had in charge, and what was the standard by which his rights were to be measured.

It appears that the church was built upon a public street in a thickly settled part of the town; and if the ringing of the bell on Sundays had materially affected the health or comfort of all in the vicinity, whether residing or passing there, this use of the property would have been a public nuisance for which there would have been a remedy by indictment. Individuals suffering from it in their persons or their property could have recovered damages for a private nuisance. *Wesson v. Washburn Iron Co.* 18 Allen, 85.

In an action of this kind, a fundamental question is, By what standard, as against the interests of a neighbor, is one's right to use his real estate to be measured? In densely populated communities, the use of property in many ways which are legitimate and proper necessarily affects, in greater or less degree, the property or persons of others in the vicinity. In such cases the inquiry always is, when rights are called in question, What is reasonable under the circumstances? If a use of property is objectionable solely on account of the noise which it makes, it is a nuisance, if at all, by reason of its effect upon the health or comfort of those who are within hearing. The right to make a noise for a proper purpose must be measured in reference to the degree of annoyance which others may reasonably be required to submit to. In connection with the importance of the business from which it proceeds, that must be determined by the effect of noise upon people generally, and not upon those, on the one hand, who are peculiarly susceptible to it, or those, on the other, who by long experience have learned to endure it without inconvenience,—not upon those whose strong nerves and robust health enable them to endure the greatest disturbances without suffering, nor upon those whose mental or physical condition makes them painfully sensitive to everything about them. That this must be the rule in regard to public nuisances is obvious. It is the rule as well, and for reasons nearly if not quite as satisfactory, in relation to private nuisances. Upon a question whether one can lawfully ring his factory bell, or run his noisy machinery, or whether the noise will be a private nuisance to the occupant of a house near by, it is necessary to ascertain the natural and probable effect of the sound upon ordinary persons in that house; not how it will affect a particular person who happens to be there to-day, or who may chance to come to-morrow. *Fay v. Whitman*, 100 Mass. 76; *Davis v. Sawyer*, 183 Mass. 289; *Walter v. Selfe*, 4 De G. & S. 323; *Soltan v. De Held*, 2

Sim. N. S. 132; *St. Helens Smelting Co. v. Typing*, 11 H. L. Cas. 642.

In *Walters v. Selfe*, Vice-Chancellor Knight Bruce, after elaborating his statement of the rule, concludes as follows: "They have, I think, established that the defendant's intended proceeding will, if prosecuted, abridge and diminish, seriously and materially, the ordinary comfort of existence to the occupier and inmates of the plaintiff's house, whatever their rank or station, whatever their age or state of health."

It is said by Lord Romilly, Master of the Rolls, in *Orump v. Lambert*, L. R. 8 Eq. 409, that "the real question in all the cases is the question of fact; viz., whether the nuisance is such as materially to interfere with the ordinary comfort of human existence."

In the opinion in *Sparhawk v. Union Passenger R. Co.* 54 Pa. 401, these words are used: "It seems to me that the rule expressed in the cases referred to is the only true one in judging of injuries from alleged nuisances, viz., such as naturally and necessarily result to all alike who come within their influence."

In the case of *Westcott v. Middleton*, 10 Cent. Rep. 202, it appeared that the defendant carried on the business of an undertaker, and the windows of the plaintiff's house looked out upon his yard, where boxes which had been used to preserve the bodies of the dead were frequently washed, and where other objects were visible and other work was going on which affected the tender sensibilities of the plaintiff and caused him great discomfort. Vice-Chancellor Bird, in dismissing the bill for an injunction against carrying on the business there, said: "The inquiry inevitably arises, If a decision is rendered in Mr. Westcott's favor because he is so morally or mentally constituted that the particular business complained of is an offense or a nuisance to him, or destructive to his comfort or his enjoyment of his home, how many other cases will arise and claim the benefit of the same principle, however different the facts may be, or whatever may be the mental condition of the party complaining?" A wide range has indeed been given to courts of equity in dealing with these matters; but I can find no case where the court has extended aid unless the act complained of was, as I have above said, of a nature to affect all reasonable persons, similarly situated, alike."

If one's right to use his property was to depend upon the effect of the use upon a person of peculiar temperament or disposition, or upon one suffering from an uncommon disease, the standard for measuring it would be so uncertain and fluctuating as to paralyze industrial enterprises. The owner of a factory containing noisy machinery, with dwelling-houses all about it, might find his business lawful as to all but one of the tenants of the houses, and as to that one, who dwell no nearer than the others, it might be a nuisance. The character of his business might change from legal to illegal, or illegal to legal, with every change of tenants of an adjacent estate; or with an arrival or departure of a guest or boarder at a house near by; or even with the wakefulness or the tranquil repose of an invalid neighbor on a particular night. Legal rights to the use of property cannot be left to such uncertainty.

When an act is of such a nature as to extend its influence to those in the vicinity, and its legal quality depends upon the effect of that influence, it is as important that the rightfulness of it should be tried by the experience of ordinary people, as it is, in determining a question as to negligence, that the test should be the common case of persons of ordinary prudence, without regard to the peculiarities of him whose conduct is on trial.

In the case at bar it is not contended that the ringing of the bell for church services in the manner shown by the evidence materially affected the health or comfort of ordinary people in the vicinity, but the plaintiff's claim rests upon the injury done him on account of his peculiar condition. However his request should have been treated by the defendant upon considerations of humanity, we think he could not put himself in a place of exposure to noise, and demand, as of legal right, that the bell should not be used.

The plaintiff in his brief concedes that there was no evidence of express malice on the part of the defendant, but contends that malice was implied in his acts. In the absence of evidence that he acted wantonly or with express malice, this implication could not come from his exercise of his legal rights. How far and under what circumstances malice may be material in cases of this kind, it is unnecessary to consider.

Exceptions overruled.

Julius A. STILES *et al.*

v.

William F. SHERMAN.

No exception lies to the finding of fact by the court.

(Middlesex—Filed March 19, 1888.)

ON plaintiffs' exceptions. *Overruled.*

Trial by jury was waived; the cause was heard by Pitman, J., for purpose of being determined by the court.

Action of contract, on an account annexed, to recover the price of groceries furnished by the plaintiffs to the defendant and his family in Lowell, Mass., between the dates of October 5, 1876, and April 24, 1879.

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A discharge in bankruptcy, on his voluntary petition, was granted the defendant October 31, 1878, by the District Court of the United States, Northern District of Illinois, of all debts which existed June 23, 1878. No question was made at the time as to the validity of such discharge.

The last twenty-nine items in the plaintiffs' account were for goods furnished to the defendant, as aforesaid, subsequently to June 23, 1878.

The defendant claimed to have been a resident of Lowell, Mass., continuously, since a time long prior to the first of the plaintiffs' charges, although for eleven years prior to the date of the writ he had been in business in the west, making his headquarters in Chicago, Illinois, and had been in Lowell only four or five times during said eleven years, and then only for a few weeks at each time, except in the winter of 1883 and 1884, at which time he remained some six months in Lowell. There was other material evidence upon both sides as to the question of domicile.

The court ruled, at the request of the plaintiffs, that "the residence necessary to bring the defendant within the territorial jurisdiction of the District Court of the United States for the Northern District of Illinois, upon his voluntary petition, was such as would, as a matter of law, suspend the operation of the Statute of Limitations of Massachusetts so long as such residence in Illinois continued."

The court found generally for the defendant.

There was no evidence in the case of any change of residence or domicile, except as above explicitly stated, by the defendant, between the time of his filing his said voluntary petition in bankruptcy and a period about six months prior to the date of the plaintiffs' writ.

To the above finding of the court for the defendant, the plaintiff excepted.

Messrs. Pratt & Quinn for plaintiffs.

Mr. W. H. Anderson for defendant.

By the Court:

The presiding justice of the superior court found, as a fact, upon evidence which is not reported, that the domicile of the defendant was in Lowell. No exception lies to such finding. No question of law is presented by the bill of exceptions.

Exceptions overruled.

3 MASS.

MAINE.
SUPREME JUDICIAL COURT.

Lucius PACKARD *et al.*

v.

County Commissioners of ANDROSCOGGIN COUNTY.

1. Technical exactness is not required in a petition for a way. There must be such a description of the proposed route as will notify interested parties and let them know with reasonable certainty what is asked for.
2. The petition may describe alternative locations for the route and the termini in some cases.

(Androscoggin—Filed January 9, 1888.)

ON exceptions of the city of Auburn, respondent. *Overruled.*

The opinion states the case and material facts.

Mr. George C. Wing, City Solicitor, for the city of Auburn:

The court of county commissioners has no jurisdiction.

Hayford v. Arrostook County, 1 New Eng. Rep. 688, 78 Me. 158. See also 87 Me. 112; 87 Me. 558; 49 Me. 146; 12 Cush. 351; 2 Met. 185.

The vagueness of the petition is inexcusable, and the proceedings should not be upheld.

Messrs. Savage & Oakes, for plaintiffs:

Where alternative places are described for the location, this furnishes no valid objection to proceeding thereon.

Sumner v. Oxford County, 87 Me. 112.

A substantial observance of the route indicated in the petition is all that is required.

Wayne v. Kennebec County, 87 Me. 560.

Foster, J., delivered the opinion of the court:

An appeal was taken from the decision of the county commissioners of Androscoggin County, a committee appointed, and, upon the coming in of their report, objections were seasonably filed against its acceptance. The presiding justice overruled the objections, ordered the acceptance of the report, and that the judgment be certified to the county commissioners.

The case comes before this court on exceptions.

The only question involved is in regard to the description of the way named in the petition to the county commissioners. The claim set up in defense is that the petition upon which the proceedings were had is uncertain and indefinite, and does not describe a way required by Rev. Stat. chap. 18, § 1.

This contention relates to no other part of the petition than the description of the southern terminus of the way, which is designated, in the language of the petition, at "some point to be determined by your honors on some one of the ways or roads near 'Perryville' or 'Foss-ville,' so called, in Auburn, by which the travel may reach the county buildings aforesaid."

While the petition cannot be recommended
: Me.

as a model, and evidently was not drawn by a professional hand, yet we think that the objections to it cannot be sustained.

From the statement of facts in the bill of exceptions, it appears that Perryville and Foss-ville are local names applied to certain of the more thickly inhabited portions of the city of Auburn; and within the limits of these places are five or six streets leading in the direction of the county buildings. These places are separated only by a small ravine or valley. The streets are but a short distance apart, any one of which can be entered by the proposed road, and by any one of which "the travel may reach the county buildings" directly.

The statute prescribes what is necessary to confer jurisdiction upon the county commissioners. Among other things, not material in the decision of this case, it requires a "petition describing a way." The statute, however, does not designate what description of the proposed way is to be set out in the petition; but undoubtedly it should be such as to describe the way with reasonable definiteness. "Hence it has been the practice in such cases to state at least the termini of the proposed way, with reasonable and approximate definiteness." *Hayford v. Arrostook County*, 1 New Eng. Rep. 688, 78 Me. 158.

Reasonable certainty, as well as a substantial compliance with the statute, is what is required in proceedings of this character; but technical exactness and precision cannot be expected, and has never been required. *Windham v. Cumberland County*, 26 Me. 406; *Raymond v. Cumberland County*, 68 Me. 112-115; *Hayford v. Arrostook County*, *supra*.

And though, in laying out the way, the commissioners are not required to follow minutely the line indicated in the petition, a substantial compliance therewith being all that is demanded (*Wayne v. Kennebec County*, 87 Me. 558), yet, in regard to the termini of the way thus laid out, they must necessarily be more precise, and designate them exactly by monuments (*Cushing v. Gay*, 28 Me. 12). Nor does it furnish any valid objection to the proceedings, that the petition describes alternative places for the location. *Sumner v. Oxford County*, 87 Me. 112; *Raymond v. Cumberland County*, 68 Me. 112.

In this last case the petition described alternative places for the proposed way, with different termini for each, described with what may be regarded as reasonable and approximate definiteness, though not with that technical precision and exactness which might be requisite in conveyancing, or in laying out the way by the commissioners. Nor have the courts, in the decided cases, demanded such technical accuracy.

The same may be said of the petition in *Sumner v. Oxford County*, *supra*; except that there the petition set out alternative places for the commencement of the proposed route. The same objection was raised in that case as in this, but the court sustained the proceedings. "It does not appear in this case," says Shepley, Ch. J., "that the description was so defective that a person would find it difficult to determine what was designed to be accomplished."

In the case now before us the southern terminus of the proposed way was to be in one of

the roads near Perryville or Fossville, by which the travel may reach the county buildings.

This was but an alternative designation of the place where the proposed route was to terminate, leaving it in the discretion of the commissioners to say into which one of the roads near these places the way was to enter. The general terminus was the city of Auburn, as an examination of the petition shows, and within which were the particular localities of Perryville and Fossville, lying side by side of each other.

If there had been but two roads—one near Perryville and the other near Fossville—would not the petition be considered as describing reasonably and approximately the alternative places of ending? As much so, certainly, as in other cases (*Windham v. Cumberland County*, 26 Me. 406; *Wayne v. Kennebec County*, 87 Me. 559; *Raymond v. Cumberland County*, 68 Me. 113) where the court has sustained proceedings of this nature, and in the recent case of *Hayford v. Aroostook County*, 1 New Eng. Rep. 688, 78 Me. 156, where the proceedings were not upheld, on account of the vagueness and indefiniteness of the description, the court says: "We do not mean to be understood as holding that the petition for every short piece of new road must necessarily contain a statement of its termini, *in totidem verbis*; for they may be so otherwise described, by their connections with the roads already made, that they cannot fail to be understood by interested persons owning land and residing along their routes."

The description was there held to be too vague and indefinite to answer the requirement of the statute; for "no one could tell within ten miles the place where 'the most direct and feasible route to Fort Kent' would terminate, nor how long the route would be."

This case is manifestly unlike that of the case of *Pembroke v. Plymouth County*, 12 Cush. 351, where the terminus might be at any place within a distance of four miles.

Exceptions overruled.

Peters, Ch. J., Walton, Virgin, Libbey, and Haskell, JJ., concurred.

Charles S. DEAKE'S APPEAL from a Decree of Judge of Probate.

1. When a will has been fraudulently concealed by any person interested in its nonproduction, the statute bar of twenty years, for the probate of the will, does not begin to run until the will is discovered.
2. A statute providing that the time during which a will has been lost, suppressed, concealed, or carried out of the State shall not constitute a part of the twenty years, does not affect pending cases.

(Cumberland—Filed January 17, 1888.)

ON report. Case remanded.

The opinion states the case and material facts.

Messrs. Nathan & Henry B. Cleaves, for appellant:

Although usual, no attestation clause is re-

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quired by law; and if it is entirely omitted, this will not invalidate the will.

1 Jarm. Wills, 5th Am. ed. p. 218; *Fry's Will*, 2 R. I. 88; *Osborn v. Cook*, 11 Cush. 532; *Ela v. Edwards*, 16 Gray, 91; *Eliot v. Eliot*, 10 Allen, 357; *Moore v. Grinnold*, 1 Redf. 388; *Roberts v. Phillips*, 4 El. & Bl. 450.

Whether the law of prescription or Statute of Limitation, which takes away every legal mode of recovering a debt, shall be considered as affecting the contract,—like payment, release, or judgment, which, in effect, extinguish the contract; or whether they are to be considered as affecting the remedy only,—is not now an open question.

Bulger v. Roche, 11 Pick. 38.

Statutes of Limitation affect the remedy only, and not the validity of a contract.

Lincoln v. Battelle, 6 Wend. 485.

The Legislature has the power to take away by statutes what was given by statute, except vested rights.

Potter v. Sturdivant, 4 Me. 154.

A remedy of a party may be changed by the Legislature, although such change may affect suits then pending.

Thayer v. Seavey, 11 Me. 284; *Oriental Bank v. Freeze*, 18 Me. 109; *Read v. Frankfort Bank*, 23 Me. 318.

The Statute of Limitations in force when the remedy is sought, and not that existing when the contract was made, must govern the remedy; and it is competent for the Legislature to shorten the period of limitation of actions upon contracts.

Sampson v. Sampson, 63 Me. 339.

In *Wright v. Oakley*, 5 Met. 410, the court says: "It cannot be said, in technical strictness, that a man has a vested right to plead the Statute of Limitations, so that it could not be taken away by an express Act of the Legislature."

In *Dean v. Dean*, 2 Mass. 150, an appeal was authorized from the probate-court decree after the time to appeal had expired. The appeal was dismissed, but the authority of the Legislature to pass the Act was not denied or indeed discussed.

There is no such thing as a vested right to a particular remedy. The Legislature may always alter the form of administering right and justice, and may transfer jurisdiction from one tribunal to another.

Com. v. Hampden County, 6 Pick. 501. See *Sampyreac v. United States*, 32 U. S. 7 Pet. 222 (8 L. ed. 665); Sedg. Stat. & Const. L. 603.

The granting probate of a will has no other effect than to establish generally its claim to be received as testamentary. It simply strengthens its character and effect as evidence. Its probate is conclusive proof of its execution. It remains for the court of construction to determine its meaning and effect.

1 Jarm. Wills, chap. 11, p. 53; Rev. Stat. chap. 74, § 15.

It is objected that this will should not be admitted to probate on account of its age, but there is no limitation as to the time of the probate of wills.

Shumway v. Holbrook, 1 Pick. 117.

Acts done and rights acquired under previous administration will be entitled to protection, so that no serious consequences can follow from any delay in probating a will.

Lyman v. Gedney, 55 Am. Rep. 871. *Belfast v. Fogler*, 71 Me. 404, is in point.

Messrs. Mattocks, Coombs, & Neal, for Warren Hayford *et al.*, named as executors of will, and for John F. Colby, special administrator of the estate of George Deake:

Statutes are to be considered as prospective only, unless the intention of the Legislature to give them a retrospective operation is clearly expressed, or it is a necessary construction.

Hastings v. Lane, 15 Me. 184; *Rogers v. Greenbush*, 58 Me. 395; *Given v. Marr*, 27 Me. 212; *Murray v. Gibson*, 56 U. S. 15 How. 421 (14 L. ed. 755); *Harvey v. Tyler*, 69 U. S. 2 Wall. 829 (17 L. ed. 871); *Heong v. United States*, 112 U. S. 536 (28 L. ed. 770).

In analogous cases it has been held that similar statutes did not apply to cases where, as in the case at bar, the proceedings were barred by the Statute of Limitations that was in force, before the amendment went into operation.

See *Wright v. Oakley*, 5 Met. 400; *Garfield v. Bemis*, 2 Allen, 445; *Kinsman v. Cambridge*, 121 Mass. 558.

Virgin, J., delivered the opinion of the court:

This is an appeal from a decree of the judge of probate, disallowing the proposed will of Benjamin Deake, late of Cape Elizabeth, deceased.

The report discloses the following, among other facts:

The testator resided for many years in this county and died here August 7, 1854, leaving real estate in Boston, real and personal estate in this county, and two sons, George and Charles Deake, his only heirs at law.

On November 21, 1854, no will having been produced or suggested, Charles Deake was appointed administrator on his father's estate.

Several years prior to 1873, Charles resided with his brother George in Boston, and died there in December of that year, leaving one son (appellant) and two daughters, his only heirs at law.

George Deake died in Boston, in 1885, leaving a widow, but no children.

Some months after Charles's decease in December, 1873, his daughter (Mrs. Browne) then about twenty years of age, while looking over some old letters and other papers at her Uncle George's, took, among other papers, what now purports to be a holographic will of her grandfather (Benjamin Deake),—the purport of which she did not then know, having incidentally taken it, with the others, out of mere curiosity, as specimens of his handwriting and signature,—tied them together, and carried them to New York, where she then resided, and never saw them afterwards until found there by her brother (appellant), who, after the decease of his Uncle George in 1885, having learned then for the first time, in an interview with the latter's widow, that the will was made, and having thereupon sought for it in vain among his Uncle George's papers, finally found it in the bundle of papers in New York, where Mrs. Browne unwittingly left it.

The will is quite lengthy, untechnically drawn, and phonetical in its orthography; but the intention of the testator is not left in doubt.

The only attestation clause preceding the

signatures of the witnesses is simply the word "witness." But, as the statute (Rev. Stat. chap. 74, § 1) simply requires a will to be "subscribed in his (testator's) presence by three credible attesting witnesses," no *testimonium* clause is necessary. 1 Redf. Wills, 231, and cases in note. The statute does not require the testator to sign in the presence of the witnesses, but does require them to subscribe in his presence, in order that he may identify the instrument which they subscribe as his will. *Devey v. Devey*, 1 Met. 849; 2 Greenl. Ev. § 678. They need not subscribe at the same time or in the presence of each other. *Ibid.* They need not see him sign; his acknowledgment of his signature to each separately, by word or act, accompanied with a request for them to attest as witnesses, is clearly sufficient, *Stonehouse v. Evelyn*, 3 P. Wms. 254; *Hogan v. Grosvenor*, 10 Met. 56; *White v. British Museum*, 6 Bing. 310. They need not know that the instrument subscribed by them is a will; for the fact that it is in his own handwriting is sufficient evidence that the testator knew its contents and intended it to be his will. *Osborn v. Cook*, 11 Cush. 532; *Ela v. Edwards*, 16 Gray, 91, and cases there cited. Moreover, when, as in this case, all the witnesses are dead, it is well settled that proof of the genuineness of the signatures of the testator and of the witnesses is *prima facie* proof that all the requisites of the statutes have been complied with, especially when, as in the case in hand, the witnesses were men of character, and friends and neighbors of the testator. *Hinds v. James*, 2 Com. 581; *Croft v. Pawlet*, 2 Str. 1109; *Nickerson v. Buck*, 12 Cush. 332; *Ela v. Edwards*, *supra*.

The will is proved to be in the handwriting of the testator, the signatures of the testator and of the respective witnesses are amply established as genuine; and, in the absence of any suggestion to the contrary, we consider the due execution of the will established.

The principal objection interposed to the probate of the will proposed for the first time in November, 1885,—thirty-one years after the decease of the testator,—is based on Rev. Stat. chap. 64, § 1, which, so far as applicable to this will, provides: "After twenty years from the death of any person, no probate of his will shall be originally granted." This bar is sought to be avoided under an exception thereto found in Stat. 1887, chap. 108, which provides: "When an original last will is produced for probate, the time during which it has been lost, suppressed, concealed, or carried out of the State, shall not be taken as part of the limitation provided in the first section." We are of opinion, however, that the provisions of that new statute cannot affect this case.

This report was made up at the April Term, 1886, of the Supreme Court of Probate; was entered at the succeeding July Law Term, when it was set down to be argued by both parties within ninety days; but the arguments were not filed until June, 1887. In the mean time the new statute was enacted, and did not take effect until April 16, 1887, nearly one year after the case was set down for argument. So that the twenty years' bar had expired thirteen years before the new statute became effective.

Now, passing by the question whether the

Legislature had authority to revive the right of probating a will after it had become fully barred by the express provisions of the statute (*Atkinson v. Dunlap*, 50 Me. 111; Wood, Lim. 82), we are of opinion that a fair construction of the new statute will not allow it to affect this case. For it is one of the settled rules of the interpretation of the statutes (though, like all others, subject to exceptions) that they shall always have a prospective operation, unless the intention of the Legislature is clearly expressed, or clearly to be implied from their provisions, that they shall apply to past transactions. *Bryant v. Merrill*, 55 Me. 515. We may well adopt the language of Kent, J., who, in speaking for the court in relation to another statute passed during the pendency of an action, said: "There is no language in the new statute which indicates any intention of the Legislature to make it retrospective, or to interfere with actions pending. We never hold an Act to be retrospective, unless it is plain that no other construction can fairly be given." *Rogers v. Greenbush*, 58 Me. 397. See also *Garfield v. Bemis*, 2 Allen, 445; *Kinsman v. Cambridge*, 121 Mass. 558; *Harver v. Tyler*, 69 U. S. 2 Wall. 329 (17 L. ed. 871); 1 Kent, Com. 455; *Dash v. Van Kleeck*, 7 Johns. 477; Smith, Const. & Stat. Const. § 172.

But it does not necessarily follow that, because more than twenty years have elapsed since the death of the testator, his will may not now be admitted to probate. For fraudulent concealment of a cause of action has long been considered a good replication to a statute bar in actions at law as well as in suits in equity (2 Story, Eq. § 1521; *Sherwood v. Sutton*, 5 Mason, 143, 145, and cases; Wood, Lim. § 275; Ang. Lim. chap. 18, § 4 *et seq.*); though judges have not always agreed respecting the grounds for the rule.

This question became *res judicata* in this State long before the separation. *First Mass. Turnp. Corp. v. Field*, 3 Mass. 201. The defendant in that case contracted to construct a turnpike for the plaintiff, did some of the work, deceitfully covered it with earth, but represented it completed and received his pay therefor. The defect having been discovered after six years, it was held, in an action for damages for the defective work, that the Statute of Limitations did not bar the action. Parsons, Ch. J., said: "If the knowledge of the defective work was fraudulently concealed from the plaintiff by the defendant, we should violate a sound rule of law if we permitted the defendant to avail himself of his own fraud."

This principle has been followed, approved, and recognized in numerous cases, among which are *Homer v. Fish*, 1 Pick. 485; *Welles v. Fish*, 3 Pick. 74; *Bishop v. Little*, 8 Me. 406; *Cole v. McGlathry*, 9 Me. 181; *Farnam v. Brooks*, 9 Pick. 212, 244; *Nudd v. Hamblin*, 8 Allen, 180; *Atlantic Nat. Bank v. Harris*, 118 Mass. 147, 158; *Carr v. Hilton*, 1 Curtis, 290, 237, 298; *Bailey v. Glover*, 88 U. S. 21 Wall. 342, 348 (22 L. ed. 686).

After the decision in *First Mass. Turnp. Corp. v. Field*, *supra*, the Legislature of Massachusetts enacted a statute of the same purport, which in 1841 was followed by the Legislature in this State, making it applicable only to the specific actions therein enumerated. Rev. Stat.

1841, chap. 146; Rev. Stat. chap. 81, § 96. This statute is merely declaratory of the common law, so far as it goes, and finds many illustrations in the cases cited on the margin of the section in the revision.

But, to bring a case within the rule, actual fraud and concealment must be shown (*Cole v. McGlathry*, 9 Me. 181; *Nudd v. Hamblin*, *supra*), unless the fraud itself was *per se* concealment (*Gerry v. Dunham*, 57 Me. 334). And if the plaintiff had ample means, in the exercise of ordinary diligence, to detect the fraud, he is chargeable with it (*McKown v. Whitman*, 31 Me. 448; *Rouse v. Southard*, 39 Me. 404; *Farnam v. Brooks*, 9 Pick. 212; *Wells v. Child*, 12 Allen, 338, 335); or, in the language of Mr. Justice Miller: "When the party injured by the fraud remains in ignorance of it, without any fault, or want of diligence or care, on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or effort on the part of the party committing the fraud to conceal it from the knowledge of the other party" (*Bailey v. Glover*, 88 U. S. 21 Wall. 348 (22 L. ed. 688, and cases cited),—which proposition was affirmed in *Traer v. Clews*, 115 U. S. 537, 538 (29 L. ed. 470).

This being the rule governing matters in law and equity, we perceive no reason why it should not, but many reasons why it should, also apply to wills fraudulently concealed.

Whether the facts in the present report are sufficient to bring the case within this rule, we need not now inquire; for this question was not raised in the probate court or made a reason for the appeal, and hence the appellees have had neither occasion nor opportunity to meet it. But the facts apparent on the face of the report,—such as the finding of the will among the papers of persons interested in its nonproduction; their duty, under penalty of imprisonment, to deliver it to the probate court (Rev. Stat. 1857, chap. 68, § 1); its nondelivery, and the consequent deprivation of the appellant's property rights,—especially when connected with the fact that the real property, in Portland at least, still remains in the family as it did at the decease of the testator,—all compel in us the belief that "law and justice require" us, under the authority conferred by Rev. Stat. chap. 68, § 28, to remand the case to the probate court for the trial of the question whether or not the will in question was fraudulently concealed; where the parties can both be fully heard on such evidence as they may adduce.

If that question is determined in behalf of the appellant, the rights of all parties may be protected thereafter. 2 Redf. Wills, 8, and note; *Rebham v. Mueller*, 114 Ill. 348; S. C. 55 Am. Rep. 869.

Case remanded to Probate Court for the purpose mentioned above, and for further proceedings.

Peters, Ch. J., Walton, Libbey, Emery, and Haskell, JJ., concurred.

Eugene S. ACHORN

v.

John H. ANDREWS.

1. The rules of court are as binding as

the justice of the court as upon the parties.

2. A new trial will not be granted on the ground of newly discovered evidence when the witness whose testimony is relied upon to furnish such evidence was a witness at the trial and examined upon the subject to which the newly discovered testimony related.

3. Where the return of fence-viewers states that they gave reasonable notice to the parties of the hearing before them, such return is *prima facie* evidence of such notice.

(Knox—Filed January 26, 1888.)

ON exceptions and motion for new trial by defendant. *Overruled.*

An action under the statutes to recover double the expense of building defendant's part of a partition fence after proper proceedings by fence-viewers.

Mr. J. E. Hanly, for defendant:

Rev. Stat. chap. 22, § 13, provides: "If any person lays his lands common and determines not to improve any part of them adjoining such fence, and gives six months' notice to all occupants of adjoining lands, he shall not be required to maintain such fence while his land so lies common and unimproved."

Land must be enclosed or improved, and the fact that a part is improved does not require him to maintain any part of a partition fence along that part which is not improved.

James v. Tibbetts, 60 Me. 557.

Chap. 22, § 5, reads: "If the fence-viewers adjudge it to be good and sufficient," and the record produced recites that "we find it a sufficient fence."

It is objected that the defendant had no notice of the division of the fence by the fence-viewers. Now, in this case no notice was shown to have been given defendant except that implied by what was called a record.

Briggs v. Haynes, 68 Me. 535.

The time limited by fence-viewers within which each adjacent owner shall build, etc., must be definitely fixed.

James v. Tibbetts, 60 Me. 557.

"Within twelve days from date of receiving notice of this assignment" is not sufficiently definite.

Ibid.

Land must be enclosed or improved, and the fact that a part is improved does not require defendant to maintain any part of a partition fence along that part which is not improved.

Ibid.

Fence-viewers have no authority to determine the right of adjacent owners to a partition fence.

Ibid.

If a statute be both penal and remedial, it should be construed strictly.

Plaintiff cannot on trial give parol evidence of contents of writing, etc., given to defendant, without having given the regular previous notice to produce it.

Abbott v. Wood, 22 Me. 541.

An action to recover double the value of the fence cannot be sustained, unless the fence-viewers adjudge the fence built by the plaintiff is sufficient, and give notice thereof, and of the

value of the fence as ascertained by them, to the occupant so neglecting to repair or rebuild.

Ibid.

The adjudication by fence-viewers, as to the sufficiency and value of a fence built by one party, is invalid unless previous notice to the other party be given, of the time and place of their meeting to examine into the subject, that he may have opportunity to appear before them to present his views and protect his rights.

Harris v. Sturdivant, 29 Me. 366; Rev. Stat. p. 268, § 4; *Scott v. Dickinson*, 14 Pick. 276.

Two or more several owners and occupants of lands adjoining the land of another cannot legally join in an application to fence-viewers for a division of the partition fences.

Briggs v. Haynes, 68 Me. 535. See *Rowe v. Beale*, 15 Pick. 123.

Mr. J. H. Montgomery, for plaintiff:

If plaintiff's cattle escaped into this land of defendant, plaintiff would be a trespasser.

Little v. Lathrop, 5 Me. 356.

A plaintiff entitled to treble damages, but not having demanded that amount in his complaint, may have so much as he has demanded.

Pharis v. Gere, 81 Hun, 448.

The motion for a new trial simply declares that "the defendant, after verdict against him, and before judgment, moves that said verdict be set aside and a new trial granted." Motions for new trials must be filed within two days after the verdict, unless the court by special order enlarge the time."

Rule 17; *Bartlett v. Lewis*, 58 Me. 350.

The defendant did not use reasonable diligence in discovering the new evidence on which he relies for new trial. All the witnesses attended the trial and were on the stand. What the fence-viewers did was a question of inquiry all through the trial. The papers were all read in their presence and testified to by them. Defendant had ample means to learn, and use at the trial, all he now relies upon.

See *Woodis v. Jordan*, 62 Me. 495.

The fence-viewers' records are conclusive in all matters of which they have jurisdiction.

Best, Ev. § 588; 1 Greenl. Ev. § 588; *Goff v. Fowler*, 8 Pick. 300; *Cannon v. Severo*, 2 New Eng. Rep. 446, 78 Me. 310.

Their return of notice to the parties is sufficient.

Lamb v. Hicks, 11 Met. 500.

A juryman cannot testify as to how the jury came to a certain verdict, on motion for a new trial.

Woodward v. Leavitt, 107 Mass. 453.

Per Curiam:

The motion to set aside the verdict as against the evidence cannot properly be considered against the plaintiff's objection. The case before us does not show that the motion was filed within two days after verdict, as required by the 17th Rule of court. These rules are as binding on the justices of the court as on the parties before it. *Bartlett v. Lewis*, 58 Me. 350.

If the motion, however, was in fact seasonably filed, we might permit an amendment of the record to show that fact. We have therefore carefully read the testimony and there seems to be some evidence to sustain the verdict. It ought not to be set aside as being against evidence.

The motion for a new trial, based on the alleged newly discovered evidence, has been fully considered. The issue to which the new evidence is applicable was whether the plaintiff had procured an adjudication by two fence-viewers as to the value of the fence. This was a necessary issue, and the defendant expressly raised it in his brief statement. The witness upon whom the defendant now relies was examined at the trial upon that very issue, among others. He was one of the fence-viewers. The defendant now says he did not then know what the witness would say about it. He could have ascertained by inquiry while the witness was on the stand. There should not be the expense and delay of a new trial to enable him to make the inquiry now. The presiding justice correctly ruled that the recital, in the return or certificate of the fence-viewers, of the giving reasonable notice to the parties, of the intended proceeding, was *prima facie* evidence of such notice. Such notice is always essential to their jurisdiction; and, when they officially state, in their return, that the notice was given, such statement is *prima facie* evidence thereof.

There is clearly no error in the other instructions given, or in the denials of the defendant's request for instructions, so far as the rulings were unfavorable to the defendant. Such rulings as were not unfavorable to him he cannot complain of.

The exceptions to the admission and exclusion of testimony are evidently not relied on.

Our attention is not called to any error in the rulings upon the testimony.

Motion and exceptions overruled.

STATE of Maine

v.

INTOXICATING LIQUORS; C. H. Guppy, *Claimant.*

1. When a statute is susceptible of two interpretations, one of which would render it unconstitutional and the other would not, the latter should be adopted.
2. It is not in the province of the Legislature to enact a law which will destroy or materially impair the right of a trial by jury,—which would make it obligatory upon a jury to find a defendant guilty whether they believed him so or not.
3. The statute of 1887, declaring that the payment of the United States special tax, as a liquor-seller, shall be held to be *prima facie* evidence that the one paying the tax is a common seller of intoxicating liquors, only means that such evidence is competent and sufficient to justify a jury in finding a defendant guilty, provided it does, in fact, satisfy them of his guilt beyond a reasonable doubt, and not otherwise.

NOTE.—United States tax receipt as evidence. That a statute is valid which makes the posting of a United States tax receipt, running to keeper of premises as dealer in intoxicating liquors, competent evidence that he kept the premises for the sale of liquors, see *Com. v. Uhrig* (Mass.) ante, p. 709.

4. A motion to set aside the verdict, and for a new trial, in a criminal case tried in a superior court, can be heard and determined only by the justice of that court.

(Cumberland—Decided January 20, 1888.)

ON exceptions by defendant. *Sustained.*
An appeal from the Municipal Court of the City of Portland on a libel of 41 gallons of brandy seized by Charles W. Stevens, a police officer, in a freight car at the depot of the Boston & Maine Railroad in Portland, and claimed by C. H. Guppy, a druggist and apothecary in Portland.

The presiding justice in the superior court, in his charge to the jury, gave, among other things, the following instruction and rulings:

1. It is in evidence that this claimant at the time this liquor was seized, or prior thereto, paid a special tax to the United States, which authorized or permitted him to conduct the business of a retail liquor seller. The statute says that fact is *prima facie* evidence that the person so paying the tax is a common seller of intoxicating liquors.

2. As I have said, testimony has been offered tending to show that Guppy, at the time the liquor was seized, had paid such a tax; and I instruct you, as a matter of law, that, if such was a fact, then at this time he was a common seller of intoxicating liquors.

3. The claimant says that he paid the special tax to the United States because he deemed it to be his duty, he being a druggist.

4. It is true that a druggist has a right to have in his possession intoxicating liquors intended to be mixed with other ingredients, the compound itself not to be intoxicating.

5. If you find that Mr. Guppy bought it simply to compound with other ingredients in his business as a druggist, the mixture itself not being intoxicating, then you should find for the claimant.

The defendant alleged exceptions to these instructions.

Mr. D. A. Meagher, for defendant:

It is evident the jury labored under a mistake, and were influenced by improper motives; and this is a proper case for a new trial.

Williams v. Buker, 49 Me. 427; *Hovey v. Chase*, 52 Me. 804; *Folsom v. Skofield*, 53 Me. 171; *Fessenden v. Sager*, Id. 531.

It is sufficient to authorize the granting of a new trial if the court is satisfied that the facts of the case were not fully understood.

Bangor v. Brunswick, 27 Me. 351; *Edwards v. Currier*, 43 Me. 474.

Legislatures have authority to enact retrospective laws, if they affect remedies only; but such laws, if they impair vested rights or create personal liabilities, are unconstitutional and void.

Coffin v. Rich, 45 Me. 507; *Kennebec Purchase v. Laborer*, 2 Me. 275; *Oriental Bank v. Freese*, 18 Me. 110; *Atkinson v. Dunlap*, 30 Me. 111, and cases cited.

Mr. Geo. M. Seiders, County Atty., for the State:

This court has not jurisdiction of a motion for a new trial in criminal cases, on the ground that the verdict is against evidence. All ques-

tions as to the sufficiency of evidence must be addressed to and decided by the justice of the superior court.

State v. Hill, 48 Me. 241; *State v. Smith*, 54 Me. 53; *State v. Intoxicating Liquors*, 63 Me. 121.

The refusal of the court to grant the motion for order of restoration is not a subject of exception, being a discretionary act of the court.

State v. Smith, *supra*; *Boody v. Goddard*, 57 Me. 602; *French v. Stanley*, 21 Me. 512; *Stephenson v. Pisataqua F. & M. Ins. Co.* 54 Me. 55; *Leighton v. Manson*, 14 Me. 208; *Bragdon v. Appleton Mut. F. Ins. Co.* 42 Me. 259.

The question for the jury to determine was whether the liquor was intended for unlawful sale in this State. It is proper, on this issue, to show all the circumstances attending the business of the claimant.

State v. Plunkett, 64 Me. 535; *Com. v. Dearborn*, 109 Mass. 368; *Com. v. Stoehr*, Id. 365; *Bish. Stat. Cr. § 1058*, and cases cited; *Pub. Laws 1887*, chap. 40, § 8; *State v. McGlynn*, 84 N. H. 422; *Com. v. Timothy*, 8 Gray, 480.

To be available upon exceptions, an objection to testimony must be specific.

Harriman v. Sanger, 67 Me. 442; *Baker v. Cooper*, 57 Me. 888; *Bonney v. Morrill*, 57 Me. 368; *Staples v. Wellington*, 58 Me. 453; *Ornard v. Swanton*, 39 Me. 125.

To authorize the court to sustain exceptions, it must affirmatively appear that the party excepting was aggrieved by the ruling to which exceptions are taken.

Soule v. Winslow, 66 Me. 447; *State v. Pike*, 65 Me. 111.

The attention of the court was not called to the error at the time; hence defendant's exception cannot now be sustained, as he thereby waived his right of exception.

Stephenson v. Thayer, 68 Me. 143; *Harvey v. Dodge*, 73 Me. 816.

The term "intoxicating liquor" denotes any liquor which, by reason of its containing alcohol, whether only created by fermentation, or afterwards extracted by distilling, and then mixed with other ingredients, or left pure, is, in such quantities as may be practically drank, capable of producing intoxication.

Bish. Stat. Cr. § 1007; *Com. v. Blos*, 116 Mass. 56; *Com. v. Peckham*, 2 Gray, 514; *Com. v. Pease*, 110 Mass. 412.

The statute establishing a rule of *prima facie* evidence is constitutional.

Com. v. Williams, 6 Gray, 1; *Com. v. Wallace*, 7 Gray, 222; *Com. v. Rowe*, 14 Gray, 47.

Walton, J., delivered the opinion of the court:

One of the provisions of the Act of 1887, chap. 140 (amendatory of the liquor law), declares that payment of the United States special tax, as a liquor-seller, shall be held to be *prima facie* evidence that the one paying the tax is a common seller of intoxicating liquors. What is the meaning of this provision? Does it impose upon the court the duty of instructing the jury, as matter of law, that proof of such payment will make it their duty to find the defendant guilty, whether they believe him to be so or not? It is a sufficient answer to say that a jury cannot be so instructed in any criminal case. The right of trial by jury is guaran-

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teed by the Constitution, and it is not within the province of the Legislature to enact a law which will destroy or materially impair the right. The very essence of "trial by jury" is the right of each juror to weigh the evidence for himself, and, in the exercise of his own reasoning faculties, determine whether or not the facts involved in the issue are proved. And if this right is taken from the juror,—if he is not allowed to weigh the evidence for himself, is not allowed to use his own reasoning faculties, but, on the contrary, is obliged to accept the evidence at the weight which others have affixed to it, and to return and affirm a verdict which he does not believe to be true, or of the truth of which he has reasonable doubts,—then very clearly the substance, the very essence, of "trial by jury" will be taken away, and its form only will remain. And if the enactment under consideration must be construed as having this effect, then, very clearly, it is unconstitutional and void.

But we do not think it is necessary so to construe it. We have many similar statutes, in some of which the words used are "*prima facie* evidence," and in others the words are "presumptive evidence." We cannot doubt that these phrases are intended to convey the same idea. Thus, the possession of a dead bird at certain seasons of the year, and the possession of a mutilated uncooked lobster, are declared to be *prima facie* evidence that the former was unlawfully killed, and that the latter was less than ten and a half inches long when taken; while the possession of a salmon less than nine inches in length, or of a trout less than five inches in length, is declared to be presumptive evidence that they were unlawfully taken. Similar provisions exist with respect to the possession of the carcasses of moose and deer at those seasons of the year when it is unlawful to hunt or kill them.

Can it be doubted that these provisions all mean the same thing? We think not. And we are not aware that either of them has ever been construed as making it obligatory upon the jury to find the defendant guilty whether they believed him to be so or not. They mean that such evidence is competent and sufficient to justify a jury in finding a defendant guilty, providing it does, in fact, satisfy them of his guilt beyond a reasonable doubt, and not otherwise. It would not be just to the members of the Legislature to suppose that, by any of these enactments, they intended to make it obligatory upon the jury to find a defendant guilty, whether they believed him to be so or not. It is a well settled rule of construction, that if a statute is susceptible of two interpretations, and one of the interpretations will render the statute unconstitutional and the other will not, the latter should be adopted. If it be thought that these statutes, and especially the one now under consideration, if construed as above indicated, add nothing to the weight of such evidence, it will be well to remember that declaratory statutes are not uncommon, and that they are not always useless. They often serve to remove doubts, and to give certainty and stability to a rule of law which it did not before possess; and in these particulars the Act under consideration may be regarded as a wise and useful enactment.

The ruling of the justice of the superior court, not being in harmony with this interpretation of the statute, the exceptions must be sustained and a new trial granted. But the motion is not properly before us. Motions for new trials in criminal cases, tried in either of the superior courts, are to be heard and finally determined by the justices thereof. Rev. Stat. chap. 77, § 82. And although this is a proceeding against the liquor only, still it must be regarded as a criminal case. *State v. Robinson*, 49 Me. 285.

Exceptions sustained, and a new trial granted.
Peters, Ch. J. Virgin, Libbey, Foster,
and Haskell, JJ., concurred.

STATE of Maine
 v.
 Bernard DEVINE.

1. The certificate of a magistrate on a complaint for search and seizure stated that the complainant "made solemn affirmation that the above complaint by him signed is true." *Held, sufficient.*
2. An allegation of former conviction is sufficient, in a complaint for search and seizure, when it avers that at a time and in a court specified the person complained of was convicted "of unlawfully keeping and depositing * * * in said county * * * intoxicating liquors, with the intent that said liquors should be sold in this State in violation of law."

(Cumberland—Decided January 27, 1888.)

ON motion in arrest of judgment by the defendant. *Overruled.*

The question presented involved the sufficiency of the following complaint:

State of Maine,
 Cumberland, ss.

To the Recorder (the judge being absent from the court room) of our Municipal Court for the City of Portland, in the County of Cumberland.

Ezra Hawkes of Portland, in said county, competent to be a witness in civil suits, on the 7th day of August, A. D. 1886, in behalf of said State, on solemn affirmation, complains that he believes that on the 7th day of August in said year, at said Portland, intoxicating liquors were and still are kept and deposited by Bernard Devine, of Portland, in said county, in the dwelling-house, and its appurtenances, situated on the southerly side of Adams Street, in said Portland, and numbered 6 on said street, and occupied by said Devine; a part of said dwelling-house being used for purposes of traffic by said Devine; said Devine not being then and there authorized by law to sell said liquors within said State; and that said liquors then and there were, and now are, intended by said Devine for sale in the State in violation of law,—against the peace of the State and contrary to the form of the statute in such case made and provided.

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And the said complainant, on his solemn affirmation aforesaid, further alleges and complains that the said Bernard Devine has been before convicted in the Municipal Court for the City of Portland, to wit, on the 29th day of October, A. D. 1880, of unlawfully keeping and depositing in this State, in said county of Cumberland, intoxicating liquors, with the intent that said liquors should be sold in this State, in violation of law, against the peace of the State, and contrary to the form of the statute in such case made and provided.

He therefore prays that due process be issued to search the premises hereinbefore mentioned, where said liquors are believed to be deposited, and, if there found, that the said liquors and vessels be seized and safely kept until final action and decision be had thereon; and that said Devine be forthwith apprehended and held to answer to said complaint, and to do and receive such sentence as may be awarded against him.

Ezra Hawkes.

Cumberland, ss.

On this 7th day of August aforesaid, personally appeared the said Hawkes and made solemn affirmation that the above complaint by him signed is true.

Before me, Edwin L. Dyer,
 Said Recorder.

Messrs. W. H. Looney and W. F. Lunt,
 for defendant:

Since the motion in arrest of judgment was filed, most of the points therein raised have been decided in the case of *State v. Welch*, 3 New Eng. Rep. 627, 79 Me. 99, and adversely.

But there is one point for the consideration of the court on this motion, viz.: The allegation of a former conviction is not drawn in conformity with the requirements of the common law or the statute. At common law the whole substance of the former proceedings showing a legal conviction would be required to be set out.

Rev. Stat. chap. 27, § 57, is in derogation of common-law rights, and should be construed strictly.

Mr. George Seiders, County Atty., for the State:

The complainant in this case made affirmation to the complaint, which is sufficient. The word "oath" includes affirmation.

Rev. Stat. p. 60, § 7; Rev. Stat. p. 59, § 6, XII.; *State v. Adams*, 3 New Eng. Rep. 243, 78 Me. 488.

The affirmation of the complainant is a part of the complaint, and that affirmation appears in the following words, to wit: "On solemn affirmation complains;"—again, "personally appeared the said Hawkes and made solemn affirmation."

State v. Adams; 3 New Eng. Rep. 243, 78 Me. 488.

The allegation of a prior conviction, as set out in this case, is sufficient, and answers all the requirements of the statute provisions.

State v. Wentworth, 65 Me. 247; *Jones v. Roberts*, Id. 278.

Per Curiam:

This complaint is sufficient. *State v. Welch*, 3 New Eng. Rep. 627, 79 Me. 99.

Emily W. JOHNSON *et al.*

v.

Mary H. MERRITHEW.

1. A plaintiff in a real action is a competent witness when he claims title in his own right, and is not made a party as "heir of a deceased party."
2. When parties submit questions of fact in actions at law to the determination of the law court, they must be content with a decision of such questions, without a review of the testimony in the opinion.
3. A person who leaves his home for temporary purposes, and is not heard from, for the space of seven years, by those who would naturally have heard from him, is presumed to be dead.
4. There is no presumption that death occurred at any particular time during that period. That must be proved, and it may be inferred from known circumstances.
5. The fact that a vessel which sailed from Troon, Scotland, heavily laden with coal, for Havana, was never heard from, may well authorize the inference of her loss, with all on board, within the six months following her departure.
6. Where several lives are lost in the same disaster, there is no presumption, from age or sex, that either survived the other; the fact of survivorship must be proved by the party asserting it.

(Waldo—Decided January 28, 1888.)

ON report. Judgment for plaintiffs for two thirds of the property demanded.

The case is stated in the opinion.

Messrs. W. P. Thompson & R. F. Dutton, for plaintiffs;

In order to make a valid conveyance, the grantor must have been in possession of mental capacity sufficient to transact the business with intelligence, understanding rationally what she was doing, and fully comprehending the import of her act.

Hovey v. Hobson, 55 Me. 279; *Darby v. Hayford*, 56 Me. 246; *Hovey v. Chase*, 52 Me. 304; *St. George v. Biddeford*, 76 Me. 598.

Where the fact of insanity has been shown, its continuance will be presumed; and the proof of a subsequent lucid interval lies on the party who asserts it.

Best, Ev. § 405.

The deed of an insane person, not under guardianship, obtained without fraud and for an adequate consideration, may be avoided by his heirs, not only as against his immediate grantee, but also as against subsequent bona fide purchasers for value without notice.

Hovey v. Hobson, 53 Me. 451.

The testimony of plaintiffs showing that their mother was unable to write; the facts that Aaron Nickerson, the husband, who only had a dower interest, is made the principal grantor in the deed, and signs first and acknowledges it; that a mortgage for the whole consideration is made to him at the same time; and that Margaret P. Nickerson is not made a party to the 1 Me.

mortgage, and receives no part of the consideration; the fact that the deed and mortgage were not recorded until after the death of Margaret P. Nickerson, and then both on the same day,—are sufficient evidence to overcome the presumption of execution and delivery by Margaret P. Nickerson, which is raised by the record of the deed, and to require proof of the execution and delivery by her.

Patterson v. Snell, 67 Me. 559.

When a person leaves his usual place of residence, with an intention of returning to it, and continues to be absent for seven years, without being heard of, he is presumed to be dead.

White v. Mann, 26 Me. 361; *Loring v. Steineman*, 1 Met. 204; *Stinchfield v. Emerson*, 52 Me. 465; *Stevens v. McNamara*, 36 Me. 176; *Wentworth v. Wentworth*, 71 Me. 72; *Newman v. Jenkins*, 10 Pick. 515.

A conveyance of all the right, title, and interest which the grantor has in and to the land described in his deed, conveys only the right, title, and interest which he actually has at the time of his deed.

Coe v. Persons Unknown, 48 Me. 482.

Although a person who has not been heard of for seven years is presumed to be dead, the law raises no presumption as to the time of his death; and therefore, if anyone has to establish the precise period during those seven years at which such person died, he must do so by evidence.

1 Taylor, Ev. § 157; *Davie v. Briggs*, 97 U. S. 628 (24 L. ed. 1088); *McCartee v. Camel*, 1 Barb. Ch. 455; *Smith v. Knowlton*, 11 N. H. 191; *Newman v. Jenkins*, 10 Pick. 515.

One who has sailed in a vessel which has never been heard of for such length of time as would be sufficient to allow information to be received from any part of the world to which the vessels or persons on board might be expected to have been carried, and who has never been heard of since the vessel sailed, may be presumed to be dead.

White v. Mann, 26 Me. 361.

The granting of letters of administration is conclusive proof of death of the intestate.

Newman v. Jenkins, 10 Pick. 515. See *Jeffers v. Radcliff*, 10 N. H. 242; *Tisdale v. Connecticut Mut. L. Ins. Co.* 26 Iowa, 170; *S. C.* 28 Iowa, 12; *Moons v. De Bernales*, 1 Russ. 301-307; *Thompson v. Donaldson*, 8 Esp. 68; *Brigham v. Fayerweather*, 140 Mass. 415.

In cases like this, there is no presumption of survivorship.

Neuell v. Nichols, 12 Hun, 604; *Stinde v. Goodrich*, 8 Redf. 87; *Russell v. Hallett*, 23 Kan. 276; Best, Ev. § 410; 1 Greenl. Ev. §§ 29, 30 and notes.

Mr. William H. Fogler, for defendant:

Seven years having elapsed without intelligence concerning a person, the presumption is that he is dead.

1 Greenl. Ev. § 41; 4 Stark. Ev. 458; *White v. Mann*, 26 Me. 361.

The date of his death is to be determined by the court from all the circumstances of the case. As stated by Mr. Greenleaf (1 Greenl. Ev. § 41): "Upon an issue of the life or death of a party, the jury may find the fact of death from the lapse of a shorter period than seven years, if other circumstances concur; as, if the party

sailed on a voyage which should have long since been accomplished, and the vessel has not been heard from."

See *White v. Mann*, *supra*; *Smith v. Knowlton*, 11 N. H. 191; *King v. Paddock*, 18 Johns. 141; *Gerry v. Post*, 18 How. Pr. 118; *Watson v. King*, 1 Stark. 121 (2 E. C. L. 54).

The time of death is to be inferred from circumstantial evidence which leads the mind to such a conclusion.

Smith v. Knowlton, 11 N. H. 191.

But the case shows that letters of administration were issued upon Aaron W. Nickerson's estate on the second Tuesday of August, 1860. This fact is conclusive proof of his death at the time such letters were issued.

1 Greenl. Ev. § 41; *Newman v. Jenkins*, 10 Pick. 515.

By the Roman law and by the French Code, there were certain presumptions as to the question of survivorship, based upon age, sex, etc.

See 1 Greenl. Ev. § 29.

No such presumptions obtain in this country.

See *Smith v. Oroom*, 7 Fla. 61; 1 Greenl. Ev. § 30; *Coye v. Leach*, 8 Met. 371; *Moehring v. Mitchell*, 1 Barb. Ch. 264, affirmed in 8 Denio, 610.

The law presumes every person to be of sound mind.

Swinb. Wills, 45, pt. 2, § 3, pl. 4; 1 Redf. Wills, 16; *Wait v. Maxwell*, 5 Pick. 217.

The burden of proof of mental incapacity is upon the party asserting it.

Hove v. Hove, 99 Mass. 88.

Absolute soundness of mind is not necessary to enable a person to make a valid contract or conveyance. It is sufficient if his mind fully or reasonably comprehends the import of the particular transaction in which he is engaged.

7 Wait, Act. & Def. 155; *Hovey v. Hobson*, 55 Me. 256; *Farnum v. Brooks*, 9 Pick. 212; *Dennett v. Dennett*, 44 N. H. 531.

The testimony of the demandants is incompetent and inadmissible.

Rev. Stat. chap. 82, § 98; *Higgins v. Butler*, 3 New Eng. Rep. 278, 78 Me. 520.

They are demandants, as heirs of their mother. The mother, if alive, would be the party, and not they.

Wentworth v. Wentworth, 71 Me. 75.

The deed of an insane person not under guardianship is not void, but voidable, and may be confirmed by him if afterwards sane, or by his heirs.

Hovey v. Hobson, 53 Me. 453; *Allis v. Billings*, 6 Met. 415; *Wait v. Maxwell*, 5 Pick. 217; *Arnold v. Richmond Iron Works*, 1 Gray, 484.

So, if an insane person give a deed, and afterwards becomes sane, he must disaffirm his deed within a reasonable time after he is restored to sanity; and, by parity of reasoning, if the heirs of an insane person would avoid his deed, they must do so within a reasonable time after the death of their ancestor.

2 Kent, Com. 236; *Robinson v. Weeks*, 56 Me. 102; *Emmons v. Murray*, 16 N. H. 385; 1 Washb. Real Prop. 306, and cases cited in note 3.

Haskell, J., delivered the opinion of the court:

Writ of entry. Plea, *nul disseisin*. Both parties claim title under Margaret P. Nickerson. The tenant claims that Margaret con-

veyed the premises to her son, Aaron W. Nickerson, in 1875, but demandants say that such deed is void for fraud, and inoperative for want of her capacity to make the grant, and for want of delivery.

Upon this issue the tenant objects to the competency of Mrs. Heath, one of the demandants, because she claims to have inherited a share of the property as heir to her mother, Margaret P. Nickerson.

This objection is not well taken, for Mrs. Heath demands in her own right that which she inherited from her mother, and is not made a party as "heir of a deceased party." Rev. Stat. chap. 82, § 98; *Higgins v. Butler*, 3 New Eng. Rep. 278, 78 Me. 520.

It appears that in January, 1875, while on a visit to her daughter, Mrs. Heath, in Boston, Mrs. Margaret P. Nickerson was stricken with paralysis, or some kindred malady, that prostrated her bodily and confused and unsettled her mind; that in the following March, being somewhat restored, she was taken to her home in Belfast, where she and her husband resided with their son, Aaron W. Nickerson, until her death in the following October; that ever after her illness in January she at times could not recognize her children and friends, and persisted in calling one of the daughters Aaron.

An office copy of a deed of the demanded premises from Margaret P. to her son, Aaron W., dated and recorded April 15, 1875, is set up as evidence of a conveyance of the property to him. The original is not produced, nor is any reason given for withholding it; nor is the subscribing witness who took the acknowledgment of the deed as a magistrate called to testify.

A mortgage of the same property is also in evidence, dated the same day, and recorded December 21, 1875, after the death of Margaret P. in the preceding October, from Aaron W. to her husband, Aaron, conditioned to secure the payment of \$1,200 in installments, the last falling due in four years; and a discharge of the same is shown by the record August 26, 1876; but no other evidence is adduced upon that subject.

From a careful consideration of all the evidence, without reviewing it in detail, the court is of opinion that the supposed deed from Margaret P. Nickerson to her son Aaron W. did not operate as a conveyance of the property to him. It has become a recognized rule in this court that in actions at law, when the parties submit questions of fact to the determination of the law court, they must be content with a decision of them, without a review of the testimony in the opinion, and reasons stated in detail.

Margaret P. Nickerson died in October, 1875, seised of the demanded premises, leaving three children, the demandants and Aaron W., to whom the same descended in undivided shares of one third each, so that the demandants became seised of two undivided thirds thereof.

The other one third descended to Aaron W., who, accompanied by his wife, and three children all under ten years of age, sailed February 8, 1890, from Troon, Scotland, in command of a vessel loaded with coal for Havana; none of whom have since been heard from.

His father, Aaron, died September 6, 1886, having quitclaimed all his interest in the demanded premises to the tenant September 11, 1880; so that, if Aaron W. died before that date, leaving no children surviving him, his one-third share of the same descends to his father, and passed under the latter's deed to the tenant; but if Aaron W. survived that date, then nothing passed by the father's quitclaim deed to the tenant (*Pike v. Galvin*, 29 Me. 188; *Crocker v. Pierce*, 31 Me. 177; *Coe v. Persons Unknown*, 43 Me. 482; *Walker v. Lincoln*, 45 Me. 67; *Harriman v. Gray*, 49 Me. 537; *Read v. Fogg*, 60 Me. 479; *Powers v. Patten*, 71 Me. 588); and the demandants inherited from him two thirds of his one third in the demanded premises, making their interest in the same eight ninths in all.

A person who leaves his home for temporary purposes, and is not heard from for the space of seven years by those who would naturally have heard from him, is presumed to be dead (*Wentworth v. Wentworth*, 71 Me. 72; *Stevens v. McNamara*, 36 Me. 176; *Loring v. Steineman*, 1 Met. 204); but the death of such person at any particular time during that period is never presumed, but must be proved (*Newman v. Jenkins*, 10 Pick. 515).

Death may be proved by showing facts from which a reasonable inference would lead to that conclusion; as, by proving that a person sailed in a particular vessel for a particular voyage, and that neither vessel nor any person on board had been heard of for a length of time sufficient for information to be received from that part of the globe where the vessel might be driven or the persons on board of her might be carried. *White v. Mann*, 26 Me. 361.

If death may be inferred from the facts shown, it logically follows that the time of the death may be fixed with more or less certainty in the same manner. *Watson v. King*, 1 Stark. 121.

In the case at bar the vessel commanded by Aaron W. Nickerson, heavily laden with coal, sailed from Troon, in the south of Scotland, for Havana,—a voyage usually accomplished in from twenty-five to forty days,—in the track of many sailing vessels and steamers plying between the north of Europe and America. In the case of shipwreck, it is improbable, if not impossible, that the Benj. Haseltine, if driven ashore, should not have been reported in the United States within six months of her loss. If any on board of her had been rescued by passing vessels, they would have, within that time, sent the intelligence of shipwreck to the home port of the vessel. The circumstances surrounding the vessel and the voyage that she entered upon may well authorize the inference of her loss, with all on board, within the six months following the date of her departure from Scotland; and a jury would be authorized to find the death of her master and his family prior to September 11, 1880.

The weight of authority at the present day seems to have established the doctrine that, where several lives are lost in the same disaster, there is no presumption, from age or sex, that either survived the other; nor is it presumed that all died at the same moment; but the fact of survivorship, like every other fact, must be proved by the party asserting it. *Underwood* 1 Me.

v. Wing, 4 De G. M. & G. 638, affirmed on appeal in *Wing v. Angrave*, 8 H. L. Cas. 183; *Newell v. Nichols*, 75 N.Y. 78; *Coye v. Leach*, 8 Met. 371; *S. C.* 41 Am. Dec. 518, 522, note.

In the absence of evidence from which the contrary may be inferred, all may be considered to have perished at the same moment; not because the fact is presumed, but because of failure to prove the contrary by those asserting it. Property rights must necessarily be settled on that theory.

In the case at bar the father was a man forty years of age, and his minor children under ten. The last known of either was upon their sailing from Scotland. No evidence whatever gives any light upon the particular perils they encountered at death. The children are not proved to have survived their father; and therefore he died without issue, and his one third of the demanded premises descended to his father, Aaron, prior to the date of the latter's quitclaim to the tenant, and passed to her under it.

By Rev. Stat. chap. 104, § 10, it is provided that "the demandant may recover a specific part or undivided portion of the premises to which he proves title, although less than he demanded."

Judgment for the demandants for an undivided two thirds of the premises demanded.

Peters, Ch. J., Walton, Danforth, Libbey, and Emery, JJ., concurred.

Isaac JACKSON

v.

William P. CASTLE.

Sliding in a street accompanied with boisterous conduct, calculated to frighten horses lawfully traveling therein, **may be a public nuisance; but one who is damaged thereby must allege the facts constituting the nuisance, and show that it was the proximate cause of his damage, to enable him to recover his damages from the party creating it.**

(Waldo—Decided January 28, 1888.)

ON report. Plaintiff nonsuit.

The point is stated in the opinion.

Mr. Joseph Williamson, for plaintiff:

The public have a right to require that whoever uses the limits of the highway for any purpose should make such reasonable use of it as not unnecessarily to place objects there to frighten horses.

Winship v. Enfield, 42 N. H. 211.

An individual who does anything likely to frighten the horse of a traveler is liable in damages for the injuries caused thereby.

Shearm. & Redf. Neg. § 888.

So, one who carelessly fired a gun, by which the plaintiff's horse, standing on the opposite side of the road, became frightened and ran away, was held responsible.

Cole v. Fisher, 11 Mass. 137.

The act of exploding firecrackers in a public street, even on the 4th of July, is wrongful; and, if any injury results therefrom, the injured party has a remedy against the wrongdoer.

See *Conklin v. Thompson*, 29 Barb. 218; *Vosburgh v. Moak*, 1 Cush. 453.

Although modern decisions have extended the legitimate uses of streets beyond any purpose contemplated in the days of Blackstone, by determining, as in *Purple v. Greenfield*, 138 Mass. 1, that it cannot be laid down, "as a universal proposition, that any and every use of any kind of velocipede upon the sidewalk is unlawful," or, as in *Taylor v. Goodwin*, L. R. 4. Q. B. Div. 228; Am. L. Rev. 13, 770, that a bicycle is a carriage, and thereby placed upon an equality with vehicles drawn by horses,—they have not yet gone to the extreme point that sliding down the sidewalk of a city street is a legitimate mode of passage. "Streets are not proper places for the recreation of sliding down hill."

McCarthy v. Portland, 67 Me. 168; *Ray v. Manchester*, 46 N. H. 60; *Shepherd v. Chelsea*, 4 Allen, 118.

Although "sliding down on the way to business or school" might, under circumstances, be a rightful use of the sidewalk, the allegation that the defendant was acting "contrary to the law" destroys any such presumption in his favor. If the outcries and hallooing contributed to the result charged, they were equally illegal with the sliding. A right of way cannot be thus abused. It has been held a trespass for one to stand upon a street and insult another by words.

Adams v. Rivers, 11 Barb. 890.

A statute which does not give the action, but is only in affirmance of the common law, need not be recited.

Bac. Abr. *Pleas*, B, 5, 3.

But a private Act of Parliament, or any other private record, may be brought before the jury and given in evidence, if it relates to the issues in question, though it be not pleaded; for the jury are to find the truth of the fact in question, according to the evidence brought before them."

Esp. N. P. 783, citing *Hobart*, 272, and *Cro. Jac.* 112.

If the act prohibited by statute is an offense or ground of action at common law, the indictment or action may be in the common-law form; and the statute need not be noticed, even though it prescribe a form of prosecution or of action. The statute remedy is merely cumulative.

Andrew v. Hundred of Lewkner, Yelv. 116, note 1.

In an action by a town to recover the price of a right of fishing, sold by them under an authority derived from a statute, it is not necessary to set forth in the declaration their authority to make the sale.

Taunton v. Caswell, 4 Pick. 275.

Private statutes may be proved, though not set out in pleading, where it is necessary to state them as part of the cause of action.

Atlantic Mut. F. Ins. Co. v. Sanders, 86 N. H. 252.

Even in an action on the case upon a statute, brought by a party aggrieved, to recover damages merely, it is not necessary to allege in the declaration that the injurious act or neglect of the defendant was *contra formam statuti*.

Reed v. Northfield, 18 Pick. 94.

Mr. William H. Fogler, for defendant:

Highways may lawfully be used for other purposes than public travel, provided such use

be not inconsistent and incompatible with the reasonably free passage over them of whoever has occasion to travel upon them. They are designed and constructed for the general convenience of mankind, to be used for all those purposes to which, from the earliest period of their construction, they have been accustomed to be appropriated; and it cannot be a nuisance for anyone to use them as they have been ordinarily used.

Graves v. Shattuck, 85 N. H. 257.

The allegation that the sliding of the defendant and others was "contrary to law" is not a sufficient allegation that the defendant was acting wrongfully. Whether the defendant's act was lawful must be determined by the character of the act itself. The allegation "contrary to law" does not control.

Com. v. Byrnes, 126 Mass. 248; *State v. Connelly*, 68 Me. 212.

"Law," in its legal signification, is either the common law of the land or a statutory enactment.

Bouv. L. Dict.

The declaration does not aver that the plaintiff was in the exercise of ordinary care. In order to be entitled to recover, he must prove that he was using such care.

Murphy v. Deane, 101 Mass. 455; *Dickey v. Maine Tel. Co.* 43 Me. 492.

The exercise of due care by the plaintiff being an affirmative proposition which he is bound to prove, it is necessary that it be alleged in the declaration.

Chitty, Pl. 214.

Boys on the highway, even sliding and hallooing, are not unusual objects calculated to frighten well-broken horses.

See *Nichols v. Athens*, 66 Me. 402.

The declaration does not allege that the plaintiff was using the way as a traveler. The averment that he was "in the exercise of his vocation," and "lawfully in and upon" the way, may be true, and the plaintiff may not have been a traveler.

While the fact that he was not a traveler would not prevent his recovering against the defendant in any event, yet such fact would preclude him from recovering for acts of the defendant which amounted merely to an obstruction of the way or an interference with public travel.

Blodgett v. Boston, 8 Allen, 237; *Tighe v. Lowell*, 119 Mass. 472.

Haskell, J., delivered the opinion of the court:

Does the plaintiff's declaration set out a cause of action? It charges, in substance, that the plaintiff, being lawfully in a public street with his two-horse team, suffered special damage in the loss of a horse, by reason of both horses taking fright at the defendant's sliding in the same street, with others, engaged in boisterous outcries incident to their sport.

Sliding in a street, accompanied with boisterous conduct, is not necessarily unlawful. Nor is it necessarily a public nuisance. The averment that defendant's acts were "contrary to law" does not help the plaintiff's case. It is merely a conclusion that he draws from the facts stated. If the facts do not warrant it, the court cannot adopt it.

Sliding in a street, accompanied with boisterous conduct, calculated to frighten horses lawfully traveling therein, may be a public nuisance; but there is no such averment in the declaration. Sliding may be prohibited in streets by a city ordinance, and a violation of the same would be evidence tending to show negligence. If the plaintiff would recover, he must show negligent or unlawful conduct to be the proximate cause of his injury.

Plaintiff nonsuit.

Peters, Ch. J., Walton, Danforth, Libbey, and Emery, JJ., concurred.

STATE of Maine

v.

Henry WYMAN.

The allegation of former conviction in an indictment for a single sale of intoxicating liquor averred that, at a specified term of the court, the defendant was convicted "of selling a quantity of intoxicating liquors." *Held, sufficient.*

(Waldo—Decided January 28, 1888.)

ON exceptions by defendant. *Overruled.*

The exceptions were to the ruling of the court that the following indictment did sufficiently charge a former conviction:

State of Maine.

Waldo, ss.

At the Supreme Judicial Court begun and holden at Belfast, within and for the County of Waldo, on the third Tuesday of October, in the year of our Lord one thousand eight hundred and eighty-six.

The jurors for said State, upon their oaths, present that Henry Wyman, of Belfast, in the county of Waldo, on the 6th day of October, in the year of our Lord one thousand eight hundred and eighty-six, at Belfast, aforesaid, without any lawful authority, license, or permission, did then and there sell a quantity of intoxicating liquors, to wit, one pint of intoxicating liquors, to one Wilder S. Grant, against the peace of the State, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid, upon their oaths aforesaid, do further present that the said Henry Wyman was duly convicted by the Supreme Judicial Court, at a term thereof holden at Belfast, within and for the County of Waldo, on the first Tuesday of January, A. D. 1886, of selling a quantity of intoxicating liquors.

A true bill. Benjamin P. Hall, Foreman.
Reuel W. Rogers, County Attorney.

Mr. William H. Fogler, for respondent:

The respondent is indicted for a sale of intoxicating liquor in violation of Rev. Stat. chap. 27, § 34, as amended by Pub. Laws 1885, chap. 366, § 2.

Section 57 of said chapter provides that "it is not requisite to set forth particularly the record of a former conviction, but is sufficient to allege briefly that such person has been convicted of a violation of any particular provision, or as a common seller, as the case may be."

This indictment does not allege that the re-

spondent had been convicted of "a violation of any particular provision."

The allegation of a former conviction should show, either by express words or by reference to the statute, that the former conviction was for the exact offense charged in this indictment. See form in case of common seller,—Rev. Stat. chap. 27, § 68.

In *State v. Wentworth*, 65 Me. 284, and in *State v. Gorham*, Id. 270, in which the court says technicality is not required in charging a former conviction, the indictment named the statute under which the former conviction was had.

Mr. Robert F. Dunton, County Atty., for the State:

The allegation, in the indictment, of a former conviction, is sufficient under the statute.

Rev. Stat. chap. 27, §§ 57, 63; *State v. Robinson*, 39 Me. 150; *State v. Wentworth*, 65 Me. 247; *State v. Gorham*, Id. 270; *State v. Dolan*, 69 Me. 578.

Haskell, J., delivered the opinion of the court:

The indictment charges a single sale of intoxicating liquor, in apt terms, *contra formam statuti*, and further avers that at a particular term of court the defendant was convicted "of selling a quantity of intoxicating liquor."

Rev. Stat. chap. 27, § 83, prohibits the sale of intoxicating liquor. Section 54, as amended by Act 1885, chap. 366, § 2, provides that whoever sells any intoxicating liquor in violation of this chapter forfeits, etc., and on every subsequent conviction shall be punished by fine and imprisonment.

The indictment charges a prior conviction of the same unlawful act charged in it; and is sufficient under Rev. Stat. chap. 27, § 57. A record of conviction no more specific than this indictment was held sufficient in *State v. Lashus*, 5 New Eng. Rep. 237, 79 Me. 504.

Exceptions overruled.

Peters, Ch. J., Walton, Danforth, Libbey, and Emery, JJ., concurred.

Medora C. PERKINS

v.

Thomas W. HIX, Jr., Admr.

1. Where the writ describes the defendant as an administrator, but declares against him personally, and the verdict is that the defendant's intestate promised, a new trial will not be granted, if the evidence sustains the verdict, providing the plaintiff elects to amend his declaration so as to support the verdict.
2. If the amendment is filed in such a case, and judgment is rendered on the verdict, neither party should recover costs.

(Knox—Decided January 28, 1888.)

ON motion of the defendant to set aside the verdict. *Overruled.*

Assumpsit. The writ directs the officer "to attach the goods and estate of Thomas W. Hix, Jr., of Rockland, Knox County, Maine, ad-

ministrator of the goods and estate which were of M. Alvinzi Young, late of Rockland, deceased." The declaration was "that the said defendant * * * on the day of the purchase of the writ, being indebted, * * * promised the plaintiff," etc. An account annexed to the writ was headed: "Estate of M. Alvinzi Young To Medora C. Perkins, Dr."

The verdict was: "The jury find that the defendant's intestate, M. Alvinzi Young, did promise the plaintiff in manner and form as the plaintiff has declared; and assess damages for the plaintiff in the sum of \$778.88."

Messrs. Robinson & Rowell, for defendant:

In *Marshall v. Hubbard*, 117 U. S. 415 (29 L. ed. 919), it is held that "when, after giving a party the benefit of every inference that can fairly be drawn from all the evidence, it is insufficient to authorize a verdict in his favor, it is proper for the court to give the jury a peremptory instruction for the other party."

After an estate has been decreed insolvent, no suit can be commenced and maintained against that estate, except in the manner pointed out in Rev. Stat. chap. 66, § 14.

McLean v. Weeks, 85 Me. 411; *Bates v. Ward*, 49 Me. 87.

Mr. C. E. Littlefield, for plaintiff:

This is an action for money had and received, under the provisions of Rev. Stat. chap. 66, § 14. It is the statute method of prosecuting an appeal from commissioners on a contested claim.

Had the presiding judge considered the objection of any consequence, we could have amended then, as we proposed. Inasmuch as the alleged errors are to the last degree formal, they could be amended now, and the verdict would not be disturbed on that account.

Keller v. Webb, 126 Mass. 398; *Whitney v. Houghton*, 127 Mass. 527.

The objection that the verdict is not responsive is fully met by the case of *Hoey v. Candage*, 61 Me. 257.

Per Curiam:

The issue raised by the pleadings is whether the defendant individually promised to pay the plaintiff's claim.

The verdict finds a promise by the defendant's intestate; and the evidence supports the verdict, and not the declaration.

The cause has been fully tried as though the promise laid was by the defendant's intestate. We think the evidence sustains the verdict, and that substantial justice does not require a new trial.

We therefore advise the court below to grant suitable amendments of the writ to sustain the verdict. Neither party to recover costs. *Do herty v. Dolan*, 65 Me. 87.

This being done, *motion and exceptions overruled, otherwise sustained.*

Charles R. MILLIKEN *et al.*

v.

Kate H. DOCKRAY.

An injunction will not be granted to restrain the enforcement of a judg-

ment in an action at law, when the grounds relied upon for the relief were or might have been interposed as a defense to the action at law.

(Cumberland—Decided January 27, 1888.)

ON appeal by defendant from the decree of a single justice. *Decree reversed.*

The opinion states the case.

Mr. Harvey D. Hadlock, for defendant:

The bill alleges that said defendant did not waive her provisions under the will; but the court held that she did, wholly ignoring the principle of law that a decree in equity must conform to the allegation of a party as well as to his proofs.

Vattier v. Hinde, 82 U. S. 7 Pet. 252 (8 L. ed. 676); *Crocket v. Lee*, 20 U. S. 7 Wheat. 522 (5 L. ed. 518); *Boone v. Chiles*, 85 U. S. 10 Pet. 177 (9 L. ed. 888).

The opinion of this court in *Dockray v. Milliken*, 76 Me. 517, is conclusive on the question of waiver as applied to this case.

A decree cannot be pronounced on the testimony of a single witness, unaccompanied by corroborating circumstances, against the positive denial of the defendant in her answer, supported by her evidence, of any matter directly charged by the bill.

Hughes v. Blake, 19 U. S. 6 Wheat. 453 (5 L. ed. 303); *Carpenter v. Providence W. Ins. Co.* 45 U. S. 4 How. 185 (11 L. ed. 981).

To outweigh an answer responsive to the allegations of the bill, when that answer is supported by the evidence of the respondent, the complainant must produce two witnesses, or one witness supported by corroborating circumstances.

Walton v. Hobbs, 2 Atk. 19; *Arnot v. Biscoe*, 1 Ves. Sr. 97; *Cooke v. Clayworth*, 18 Ves. 12; *Flagg v. Mann*, 2 Sumn. 489; *Langdon v. Goddard*, 2 Story, 287; *Hough v. Richardson*, 3 Story, 659; *Higbie v. Hopkins*, 1 Wash. 290; *Smith v. Shane*, 1 McLean, 22; *Piatt v. Vattier*, Id. 163. See *Tobey v. Leonard*, 2 Cliff. 40; *Parker v. Phetteplace*, 2 Cliff. 70.

"The title of an administrator *de bonis non* extends only to the goods and personal estate, such as leases for years, household goods, etc., which remain *in specie*, and were not administered by the first executor or administrator, as also to all debts due and owing to the testator or intestate."

Bac. Abr. *Executors and Administrators*, B. 2, 2; *Packman's Case*, 6 Coke, 298.

"An administrator *de bonis non* derives his title from the deceased, and not from the former executor. To him only is committed the administration of the goods, chattels, and credits of the deceased which have not been administered. He is entitled to all the goods and personal estate which remain *in specie*. Money received by the former executor or administrator, in his character as such, and kept by itself, will be so regarded, but, if mixed with the administrator's own money, it is considered as connected, or as, technically speaking, 'administered.'"

United States v. Walker, 109 U. S. 265 (27 L. ed. 927); *Beall v. New Mexico*, 83 U. S. 16 Wall. 585 (21 L. ed. 392); *Coleman v. M'Murdo*, 5

Rand. 51; *Bank of Pennsylvania v. Haldeman*, 1 Pen. & W. 161; *Potts v. Smith*, 3 Rawle, 861; *Bell v. Speight*, 11 Humph. 451; *Swink v. Snodgrass*, 17 Ala. 658; *Slaughter v. Kroman*, 5 T. B. Mon. 19; *Gamble v. Hamilton*, 7 Mo. 469.

Where personal property of an estate under administration has been sold, or a debt collected, the proceeds are not property of the decedent, but are the individual property of the executor or administrator; and he is liable to an action for not accounting; and he is only liable to account at the suit of creditors, distributees, and legatees entitled to the funds.

United States v. Walker, 109 U. S. 265 (27 L. ed. 929); *Waterman v. Dockray*, 1 New Eng. Rep. 659, 78 Me. 189.

The right of a widow to have dower assigned in the estate of her husband cannot be taken in execution for her debt.

Nason v. Allen, 5 Me. 479; *Gooch v. Atkins*, 14 Mass. 378.

In the absence of fraud, trust, or other ground of equitable jurisdiction, and in the absence of statutory provisions conferring it, courts of equity have no jurisdiction to subject a chose in action of a debtor to the payment of a judgment.

Maron v. Gray, 1 New Eng. Rep. 27, 14 R. I. 641.

In order to justify an injunction to restrain an action at law upon a matter merely pecuniary, the plaintiff must be able to satisfy the court, not only that there is a case to be tried, but that there is some probability that he will prevail.

Story, Eq. Jur. § 690.

Courts of equity will not relieve against a judgment at law when a case in equity proceeds upon a defense equally available at law; but the plaintiff ought to establish some special ground of relief.

Story, Eq. Jur. § 694.

If the complainants had a demand against the respondent, their remedy would be at law; and it is always a sufficient objection to the granting of an injunction, that the party aggrieved has a full and adequate remedy at law; and it is a well-settled rule that courts of equity will not lend their aid for the protection of rights or the prevention of wrongs where the ordinary legal tribunals are capable of affording redress.

High, Inj. § 80.

The complainants in this suit now seek to enjoin the enforcement of the judgment on precisely the same grounds on which Milliken defended in the suit for dower. And all the evidence except that contained in the depositions was before the court in *Dockray v. Milliken*, 76 Me. 517. This the law will not allow them to do.

Batchelder v. Bean, 76 Me. 375.

The widow will not be put to an election unless it be apparent that such was the intention of the testator.

42 Conn. 276; 53 N. Y. 351; 76 Pa. 854; 28 N. J. Eq. 171.

Without some writings signed by the respondent, a trust concerning real estate could not be legally established.

4 Kent, Com. 806; *Steele v. Steele*, 5 Johns. Ch. 1; *McClellan v. McClellan*, 65 Me. 500; *Walker v. Locke*, 5 Cush. 90.

1 Mr.

Mr. William L. Putnam, for plaintiffs:

The special prayer for a decree in the bill is defective, but the bill contains a prayer for general relief; and the relief granted by the decree, being akin to and the same kind of relief specially asked for in the bill, is properly allowable under it.

Dan. Ch. Pr. 5th ed. * 890.

This practice is recognized by our Chancery Rule No. 7, which requires a prayer for general as well as for special relief.

Or the court can authorize an amendment of the prayer at any stage.

See closing lines of Rev. Stat. chap. 77, § 11.

It is not enough for the appellant merely to raise a doubt, on conflicting testimony, that the judgment of the court below may possibly be erroneous; the judgment of the court below is assumed to be correct till the contrary is made to appear. It is not sufficient to produce a record from which it does not appear whether it is right or wrong.

The Potomac, 67 U. S. 2 Black, 581, 584 (17 L. ed. 263).

Under the doctrine of election, respondent, having elected to claim dower, becomes, in equity, trustee of the residue of the personal property, to protect the owners of the fee, who hold under warranty deeds from her husband, the testator.

Story, Eq. Jur. § 1083; *Firth v. Denny*, 2 Allen, 468; Pom. Eq. Jur. §§ 516, 517, 467, 468.

In § 512 the principle by which the widow is admitted to her dower in the event of unexpected insolvency is explained as a concomitant of the doctrine of election.

Haskell, J., delivered the opinion of the court:

Bill in equity to restrain the enforcement of a judgment at law awarding the respondent dower in real estate of which one of the orators is seised. 76 Me. 517.

If the cause assigned for the relief prayed could have been interposed in defense of the action at law, the orators can have no relief in equity. *Batchelder v. Bean*, 76 Me. 370.

The findings of the court below show that the title was acquired by Milliken for the benefit of himself and the other orators, at the request of the respondent, and for her benefit; and the court held that her conduct, acted upon by Milliken, created an equitable estoppel, on account of which the orators are entitled to relief.

Equitable estoppels are favored, and may be interposed in an action at law. *Stanwood v. McLellan*, 48 Me. 275; *Piper v. Gilmore*, 49 Me. 149; *Wood v. Pennell*, 51 Me. 62; *Caswell v. Fuller*, 77 Me. 105; *Fountain v. Whelpley*, 77 Me. 182; *Briggs v. Hodgdon*, 3 New Eng. Rep. 282, 78 Me. 514; *Davis v. Callahan*, 2 New Eng. Rep. 443, 78 Me. 318; *McClure v. Livermore*, 3 New Eng. Rep. 41, 78 Me. 390.

The grounds for relief in this case either were or might have been interposed to defeat the respondent's action of dower, and cannot be again invoked for relief in equity.

In this particular the court below erred in granting the relief prayed, and the decree must be reversed.

Decree below reversed. Bill dismissed, without costs.

Peters, Ch. J., Walton, Virgin, Libbey, and Foster, JJ., concurred.

Catharine D. FITCH, Exrx.,
v.

LEWISTON STEAM MILL CO. *et al.*

1. A deed is valid between the parties, though not acknowledged.
2. The certificate of acknowledgment on a mortgage of a corporation, which was executed by its treasurer, recited that the treasurer acknowledged the instrument to be "his free act and deed." Held, that the informality in the certificate of acknowledgment did not vitiate the mortgage.
8. Corporations have the power, unless restricted by statute, to sell and convey, or mortgage, their property.
4. An officer of a corporation may be authorized to execute a mortgage on behalf of the corporation. That authority may be inferred from long acquiescence, and it does not require to be shown by a formal instrument under seal, or by a formal vote.

(Androscoggin—Filed January 9, 1888.)

ON report of a real action brought on a mortgage. *Judgment for plaintiff.*

The opinion states the case sufficiently.

Messrs. Chas. P. Mattocks and D. J. McGillicuddy, for plaintiff:

In *Sherman v. Mitch*, 96 Mass. 64,—a case strikingly similar to this,—the court says: "It is not necessary that the authority should be given by a formal vote. Such an act by the president and general manager of the business of the corporation, with the knowledge and concurrence of the directors, or with their subsequent and long-continued acquiescence, may properly be regarded as the act of the corporation."

Messrs. Savage & Oakes, for defendants:

Primarily the power to mortgage real estate of a corporation resides in the corporation alone.

Jones, Mort. § 127.

We think that the statement in the text of Jones on Mortgages, p. 95,—that "the directors of a corporation, in the absence of any restriction by charter or by-law, may, * * * in behalf of the corporation, mortgage its property to secure debts they are authorized to incur," is without express authority,—is supported by the decisions cited.

But the power to sell real estate does not confer the power to mortgage. "The power should expressly declare the intention that the agent should have the authority to mortgage the property."

Jones, Mort. § 129, and cases cited.

The law is well stated in a recent Massachusetts case: "It is the well-settled rule that a ratification, by a principal, of the unauthorized acts of an agent, in order to be effectual, must be

made with a knowledge, on the part of the principal, of all the material facts; and the burden is upon the party who relies upon a ratification to prove that the principal, having such knowledge, acquiesced in and adopted the acts of the agent. It is not enough for him to show that the principal might have known the facts by the use of diligence."

Murray v. Nelson Lumber Co. 8 New Eng. Rep. 420, 143 Mass. 250. See also *Combs v. Scott*, 12 Allen, 498.

One of the directors, without any vote or action, either of the board of directors or of the corporation, mortgages, in the name of the corporation, to another director, Fitch, the entire mill property and machinery,—“the property which was used in carrying on our business,”—to secure a pre-existing debt, and thereby give him a preference over the other creditors of the corporation; and Fitch's estate is now in court seeking to maintain this security by suit, not only against the corporation, but against Savage and Packard, to whom the property was subsequently conveyed in trust for the benefit of creditors.

The bare statement of the facts is itself an argument.

Morawetz, Priv. Corp. §§ 516-518, and cases cited; 97 U. S. 13 (24 L. ed. 917); 45 U. S. 4 How. 552 (11 L. ed. 1098); 67 U. S. 2 Black. 715 (17 L. ed. 839); *Ang. & A. Corp.* § 312.

Foster, J., delivered the opinion of the court:

The only question to be determined is whether the plaintiff is entitled to prevail in this action, which is a writ of entry upon a mortgage alleged to have been given to Jonas Fitch, plaintiff's testatrix, by the defendant corporation.

Two objections are interposed: (1) that the mortgage is defective in form; (2) that it was given without the authority of the corporation.

1. The defect relied upon relates wholly to the acknowledgment of the instrument. The mortgage itself is free from any objection in form. It purports to be executed as the deed of the corporation by its treasurer, duly authorized. It names the corporation as the party making it. Upon its face it is the contract of the defendant corporation. But it is contended, by the council for the defense, that the acknowledgment is not for or in behalf of the corporation, but it is the acknowledgment of the treasurer in his individual capacity. By the certificate of the magistrate it appears that "James Wood, Treasurer," personally appeared, "and acknowledged the above instrument to be his free act and deed."

It needs no discussion to show that the mortgage, in every other respect complete and formal, is not vitiated by this informality in the certificate of acknowledgment. As between the parties, a deed is valid though not acknowledged. It will pass the title to the estate in such case as against the grantor and his heirs. *Lavery v. Williams*, 13 Me. 281; *Buck v. Babcock*, 36 Me. 498; *Poor v. Larrabee*, 58 Me. 559.

Such an acknowledgment as this, however, has been sustained by other courts. Thus, in *Tenney v. East Warren Lumber Co.* 43 N. H. 848, the same objection was raised as in the

present case; and the court there held that the acknowledgment was sufficient and that "this objection has no reasonable foundation."

2. That it was given without authority of the corporation. The equities in this case are by no means in favor of the defendant corporation. The mortgage was executed in behalf of the corporation by one who was, and for a long time had been, its treasurer and general business manager. The money obtained upon this mortgage, \$13,551.76, was received and retained by the corporation. It is in evidence that the treasurer and general manager of this concern had been in the habit of deeding and conveying land with the corporation's name, for corporation purposes and for the corporation's benefit, and that this was one of those transactions. It appears also that at the time of this conveyance the treasurer exhibited a vote of the corporation to Fitch, the mortgagee, and informed him that he had authority, by virtue of such vote passed at the organization of the company, to execute this mortgage as security for the money obtained from him. That vote is as follows: "Voted that the treasurer be hereby authorized and empowered to make, sell, execute, and deliver, in the name of the company, any and all conveyances of land, by deed or bond or otherwise, and all the papers of the company not otherwise provided for in the by-laws."

The corporation has retained the money thus obtained, paying interest thereon to the mortgagee from year to year with checks drawn by the treasurer of the corporation upon its funds.

There is no good reason why this mortgage should not be upheld, if it can be done consistently with the rules of law.

Let us pass, then, for a moment, to the consideration of these rules, so far as may be proper in their application to this case.

It is a well-settled principle applicable to corporations that they have the power to sell their property, real and personal, and to mortgage it for the security of their debts. This is incident to the power of acquiring and holding it. *Pierce v. Emery*, 32 N. H. 503; *Jones, Mort.* § 124; *Ang. & A. Corp.* § 107; *Richards v. Merrimack & C. R. R.* 44 N. H. 135. This is a right existing by common law, but of course may be limited by statute or by the acts under which they are organized. No charter or by-law has been introduced limiting the general power of this corporation. This power, unlike that applicable to natural persons, is in general executed only through some agent of the corporation, and whose authority is derived in some manner therefrom,—or, if not authorized, whose acts may be subsequently ratified by the corporation.

And in matters where the acts of the agent of a corporation in the transfer of personal property require no formal instrument under seal, as in the sale or mortgage of personal property, it is not necessary that the authority should be given by a formal vote. In this State, as well as many others, it is held that the same presumptions are applicable to corporations as to individuals; and that a deed, vote, or by-law is not necessary to establish a contract, promise, or agency. *Maine Stage Co. v. Longley*, 14 Me. 449; *Trundy v. Farrar*, 32 Me. 228. "Authority in the agent of corporation may be inferred

from the conduct of its officers, or from their knowledge and neglect to make objection, as well as in the case of individuals." *Sherman v. Fitch*, 98 Mass. 64; *Badger v. Cumberland Bank*, 26 Me. 428, 435; *Goolwin v. Union Screw Co.* 34 N. H. 378; *Story*, Ag. § 52.

It is a general rule of law applicable to natural persons, that whenever the act of agency is required to be done in the name of the principal under seal, the authority to do the act must be conferred by an instrument under seal.

Such was formerly the doctrine in regard to the authority of agents of corporations. But in modern times this ancient rule has been wholly discarded in this country, and it is now well settled that an agent of a corporation may be appointed—certainly by vote—without the use of a seal, whatever may be the purpose of the agency. *Columbia Bank v. Patterson*, 11 U. S. 7 Cranch, 299 (3 L. ed. 351); *Fleckner v. United States Bank*, 21 U. S. 8 Wheat. 338 (5 L. ed. 631); *Despatch Line of Packets v. Belamy Mfg. Co.* 12 N. H. 281; *Ang. & A. Corp.* §§ 282, 283.

The contention, therefore, that the mortgage in question was given without authority, comes with an ill grace from the defendants, and under the circumstances must be deemed untenable.

Here was the express authority of the corporation, created and existing by vote duly recorded, authorizing and empowering its treasurer to make, sell, execute, and deliver in the name of the corporation any and all conveyances of land by deed, bond, or otherwise. This authority was broad enough to embrace the transaction in relation to this mortgage. The treasurer, not only in this case but on other occasions, had acted in like manner, relying on the authority conferred by this vote. The party who advanced the money and received the mortgage was led to believe that the treasurer was acting under that authority. This is not denied. Consequently, after enjoying the benefit of the loan and acquiescing in the transaction for more than eight years, it does not lie in the mouth of the defendant corporation to say that the mortgage is inoperative and void. *Aurora Agricultural Soc. v. Paddock*, 80 Ill. 263.

Judgment for plaintiff.

Peters, Ch. J., Walton, Virgin, Libbey, and Haskell, JJ., concurred.

Spencer W. MATHEWS, Assignee,

v.

Asa F. RIGGS.

1. When a creditor receives from his insolvent debtor a payment, and the transaction is **not in the usual and ordinary course of business**, it is on that account *prima facie* fraudulent under the Insolvent Act.
2. When the transaction is of such a character as to give the creditor reasonable cause to believe that the debtor was insolvent, the law presumes that he knew of such insolvency, and considers such transaction a preference, in fraud of the insolvent law.

3. When the creditor in such transaction is represented by an agent, and the agent had knowledge of the insolvency of the debtor, that is just as effectual to charge the creditor with such knowledge as though he actually possessed it.

(Waldo—Decided January 23, 1888.)

ON report. *Defendant defaulted.*

This is an action of trover brought by the plaintiff, as assignee of Christiana F. Morrison, insolvent debtor, in insolvency, to recover the value of 80 shares of stock in the Belfast Coliseum Company, of the par value of \$2,000, assigned to the defendant by the insolvent within four months of the filing of the petition in insolvency, in payment of a liability, and alleged to be in fraud of Rev. Stat. chap. 70, § 52.

Further facts appear in the opinion of the court.

Messrs. W. P. Thompson and R. F. Dutton, for plaintiff:

The transaction was not in the usual and ordinary course of business of the debtor, and is *prima facie* evidence of the intent to prefer in violation of the insolvent law, and is sufficient to establish the creditor's reasonable cause to believe that fact, and also to believe that the debtor is insolvent.

Rev. Stat. chap. 70, § 52; *Insolv. L. p. 81; Bump, Bankr. p. 882; Otis v. Hadley*, 112 Mass. 105; *Meserve v. Weld*, 75 Me. 488; *Tuttle v. Truax*, 1 Nat. Bankr. Reg. 601; *Re Palmer*, 3 Nat. Bankr. Reg. 288; *Re Meyer*, 2 Nat. Bankr. Reg. 422; *Re Colman*, 2 Nat. Bankr. Reg. 568; *North v. House*, 6 Nat. Bankr. Reg. 886; *Scammon v. Cole*, 5 Nat. Bankr. Reg. 257.

And the burden of proof will be upon the creditor receiving it to show the validity of the transaction, as respects fraud on the Act.

Collins v. Bell, 3 Nat. Bankr. Reg. 587; *Scammon v. Cole*, 3 Nat. Bankr. Reg. 398.

The schedule, proofs, and list of debts in proceedings in insolvency are competent evidence to prove the debtor's insolvency, in an action brought by his assignee to recover property alleged to have been fraudulently conveyed.

Heywood v. Reed, 4 Gray, 574.

The intent to prefer may be properly inferred from the fact of preference.

Beals v. Clark, 13 Gray, 18; *Forbes v. Howe*, 102 Mass. 427; *Toof v. Martin*, 80 U. S. 13 Wall. 40 (20 L. ed. 481).

When there is sufficient evidence to raise a legal presumption that a transfer was made with a legal or actual intent to give or to obtain a preference, in fraud of the policy and provisions of the bankrupt law, the transfer can only be sustained upon very clear and satisfactory proofs to repel such presumption.

Warren v. Delaware L. & W. R. Co. 7 Nat. Bankr. Reg. 451.

If the facts and circumstances attending the obtaining of his pay are such as afford the creditor reasonable cause to believe that he thereby prevents other creditors from obtaining theirs, and such is the effect in fact, the law will not permit him to reap the advantages of his legal wrong, but will cause him to surrender whatever he obtained to the assignee.

Merrill v. McLaughlin, 75 Me. 64.

A creditor who has before him what the Bankrupt Act declares shall be *prima facie* evidence of fraud must, in law, be deemed to have reasonable cause to believe in the existence of such fraud, unless this legal presumption is overborne by opposing testimony.

Wilson v. Stoddard, 4 Nat. Bankr. Reg. 254; *Re Kingsbury*, 3 Nat. Bankr. Reg. 318.

The principal is chargeable with all the knowledge which his agent had at the time of the transaction.

Insolv. L. p. 83; Bump, Bankr. p. 836; Re Meyer, 2 Nat. Bankr. Reg. 422; *Ungewitter v. Von Sachs*, 8 Nat. Bankr. Reg. 723; *Graham v. Stark*, 3 Nat. Bankr. Reg. 857; *Vogel v. Lathrop*, 4 Nat. Bankr. Reg. 489; *Markson v. Hobson*, 2 Dill. 827; *Mayer v. Hermann*, 10 Blatchf. 256.

The testimony of the parties as to their intention is inexpressibly weak, and can rarely avail against the stronger proof which the transaction itself affords.

Bump, Bankr. p. 825; Insolv. L. p. 77; Oxford Iron Co. v. Slaffer, 13 Blatchf. 455.

Mr. Wm. H. Fogler, for defendant:

In order to recover, the plaintiff must prove four things: (1) that at the time of the transfer of the stock to the defendant, Mrs. Morrison was insolvent or in contemplation of insolvency; (2) that the transfer in question was made with a view to give a preference to the defendant over other creditors; (3) that, at the time of said transfer, the defendant had reasonable cause to believe that Mrs. Morrison was insolvent or in contemplation of insolvency; (4) that the defendant also had reasonable cause to believe that such conveyance was made in fraud of the laws relating to insolvency.

Rev. Stat. chap. 70, § 52; *Merrill v. McLaughlin*, 75 Me. 64; *Forbes v. Howe*, 102 Mass. 427; *Abbott v. Shepard*, 2 New Eng. Rep. 366, 142 Mass. 17; *Toof v. Martin*, 80 U. S. 13 Wall. 40 (20 L. ed. 481).

The Insolvent Act does not define what shall constitute "insolvency." The term is used in its restricted sense to express the inability of a party to pay his debts as they become due, only in case of merchants or traders. As to all other persons it is used in its general signification, to denote the insufficiency of the entire property and assets of an individual to pay his debts.

See *Toof v. Martin*, 80 U. S. 13 Wall. 40 (20 L. ed. 481), in which this distinction in the use of the term is recognized and adopted.

In order that the transaction be declared void, it must appear that the defendant had "reasonable cause to believe" that Mrs. Morrison was "insolvent or in contemplation of insolvency," and that the transfer was "made in fraud of the laws relating to insolvency."

Rev. Stat. chap. 70, § 52.

In reference to the meaning of the phrase "having reasonable ground to believe such a person insolvent," it is not enough that a creditor has some cause to suspect the insolvency of the debtor, but he must have such a knowledge of facts as to induce a reasonable belief of his insolvency.

King v. Storer, 75 Me. 62; *Grant v. Monmouth Nat. Bank*, 97 U. S. 80 (24 L. ed. 971); *Barbour v. Priest*, 108 U. S. 293 (26 L. ed. 478); *Everett v. Stowell*, 14 Allen, 32; *Purinton v. Chamberlin*, 131 Mass. 589; *Abbott v. Shepard*,

2 New Eng. Rep. 366, 142 Mass. 17; *Coburn v. Proctor*, 15 Gray, 38.

Haskell, J., delivered the opinion of the court:

Case by the assignee of an insolvent debtor to recover from the defendant the value of 80 shares in a corporation, received by him from the insolvent debtor within four months of insolvency proceedings, as a fraudulent preference under the insolvent law.

No questions are raised as to the form or the sufficiency of the declaration, but the cause is submitted upon the merits.

On March 6, 1886, prior to insolvency proceedings begun May 27, 1886, the debtor, being hopelessly insolvent, and not able to meet her maturing demands in the ordinary course of business (*Clay v. Towle*, 1 New Eng. Rep. 669, 78 Me. 86), assigned to the defendant 80 shares of Coliseum stock, of the par value of \$25 each, and of the actual value of 50 or 60 cents on the dollar, amounting to some \$1,000 or \$1,200, in exchange for her son's notes amounting to \$1,928, and not due for a year to come, upon which she was an indorser.

This transaction was not in the usual and ordinary course of business, and was therefore *prima facie* fraudulent (Rev. Stat. chap. 70, § 52), and must be so considered unless the contrary appears.

Scammon v. Cole, 3 Nat. Bankr. Reg. 101, affirmed in 3 Cliff. 472.

On the same day the debtor conveyed other parcels of her property in a manner indicating no desire to distribute the same equally among all her creditors, and there can be no doubt but that she intended a preference to the defendant. *Merrill v. McLaughlin*, 75 Me. 64.

The defendant denies that he knew of the debtor's insolvent condition; but the transaction was of such a character as to, at least, give him reasonable cause to believe her insolvent; and that is all that the statute requires. *Merrill v. McLaughlin*, *supra*.

He admits that he applied to the insolvent's son to negotiate the transaction for him. He says: "Mr. Morrison acted for me at my request. He was acting for me in negotiating for the exchange of the notes for the stock." Mr. Morrison testifies: "I knew my mother's financial condition in the winter and spring of 1886."

The defendant sought the exchange of his notes for stock in value scarcely exceeding one half the face of the notes, when the notes had only run half their time and would not fall due for a year to come. He employed an agent to accomplish the exchange, who knew of the debtor's insolvency and, no doubt, conferred with his principal about the advisability of the exchange.

Moreover, the knowledge of the debtor's financial condition by Morrison, the defendant's agent, is just as effectual to charge the defendant with such knowledge as though he actually possessed it. *Re Meyer*, 2 Nat. Bankr. Reg. 422; *Vogle v. Lathrop*, 4 Nat. Bankr. Reg. 439; *North v. House*, 6 Nat. Bankr. Reg. 365; *Markson v. Hobson*, 2 Dill. 327; *Mayer v. Hermann*, 10 Blatchf. 256.

"The general rule that a principal is bound by the knowledge of his agent is based on the

principle of law that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty." *The Distilled Spirits*, 78 U. S. 11 Wall. 367 (20 L. ed. 171).

"The general doctrine that the knowledge of an agent is the knowledge of the principal cannot be doubted." *Hoover v. Wise*, 91 U. S. 310 (23 L. ed. 393); *Bank of U. S. v. Davis*, 2 Hill, 451; *Ingalls v. Morgan*, 10 N. Y. 178; *Fulton Bank v. New York & S. Canal Co.* 4 Paige, 127.

The court is constrained to hold that the defendant had reasonable cause to believe that his debtor was insolvent, and that he received the property sued for in fraud of the insolvent law.

Defendant defaulted for \$1,000, and interest from March 6, 1886.

Peters, Ch. J., Walton, Danforth, Libbey, and Emery, JJ., concurred.

Joseph C. NUGENT

v.

BOSTON, CONCORD, & MONTREAL R. R.

1. In an action against a railroad company for a personal injury resulting from the defective construction of a station-house, the question of contributive negligence, though depending upon undisputed facts, is for the jury, when reasonable and fair-minded men might arrive at different conclusions thereon.
2. A railroad company is liable to a brakeman of another road for a personal injury while in the performance of his duty on his employer's train, caused solely by reason of the negligent construction of the former's station-house, which the latter road uses.
3. When a railroad company leases its road, it is still liable, to one lawfully on the premises, for a personal injury which resulted solely from the original defective construction of its station-house, if it has not been exempted from such liability by legislative authority.
4. At the trial of an action by a brakeman for injuries received while ascending a side ladder on a moving freight car, by coming in contact with the station awning, testimony is admissible in his behalf that no other awning on the line of the road came in such close proximity to a moving car.
5. In such an action the plaintiff may show by experienced brakemen that the side ladders on freight cars are so variously constructed that ascending one on a moving car requires the undivided attention.

(Cumberland—Decided January 25, 1886.)

ON exceptions and motion by the defendant. Overruled.

An action for damages arising from personal injuries alleged to have been caused by the

negligent construction of the awning upon the station at Bethlehem Junction, in New Hampshire, built by the defendant corporation.

The following is the testimony referred to in the last line of the opinion:

Eugene H. Sawyer, conductor of the train on which the plaintiff got hurt, was called by the plaintiff, and, among other things, testified that he had had daily experience in going up ladders on moving cars for the last four years. He was then asked the following questions, which were seasonably objected to by defendant's counsel, but were admitted by the court:

Q. Whether or not it requires the undivided attention of a man going up and down a ladder on a moving car in that way.

A. I should say it did; it does mine.

Q. Why?

A. Because the ladders on the cars are not all alike. They differ in a good many ways; the difference that bothers us most is the handles on top of the car; sometimes it will be a rod of iron a foot and a half long to get hold of; then it will be just a small handle, just enough to get your hand hold of.

Mr. A. A. Strout, for defendant:

In relation to the matter of due care, see—2 Wood, R. R. pp. 1098, 1253-1262, and cases cited; *Chase v. Maine Cent. R. Co.* 78 Me. 348; *State v. Maine Cent. R. Co.* 77 Me. 538; *Taylor v. Carew Mfg. Co.* 143 Mass. 470; *Lovejoy v. Boston & L. R. Co.* 125 Mass. 79; *Thayer v. St. Louis, A. & T. H. R. Co.* 22 Ind. 26; *Perigo v. Chicago, R. I. & P. R. Co.* 52 Iowa, 276.

In *Gibson v. Erie R. Co.* 63 N. Y. 449, the party injured was caught by the projecting roof of the depot and killed while climbing up over the side of the car. In granting a new trial the court says: "Here the structure was permanent in its character, and the risk resulting from its location was apparent to the ordinary laborer as to the skilled mechanic or expert; they were visible to all, and could be as well appreciated by the deceased, who had for many years resided at the place of the injury, as by the officers and agents of the company."

See *Toomey v. London & B. R. Co.* 8 C. B. N. S. 149; *Atchison, T. & S. F. R. Co. v. Retford*, 18 Kan. 245; *Pierce, R. R.* 379, and cases cited.

Where the facts are uncontradicted, the issue becomes a question of law and not of fact.

Grove v. Maine Cent. R. Co. 67 Me. 100; *Burns v. Boston & L. R. Co.* 101 Mass. 50.

A railroad company, by giving permission to another railroad to use a part of its track, does not appoint itself to make its track safe, or to put it in repair, or to make any change in its existing state; such company, by contracting to let to another company the use of its track, is under no duty to a passenger of the other railroad. The claim of such passenger injured is on the company with whom he contracts.

Murch v. Concord R. Co. 29 N. H. 9. See *Baylor v. Delaware, L. & W. R. Co.* 40 N. J. L. 23; *Baltimore & O. R. Co. v. Stricker*, 51 Md. 47; *Owen v. N. Y. Cent. R. Co.* 1 Lans. 108; *Devitt v. Pacific R. Co.* 50 Mo. 302; *Stetler v. Chicago & N. W. R. Co.* 46 Wis. 497; *S. C.* 49 Wis. 609; 2 Wood, R. R. p. 1333, § 325 *et seq.*, and cases cited.

Defendant would not be liable for the ne-

glect of the employees of the Portland & Ogdensburg Railroad.

Clark v. Chicago, B. & Q. R. Co. 92 Ill. 43.

Messrs. Wilbur F. Lunt and Joseph W. Spaulding, for plaintiff:

This defendant corporation was liable to the general public for negligence in the construction of its station when from such neglect it would be apparent to a prudent and careful man that, in the natural course of affairs, some person might suffer an injury thereby.

Heaven v. Pender, L. R. 11 Q. B. Div. 503; *Sioux City & Pac. R. Co. v. Stout*, 84 U. S. 17 Wall. 661 (21 L. ed. 748).

The right of protection extends to all persons who have a rightful occasion to pass over the line.

Tobin v. Portland, S. & P. R. Co. 59 Me. 183; *Wendell v. Baxter*, 12 Gray, 494.

An employee who goes upon a company's premises to receive his master's freight enjoys the same right of protection that the master does.

Toledo, W. & W. R. Co. v. Grush, 67 Ill. 262; *St. Louis, I. M. & S. R. v. Fairbairn* (Ark.), 4 S. W. Rep. 80.

Where one person, being on the land of another with his license and consent, express or implied, suffers an injury through the negligence of the latter or his servants, the owner of the land is liable in case, though there is no question of contract.

2 Wood, R. R. 1339, 1389, and cases cited; *Godley v. Hagerty*, 20 Pa. 337; *Philadelphia & R. R. Co. v. Derby*, 55 U. S. 14 How. 468 (14 L. ed. 502); *Sawyer v. Rutland & B. R. Co.* 27 Vt. 370; *Bennett v. Louisville & N. R. Co.* 102 U. S. 580 (36 L. ed. 235); *Davis v. Jamaica Cent. Cong. Soc.* 129 Mass. 367; *Nickerson v. Tirrell*, 127 Mass. 236; *Carleton v. Franconia I. & S. Co.* 99 Mass. 216; *Tobin v. Portland, S. & P. R. Co.* 59 Me. 183.

Persons expressly or impliedly invited upon premises cannot be exposed to danger.

Larnore v. Crown Point Iron Co. 2 Cent. Rep. 409; 101 N. Y. 391. See *Snow v. Housatonic R. Co.* 8 Allen, 441; *Catawissa R. Co. v. Armstrong*, 49 Pa. 186, 187; *S. C.* 52 Pa. 282; *Graham v. Northeastern R. Co.* 18 C. B. N. S. 229; *Shearn & Redf. Neg.* 101.

The right of the plaintiff in the case at bar, as against the Boston, Concord, & Montreal Railroad, was that of a passenger.

Patterson, R. Acc. L. 223, and cases cited; *Yeomans v. Contra Costa Steam Nav. Co.* 44 Cal. 71.

A servant carried as a passenger, under a contract to carry made with his master, who purchased the ticket, may sue the carrier for personal injuries, or for the loss of his luggage, through the negligence of the carrier.

Dicey, Parties, 19; *Marshall v. York, N. & B. R. Co.* 11 C. B. 655; *Martin v. Great Indian P. R. Co.* L. R. 3 Exch. 9; *Whart. Neg.* § 439. See *Graham v. North Eastern R. Co.* 18 C. B. N. S. 229.

Railroad companies as passenger-carriers are bound to the most exact care and diligence, not only in the management of the trains and cars, but also in the structure and care of the track and all subsidiary arrangements necessary for passengers.

Norris v. Androscoggin R. Co. 39 Me. 276.

They cannot relieve themselves of their responsibilities by merely transferring them to a foreign corporation.

Whitney v. Atlantic & St. L. R. Co. 44 Me. 367; *Gardner v. London, C. & D. R. Co.* L. R. 2 Ch. App. Cas. 201; *Washington A. & G. R. Co. v. Brown*, 84 U. S. 17 Wall. 445 (21 L. ed. 675); *York & M. L. R. Co. v. Winans*, 58 U. S. 17 How. 80 (15 L. ed. 850); *Beman v. Rufford*, 1 Sim. N. S. 550; *Winch v. Birkenhead, L. & C. J. R. Co.* 5 De G. & S. 562; 16 Jur. 1085; *Great Northern R. Co. v. Eastern Counties R. Co.* 9 Hare, 806; *Black v. Delaware & R. Canal Co.* 22 N. J. Eq. 180; *Middlesex R. Co. v. Boston & C. R. Co.* 115 Mass. 847; *Thomas v. West Jersey R. Co.* 101 U. S. 71 (25 L. ed. 950).

A company is liable to the passengers of another company running its train upon the first-named company's track, for an injury occasioned by its own negligence or that of its employees.

Keop v. Indianapolis & St. L. R. Co. 10 Fed. Rep. 454; *S. C. 8 McCrary*, 302.

As to the liability of a landlord generally for dangerous condition or unsafe structure of the leased premises, see—

King v. Peddy, 1 Ad. & El. 822; *Roswell v. Prior*, 12 Mod. 685; *King v. Moore*, 3 Barn. & Ad. 184; *Cheetham v. Hampson*, 4 T. R. 318; *Penraddock's Case*, 5 Coke, 205; *Plumer v. Harper*, 3 N. H. 88; *Woodman v. Tufts*, 9 N. H. 88, 91; *Benoick v. Cunden*, Cro. Eliz. 402; *Waggoner v. Jermaine*, 8 Denio, 806; *Fish v. Dodge*, 4 Denio, 311; *House v. Metcalf*, 27 Conn. 681; *Wood, Nuis. §§ 827, 837*, and note 2, and cases cited; *Shearm. & Redf. Neg. § 56*, and cases cited.

Where statutory authority exists for the lease, but the injury results from the original faulty construction of the road, or the omission by the lessor of some duty in its construction, the lessee is not responsible.

St. Louis, W. & W. R. Co. v. Curl, 28 Kan. 622; *S. C. 11 Am. & Eng. R. R. Cas. 458*; *Cook v. Milwaukee & St. P. R. Co.* 36 Wis. 45.

Lessor, failing to construct cattle-guards, is liable for injuries to animals by lessee operating the road.

St. Louis, W. & W. R. Co. v. Curl, *supra*. See *Fontaine v. Southern Pac. R. Co.* 1 Am. & Eng. R. R. Cas. 159; *S. C. 54 Cal. 645*; *Illinois Cent. R. Co. v. Kanouse*, 59 Ill. 272; *Toledo, P. & W. R. Co. v. Rumbold*, 40 Ill. 143; *Mahoney v. Atlantic & St. L. R. Co.* 63 Me. 68; *Freeman v. Minneapolis & St. L. R. Co.* 7 Am. & Eng. R. R. Cas. 410; *Wassmer v. Delaware, L. & W. R. Co.* 1 Am. & Eng. R. R. Cas. 123; *S. C. 80 N. Y. 212*; *Snow v. Housatonic R. Co.* 8 Allen, 441; *Sawyer v. Rutland & B. R. Co.* 27 Vt. 870; *Nelson v. Vermont & C. R. Co.* 26 Vt. 416; *Graham v. Northeastern R. Co.* 18 C. B. N. S. 229; *Low v. Grand Trunk R. Co.* 72 Me. 818; *Tobin v. Portland S. & P. R. Co.* 59 Me. 188; *Wendell v. Baxter*, 12 Gray, 494; *Collett v. London & N. W. R. Co.* 16 Ad. & El. N. S. 984; *Shearm. & Redf. Neg. 101*.

The exemption of the lessor from liability for the torts of lessees can only be created by express words of legislative Act authorizing or ratifying the lease.

Balsley v. St. Louis, A. & T. H. R. Co. 6 West. Rep. 469, and authorities cited in appellant's brief there reported; *S. C. 119 Ill. 68*; *S. C. 25 Am. & Eng. R. R. Cas. 497*, note;

1 ME.

See also *Singleton v. Southwestern R. Co.* 70 Ga. 464; *S. C. 48 Am. Rep. 574*.

A railroad company is bound to provide suitable and safe materials and structures in the construction of its roads and appurtenances; and if, from a defective construction of its road and appurtenances, an injury happens to one of its servants, the company is liable for the injuries sustained.

Chicago & N. W. R. Co. v. Sweett, 45 Ill. 197; *Illinois Cent. R. Co. v. Welch*, 52 Ill. 188; *S. C. 4 Am. Rep. 598*; *Chicago & I. R. Co. v. Russell*, 91 Ill. 298; *S. C. 83 Am. Rep. 54*.

The master is bound not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master.

Hough v. Texas & P. R. Co. 100 U. S. 218 (25 L. ed. 612). See 8 Wood, R. R. 1482; *Baltimore, O. & C. R. Co. v. Rowan*, 1 West. Rep. 914, 104 Ind. 88.

A brakeman is not bound to know all the obstructions and defects in the line.

Chicago & A. R. Co. v. Johnson, 2 West. Rep. 388, 116 Ill. 206.

If the servant is not aware of the danger, and the company is, the servant may recover.

8 Wood, R. R. 1480 *et seq.* See *Kearns v. Chicago, M. & St. P. R. Co.* (Iowa) 22 Am. & Eng. R. R. Cas. 287; *Gould v. Chicago, B. & Q. R. Co.* 22 Am. & Eng. R. R. Cas. 289; *Houston & T. C. R. Co. v. Hampton*, 22 Am. & Eng. R. R. Cas. 291; *Wabash R. Co. v. Elliott*, 98 Ill. 481; *S. C. 4 Am. & Eng. R. R. Cas. 651*; *Pittsburgh & C. R. Co. v. Sentmeyer*, 92 Pa. 276; *S. C. 5 Am. & Eng. R. R. Cas. 508*; *Lawless v. Connecticut River R. Co.* 136 Mass. 1.

A party may voluntarily, and, without actual necessity, expose himself to danger, and still not be chargeable with contributory negligence.

Jeffrey v. Keokuk & D. M. R. Co. 5 Am. & Eng. R. R. Cas. 577.

It is for the jury to determine the question of contributory negligence, in the light of all the facts and circumstances surrounding the plaintiff at the time of the accident.

Herbert v. Northern Pac. R. Co. 8 Am. & Eng. R. R. Cas. 85. See *Tivae v. Baltimore & O. R. Co.* 2 Cent. Rep. 596, 112 Pa. 91; *Baltimore O. & C. R. Co. v. Rowan*, 1 West. Rep. 914, 104 Ind. 88; *Houston, etc. R. Co. v. Oram*, 49 Tex. 341; *Chicago & N. W. R. Co. v. Sweett*, 45 Ill. 197; *Illinois Cent. R. Co. v. Welch*, 52 Ill. 188; *Chicago & I. R. Co. v. Russell*, 91 Ill. 298; *Hough v. Texas & P. R. Co.* 100 U. S. 218 (25 L. ed. 612); *Indiana Car. Co. v. Parker*, 100 Ind. 181; *Beach*, Cont. Neg. § 184.

As to whether the awning was a nuisance, although the fact of its existence and proximity to the track was undisputed, different persons might disagree upon the question; and it was properly left to the jury to determine.

Shannon v. Boston & A. R. Co. 1 New Eng. Rep. 681, 78 Me. 52.

Even though the facts are undisputed, if they are of such a nature or pertain to such a matter that different intelligent and honest minds might exercise different judgments upon them, the question to be decided belongs to the jury.

Lesan v. Maine Cent. R. Co. 77 Me. 91; *Sioux City & Pac. R. Co. v. Stout*, 84 U. S. 17 Wall. 657 (21 L. ed. 745).

Virgin, J., delivered the opinion of the court:

By a contract of March 1, 1884, the Portland & Ogdensburg Railroad Company, for certain valuable considerations therein expressed, was permitted, among other things, to run all of its through freight trains, for one year at least, over that portion of the defendant's tracks between certain named stations, between which was the Bethlehem station,—the defendant "assuming all liability and risk of accident arising from defect of roadbed or track, or default of its employees or servants."

On June 19, 1884, while the permit was in full force, the Boston & Lowell Railroad Company leased for ninety-nine years the defendant's railroad, stations, etc., agreeing to save harmless the defendant "against all claims for injuries to persons during the term, from any and all causes whatever."

The plaintiff was rear brakeman on a P. & O. special freight train bound west. While he, in pursuance of a signal for setting brakes, was rapidly ascending the iron ladder on the side of a box car, to perform his duty of setting the brake thereon, the train being in motion, his head came in contact with the end of the depot-awning, of same height as the car and eighteen inches therefrom, and he was thereby knocked off between the cars; and, before he could extricate himself, his right arm was so crushed by the wheels of the saloon car that amputation became necessary.

The jury, after a charge, to which—so far as the general merits of the case is concerned—no exception is alleged, returned a verdict for the plaintiff for \$3,100. Under the instructions, the jury must have found: (1) that the awning was negligently constructed on account of its proximity to the passing car; (2) that the injury was caused solely thereby; and (3) that the plaintiff was in the exercise of ordinary care at the time of the injury.

It is contended that the plaintiff was guilty of contributory negligence; and that, as the facts in relation thereto were undisputed, the question was one of law, and should therefore have been decided by the presiding justice,—which he declined to do, but submitted it to the jury. While there are numerous cases wherein questions of the negligence of both parties in actions of this nature have been decided by the court on undisputed facts, still the negligence of neither party can be conclusively established by a state of facts from which different inferences may be fairly drawn, or upon which fair-minded men may reasonably arrive at different conclusions. *Brown v. European & N. A. R. Co.* 58 Me. 884; *Lesan v. Maine Cent. R. Co.* 77 Me. 85, 91; *Shannon v. Boston & A. R. Co.* 1 New Eng. Rep. 681, 78 Me. 52, 60; *Snow v. Housatonic R. Co.* 8 Allen, 441; *Treat v. Boston & L. R. Co.* 181 Mass. 371; *Peverly v. Boston*, 186 Mass. 366; *Lawless v. Connecticut River R. Co.* 186 Mass. 1; *Sioux City & Pac. R. Co. v. Stout*, 84 U. S. 17 Wall. 657, 663, 664 (21 L. ed. 745).

As a practical illustration of this proposition: The conductor of a freight train had resided at

the place of accident for twenty years, and, as conductor and brakeman, passed the station once or twice daily for seven years. Just as his train started up, he caught hold of the side ladder of a passing car, and without any call of duty there, as he climbed towards the top, was struck and killed by the roof of the depot, which projected over, and within thirty-four inches of, the car; and the court was divided on the questions of negligence involved. *Gibson v. Erie R. Co.* 63 N. Y. 449. So, in another case, where a brakeman (the plaintiff), who had pulled out the pin and disconnected a portion of the train from the engine, was walking beside the train, and, on signal for brakes, ran up the side ladder of a car, and was struck, knocked off, and lost his arm, by the awning, which projected within eighteen inches of the car, the court held the plaintiff not guilty of contributory negligence, but set aside the verdict of \$10,000 as excessive. The court remarked: "It would be preposterous in us to say, or to ask a jury to say, that a brakeman engaging in the service of the company must be held to know whether or not there may be one among the station-houses whose roof or awning so projected over the line of the road that a brakeman on a freight train, in the performance of his duties, would be liable to be swept from the train by collision with it." *Illinois Cent. R. Co. v. Welch*, 52 Ill. 188.

We are of opinion that the presiding justice very properly submitted to the jury the question of the defendant's negligence, and also that of the plaintiff's exercise of ordinary care.

Moreover, a careful examination of all the testimony bearing upon these questions, aided by the exhaustive argument of counsel, has failed to satisfy us that we ought to interpose and set the verdict aside. And, without taking space to state our reasons at length, we remark: The train never stopped at this station, except when obstructed by another, and occasionally down by the tank for water. His attention was never particularly called to the nearness of the awning, as he had no occasion to notice it in passing. When the accident happened, the plaintiff was engaged in the prompt performance of a call to active duty. The exigency caused by the repeated starting and stopping of the mixed train required his speedy ascent to the top of the car by means of the ladder. Before he reached it, his car, being in motion, arrived at the awning. Due care on the part of the defendant required space enough between the car and the awning for reasonable action of body, arms, and legs of the brakeman, whose duty required him to ascend the ladder there. It was deficient in this respect, and the plaintiff, with his attention properly fixed on his duty, was struck. It is no answer that the train, though on a down grade of thirty feet to the mile, might be handled by the engine when working steam. The plaintiff's duty was not to rely on the possibility of the engine's holding the train, but to perform the duty signaled by the conductor standing on the engine; and he lost his right arm in the prompt attempt to perform it, in consequence of the defendant's faulty awning. The acts of the plaintiff "cannot be judged of by the rule applicable to the persons engaged in no special or particular duty." The plaintiff's previous knowledge of

the awning must, on account of his few opportunities for gaining it, have been comparatively slight, and was by no means decisive. The service then and there to be performed was of a character to require his exclusive attention to be fixed upon it, and that he should act with rapidity and promptness; and it could hardly be expected that he should always bear in mind the existence of the defect,—even if he knew it,—or be prepared at all times to avoid it." *Snow v. Housatonic R. Co.* 8 Allen, 441, 450.

But while this rule may not be seriously questioned as between a railroad company and its own employees, the defendant challenges its application as between it and the plaintiff. This presents the question whether a railroad company, over a section of whose track another company, by virtue of a contract, runs its trains, is liable in tort to the latter's brakeman, who, without the fault of himself or of his coemployees, receives a personal injury while in the performance of his duty on his employer's train, solely by the reason of the negligent construction of the former's depot. We are of opinion that it is.

In such case the only materiality which attaches to the contract between the companies is to make certain that the plaintiff was lawfully, and not a trespasser, on the defendant's road. And although the defendant, in its contract with the P. & O. Company, in express terms, "assumed all liability and risk of accident from a defect of roadbed, track, or default of its employees," nothing was thereby added to the defendant's legal obligation and duty; these terms did not express all which the law required of railroad companies as to the reasonable safety of its station-houses. *Tobin v. Portland, S. & P. R. Co.* 59 Me. 188. It is common learning that, as a compensation for the grant of its corporate franchise, intended in large measure to be exercised for the public good, the common law imposed upon the defendant a duty to the public, independent of contract and coextensive with its lawful use, to keep its road and its appurtenances in a reasonably safe and proper condition. *Thomas v. West Jersey R. Co.* 101 U. S. 71, 83 (25 L. ed. 950); *Bean v. A. & St. L. R. Co.* 63 Me. 298, 295. If the cause of action were a breach of the contract, the plaintiff could not maintain an action thereon for want of privity. But this is an action *ex delicto* for an injury caused by a neglect of a duty created by law (Broom, Com. 4th ed. 675, 676, and cases); and, for the neglect of such a duty, privity is not essential to the maintenance of an action of tort therefor (*Campbell v. Portland Sugar Co.* 62 Me. 552, 564; Broom, Com. 678 *et seq.*)

This principle is variously illustrated by the numerous cases cited in Broom's Commentaries, 655-670. Thus, a railroad company is liable for the loss of a passenger's luggage whose fare was paid by another, not on account of breach of contract, but of legal duty. *Marshall v. York, N. & B. R. Co.* 11 C. B. 655.

So, where the defendant sold naphtha to one known to him as a retailer of fluids to be burned in lamps for illuminating purposes, and a retailer sold a pint thereof to the plaintiff to be used in a lamp, and it exploded, the defendant was held liable, "not upon any supposed privity between the parties, but upon a violation of 1 Me.

duty in the defendant resulting in an injury to the plaintiff." *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64, 67.

So, where a chemist compounded a hair-wash, and knowingly sold it to a husband for the use of his wife, who was injured by its use, the wife sustained an action of tort for the injury, on the ground of the defendant's breach of duty. *George v. Skittington*, L. R. 5 Exch. 1.

In like manner, "where a stage proprietor," said Parke, B., "who may have contracted with the master to carry his servant, is guilty of neglect, and the servant sustains personal damage, he is liable to the latter; for it is a misfeasance toward him, if, after taking him as a passenger, the proprietor or his servant drives without care, as it is a misfeasance toward every one traveling on the road. So, if a mason contracts to erect a bridge or other work over a public road, which he constructs not according to the contract, and the defects are a nuisance, a third person who sustains an injury by reason of its defective construction may recover damages from the contractor, who will not be allowed to protect himself from liability by showing an absence of privity between himself and the injured person, or by showing that he is responsible to another for breach of the contract." *Longmeid v. Holliday*, 6 Eng. L. & Eq. 568.

So, where, a station being in the joint occupation of the defendant and another railway, the plaintiff's decedent, a blacksmith in the service of the other railway, while engaged in repairing one of its wagons on a siding at the station, was killed by the negligent shunting of the defendant's train on that siding, a motion to set aside a verdict for the plaintiff was overruled. *Voe v. Lancashire & Y. R. Co.* 2 Hurl. & N. 728.

And it seems that an apothecary who administers improper medicine to his patient, or a surgeon who unskillfully treats him, to his injury, is liable to the patient, even when the father or friend of the patient was the contractor. *Pippin v. Sheppard*, 11 Price, 400; *Gladwell v. Steggall*, 5 Bing. N. C. 738; *Thomas v. Winchester*, 6 N. Y. 897.

The principle is sustained in the well-considered case of *Sawyer v. Rutland & B. R. Co.* 27 Vt. 370, which was re-examined and reaffirmed by the same learned court in *Merrill v. Central Vermont R. Co.* 54 Vt. 200. Also in *Smith v. New York & H. R. Co.* 19 N. Y. 127 *Snow v. Housatonic R. Co.* 8 Allen, 441; *Pierce v. R. R.* 274; *Patterson v. R. Acc. L.* § 228; 2 Wood, R. R. 1838, 1839, and notes.

We are aware that this view is not in accordance with *Murch v. Concord R. Co.* 29 N. H. 85, and *Pierce v. Concord R. Co.* 51 N. H. 593,—which cases were cited by a divided court in this State on another point (*Mahoney v. Atlantic & St. L. R. Co.* 63 Me. 72); but, notwithstanding our high opinion of the learned court which pronounced those opinions, we think the views herein declared are more satisfactory.

Our opinion, therefore, is that the plaintiff had the lawful right, as brakeman on the train of the Portland & Ogdensburg, to pass and re-pass by the Bethlehem station-house of the defendant, which therefore owed a duty to him to construct and maintain its station-house there in such a reasonably safe manner that its awning

ing would not injure him while in the performance of his duty with due care; and that, a negligent breach of that duty by the defendant having resulted in a personal injury to the plaintiff without fault on his part, he is entitled to maintain this action therefor, unless the leasing and consequent full possession of the defendant's road by the Boston & Lowell constitutes a defense.

It is declared to be the settled law of this country that one railroad corporation cannot, without statutory authority, divest itself of or relieve itself from any duty or liability imposed by its charter or the general laws of the State, by leasing its road and appurtenances to another. *York & M. L. R. Co. v. Winans*, 58 U. S. 17 How. 30 (15 L. ed. 27); *Thomas v. West Jersey R. Co.* 101 U. S. 71, 83 (25 L. ed. 950).

Assuming the lease of the defendant road, station-houses, etc., to the Boston & Lowell, to have been duly authorized by the respective Legislatures of the States which granted their charter, and that the lessee had, months before the plaintiff's injury, received, under the lease, full possession, management, and control,—was the defendant thereby relieved from liability to this plaintiff for his injury?

This court has held that an authorized lease of a railroad does not relieve the lessor from the liability, under the general statute, for an injury caused to property along its line by fire communicated by a locomotive of the lessee. *Pratt v. Atlantic & St. L. R. Co.* 42 Me. 579; *Stearns v. Atlantic & St. L. R. Co.* 46 Me. 95. In Massachusetts, both lessor and lessee are held liable for the injury, under a like statute. *Ingersoll v. Stockbridge & P. R. Co.* 8 Allen, 488; *Davis v. Providence & W. R. Co.* 121 Mass. 184.

Courts of the highest respectability have held, in well-considered opinions, that the duly authorized leasing of one railroad to another does not absolve the lessor from liability to a passenger for injury caused by the negligent acts of the lessee's employees, unless the statute authorizing the lease contains an express exemption to the lessor; that "grants to corporations, whether of powers or exemptions, are to be strictly construed, and their obligations are to be strictly performed, whether they may be due to the State or to the individuals." *Singleton v. Southwestern Railroad*, 70 Ga. 464, S. C. 48 Am. Rep. 574; *Nelson v. Vermont & C. R. Co.* 26 Vt. 717; 1 Redf. R. R. 590.

This view is adopted and sustained in an opinion, reviewing the cases and authorities, by the court in Illinois. The court in its opinion does not rest its decision "upon the narrow ground alone of the latter (lessee) being in the exercise of a franchise which belonged to the former (lessor), and in so acting, is to be held as the servant of the lessor corporation; 'but,' in consideration of the grant of its charter, the corporation undertakes the performance of duties and obligations toward the public; and there is a matter of public policy concerned that it should not be relieved from the performance of its obligations without the consent of the Legislature"—adding: "There is no express exemption in the statute which authorized the lease." *Balsley v. St. Louis, A. & T. H. R. Co.* 6 West. Rep. 469, 119 Ill. 68. See also *Pierce*, R. R. 244.

In this State, where the defendant had leased

its road under the authority of a statute which expressly provided that "nothing contained therein * * * shall exonerate the lessor from any duties or liabilities imposed upon it by the charter or by the general laws of the State," a divided court held that the lessee, and not the lessor, was liable to a passenger injured by an assault and wrongful expulsion from its train by one of the lessee's servants. *Mahoney v. Atlantic & St. L. R. Co.* 63 Me. 68. This case, however, does not meet the facts in the case at bar; for there the injury complained of resulted solely in the wrongful acts of the servant of the lessee, who had sole control of the trains, and not, as here, from the wrong of the lessor in the negligent original construction of its depot.

And herein, as we think, lies the true distinction which marks the dividing line of the lessor's responsibility. In other words, an authorized lease without any exemption clause absolves the lessor from the torts of the lessee, resulting from the negligent operation and handling of its trains and the general management of the leased road, over which the lessor could have no control. But for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, station-houses, etc., the charter company cannot, in the absence of statutory exemption, discharge itself of legal responsibility. *St. Louis, W. & W. R. Co. v. Crrl*, 28 Kan. 622; *S. C.* 11 Am. & Eng. R. R. Cas. 458.

The covenant in the lease to "save the lessor harmless," etc., is predicated of an implication of a primary liability on the part of the lessor. It is an obligation which in no wise affects the plaintiff, or the defendant's liability to him, but is simply a contract for reimbursement for such damages as may in any wise be recovered against it by the plaintiff and other lawful claimants whose injury results from its breach of duty owed them.

We are also of opinion that the defendant is liable under the rule which governs the responsibility of a lessor of demised premises for their condition. For it is settled law that, when the owner lets premises which are in a condition which is unsafe for the avowed purpose for which they are let, or with a nuisance upon them when let, and receives rent therefor, he is liable, whether in or out of possession, for the injuries which result, from their state of insecurity, to persons lawfully upon them; for, by the letting for profit, he authorizes a continuance of the condition they were in when he let them, and is therefore guilty of a nonfeasance. Among the numerous cases supporting this general view are: *Rosewell v. Prior*, 2 Salk. 459; *S. C.* more fully reported, 12 Mod. 685, 689,—where the defendant erected a house, thereby obstructing the plaintiff's ancient lights, and demised it to another; and the court held the "action well brought, * * * for before his assignment over he was liable for all consequential damages, and it shall not be in his power to discharge himself by granting over." See also *Rex v. Pedley*, 1 Ad. & El. 822; *Staple v. Spring*, 10 Mass. 72; *Fish v. Dodge*, 4 Denio, 311; *House v. Metcalf*, 27 Conn. 681; *Todd v. Flight*, 9 C. B. N. S. 377.

In the last case *Earle, Ch. J.*, after reviewing *Rex v. Pedley* and *Rosewell v. Prior*, said:

"These cases are authorities for saying that, if the wrong causing the damage arise from the nonfeasance or the misfeasance of the lessor, the party suffering damage from the wrong may sue him. And we are of opinion that the principle so contended for on behalf of the plaintiff is the law, and that it reconciles the cases." Also, *Nelson v. Liverpool Brewery Co.*, L. R. 2 C. P. Div. 811; *Owings v. Jones*, 9 Md. 108; *Gandy v. Jubber*, 5 Best & S. 78; *S. C.* on error Id. 486. See opinion *S. C.* 9 Best & S. 15; *Stratton v. Staples*, 59 Me. 94. This principle is recognized in *Campbell v. Portland Sugar Co.* 62 Me. 552, and in *McCarthy v. York County Sav. Bank*, 74 Me. 815, 325; *Burlbank v. Bethel S. M. Co.* 75 Me. 878; *Allen v. Smith*, 76 Me. 335, 341.

See also *Godley v. Hagerty*, 20 Pa. 387, affirmed in *Carson v. Godley*, 26 Pa. 111, where buildings were let to the government as bonded warehouses, and, being defectively built and of insufficient strength, they fell by reason of storage of heavy merchandise.

So in Maryland, in *Albert v. State*, 6 Cent. Rep. 447, 66 Md. 325, the court of appeals approved the instruction: "If the jury found that the defendant was the owner of the wharf, and rented it to the tenant, and that, at the time of the renting, the wharf was unsafe, and the defendant knew, or by the exercise of reasonable diligence could have known, of its unsafe condition, and the accident happened in consequence of such condition, then the plaintiff was entitled to recover."

So in *Swords v. Edgar*, 59 N. Y. 28, the court, after an elaborate review of the cases, held that the lessors of a pier, in the possession of their lessee, from whom they received rent for it, were liable for an injury received by a longshoreman engaged in discharging a cargo thereon; the cause of the injury being a dangerous defect which existed at the time of the demise.

In a very recent case in Rhode Island of like facts, the court held both lessor and lessee jointly liable. *Joyce v. Martin*, 4 New Eng. Rep. 796. See also the recent case in New Jersey of *Rankin v. Ingverson*, 8 Cent. Rep. 371; also a Massachusetts case, *Dalay v. Savage*, 4 New Eng. Rep. 863, 145 Mass. 38.

We are aware that there are a few cases which hold that, even if premises are dangerous when demised, the lessor is not liable to one injured thereby, if the tenant in the lease covenanted to keep them in repair. *Pretty v. Bickmore*, L. R. 8 C. P. 401. And the same principle was subsequently affirmed in a case of very similar facts. *Guinnell v. Eumer*, 10 C. P. 658. See also *Leonard v. Storer*, 115 Mass. 86, where the lessee covenanted to "make all needful and proper repairs both internal and external." The language of the court, when taken in connection with the facts, is explainable in consonance with the early English cases before cited. See also the dictum in the recent case in Massachusetts, already cited, of *Dalay v. Savage*.

But this principle has been ably reviewed in the strong opinion of Folger, J., in *Swords v. Edgar*, *supra*. This opinion declines to accept the doctrine of the above cases for the reason that they "ignored the rule announced in *Rosewell v. Prior*, *supra*, and followed and estab-

1 ME.

lished in many cases." Fogler, J., speaking for the whole court, upon this question, said: "The person injuriously affected by the ruinous state of the premises demised has no right or privity in the covenant. He is not given thereby a right of action against the lessee, greater or more sure than he had before. He has the right without the covenant. The covenant is a means by which the lessor may reimburse himself for any damages in which he is cast by reason of his liability. But it is an act and obligation between himself and another, which does not remove or suspend that liability. It is not so that a person on whom there rests a duty to others may, by an agreement between himself and a third person, relieve himself from the fulfillment of his duty. Surely an ineffectual attempt to fulfill would not; as if, in this case, insufficient repair of the pier had been made by a builder who had contracted with the lessor to do all that was needful to make the pier secure for all comers. A covenant taken from a lessor to keep in order and repair is no more effectual than a contract with a builder to the same end. Both may afford an indemnity to the lessor, but neither can shield him from responsibility." The New Jersey case of *Rankin v. Ingverson*, *supra*, sustains the same view. And we adopt the doctrine of the case from which we have so largely quoted, as sound on legal principles and public policy.

And even if the lessee's covenant would, when broad enough in its terms, operate a relief of the lessor's liability, the covenant here would not affect the case in hand; for it is restricted and limited to "maintaining, preserving and keeping the station-houses in as good order and repair as the same now are, so that there shall be no depreciation in the general condition thereof at any time during the term."

The testimony as to the proximity of the awnings of the other stations had a legitimate bearing on the question of the exercise of care on the part of the plaintiff; and the defendant pursued the same line of inquiry, not only on cross-examination, but in the direct examination of its own witnesses, Stowell and Winters. We think also that Sawyer's testimony was legitimate.

Motion and exceptions overruled.

Peters, Ch. J., Walton, Libbey, Foster, and Haskell, J.J., concurred.

Andrew J. STEVENS

v.

Benjamin KELLEY et al.

So long as a milldam rightfully stands, it is the bounden duty of its owners to vent the water for the use of mill-owners below, so that each shall have the natural flow of the stream, except so far as that flow is modified by the reasonable use of the water of the successive riparian proprietors.

(Waldo—Decided January 25, 1888.)

ON exceptions by the plaintiff. *Overruled.* This was an action on the case, in which the plaintiff claims damages of defendants for drawing off the water from the pond raised by

the upper papermill dam, and thereby letting plaintiff's ice in said pond down into the mud and thereby spoiling the same.

There was evidence introduced tending to prove that the dam in question was built in 1842 by Benjamin Kelley's father, who owned the land upon which said dam was built, and a mill erected upon said dam and operated by said defendant's father till 1854, when the present paper-mill was erected upon said dam, and operated by means of water raised by said dam till 1877, when operations in said paper-mill ceased, and the mill has been idle since. There was also evidence tending to show that the defendant Kelley used said dam, during the period covered by the writ, for storing water, as a reservoir dam, and drawing it off for use in operating his axe factory and the mills of others situated below said dam upon said stream.

The plaintiff, at the trial, contended that defendant Kelley had no right to use said dam as a reservoir dam, for the purpose of storing water and drawing it off for the purpose of operating his said factory or the mills of others on said stream below.

Presiding Justice Emery instructed the jury as follows:

"It seems to be undisputed that this defendant, Mr. Kelley, with his partner, is the owner of the land upon which this dam is, and was the owner during the period of time named in the writ. It is also undisputed that he and his partner, Mr. Rankin, own the axe factory below, and own the land that it is on; and, therefore, they say that, owning the land that the dam and the mill are on, they have a right to store the water, and then, having stored it, they have a right to draw it off to turn the mill with. That would be his right. If he has raised this head of water for the purpose of turning that mill, he would have a right, being upon his own land, to store and use it for that purpose and to draw it off in a reasonable manner."

To this ruling, direction, and instruction the plaintiff alleged exceptions.

Messrs. W. P. Thompson and R. F. Duntun, for plaintiff:

The statute authorizes "any man" to erect and maintain a watermill and dam to raise water for working "on his own land;" but it does not authorize him to do it on any other person's land; and, if he does so, it is a nuisance, and is not protected by chapter 92.

Jones v. Skinner, 61 Me. 80. See also *Wilson v. Campbell*, 76 Me. 94; *Goodwin v. Gibbs*, 70 Me. 246; *Morton v. Franklin Co.* 62 Me. 455.

The defendants' right of flowage, whether obtained by grant or under the Mill Act, having been used for more than thirty years with the mill, and, so far as appears, for no other purpose, must be understood to be for the benefit of the mill. As such, their right to the use of the water thus flowed must be limited by the wants and requirements of the mill, at least in kind. It might, perhaps, be more or less extensive in quantity, as changes in the mill from time to time might require more or less water; but it could be used for no other purpose.

Stevens v. Kelley, 3 New Eng. Rep. 280, 78 Me. 450. See also *Crockett v. Millett*, 65 Me. 191; *Farrington v. Blish*, 14 Me. 428.

The right to overflow the lands of other per-

sons is in derogation of the common law and the natural right of the citizen, and should not therefore be extended by implication.

Jordan v. Woodward, 40 Me. 317.

The mill is the principal. The dam is subservient to it.

Crockett v. Millett, and *Farrington v. Blish*, *supra*.

The dam cannot be maintained for any purpose other than that of raising water for working a watermill.

Wilson v. Campbell, 76 Me. 94; *Dixon v. Eaton*, 68 Me. 542; *Paine v. Woods*, 108 Mass. 160.

When a mill is disused, the dam ceases to be a milldam under the protection of the Mill Act, and the remedy for the owner of the land which is flowed by it is an action at common law.

Baird v. Hunter, 12 Pick. 555.

In Massachusetts, under a statute similar to ours, the court has recognized the right of the landowner to the ice upon a millpond, as his property, and has decided that, in estimating damages to the landowner under the Flowage Act, the jury should take into consideration, in diminution of damages, the benefit which the landowner might derive from taking ice from the pond.

Paine v. Woods, 108 Mass. 160.

This case has been before this court once, and the rights and duties of the respective parties concerning the ice formed in the pond have been clearly stated in *Stevens v. Kelley*, 3 New Eng. Rep. 280, 78 Me. 450.

Messrs. Wm. H. Fogler and True P. Pierce, for defendants:

Stevens v. Kelley, 3 New Eng. Rep. 280, 78 Me. 445, is an exhaustive examination of the whole subject of littoral rights on unnavigable streams, and is decisive of all the questions now in issue.

See *Davis v. Winslow*, 51 Me. 264.

In *Lancey v. Clifford*, 54 Me. 490, upon the question of reasonable use, *Dickerson, J.*, says: "This rule does not require that there shall be no diminution, abstraction, or detention whatever by the upper or lower riparian proprietor, as that would be to prevent all reasonable use of it; * * * it must be a reasonable use, and not inconsistent with the reasonable enjoyment of the stream by others who have an equal right to its use. Reasonable use is the touchstone for determining the rights of the respective parties."

Tourtillot v. Phelps, 4 Gray, 370, is to the same purpose.

In *Gould v. Boston Duck Co.* 13 Gray, 452, the court says: "Usage is some proof of what is considered a reasonable and proper use of that which is common right, because it affords evidence of the tacit consent of all parties interested, to the general convenience of such use;" and further on: "And if this use did interfere at times with the use which the plaintiff might have made of the water, if the defendants had had no occasion to use it, it was *damnum absque injuria*."

In *Phillips v. Sherman*, 64 Me. 171, it is said "the question of reasonable use of the water is one of fact to be determined by the jury."

See also *Thurber v. Martin*, 2 Gray, 397.

The mill is principal. The dam is subservient to it.

Crockett v. Millett, 65 Me. 191.

This dam is as much subservient to the defendants' axe factory as it is to the papermill. The application of power is the same in both cases.

In *Fiske v. Framingham Mfg. Co.* 12 Pick. 68, the court decides that a reservoir dam, several miles above the mill, operated by water from it, was a milldam, and to be treated in all respects like a milldam at the mill.

See also *Wolcott Woolen Mfg. Co. v. Upham*, 5 Pick. 292, to same effect; *Bates v. Weymouth Iron Co.* 8 Cush. 549.

The fact that Mr. Rankin had become associated with Kelley in the business of operating the axe factory does not change the relative legal rights of the parties, because Rankin had all the natural rights which belonged to any other owner, to be exercised to the same extent and with the same freedom.

Cary v. Daniels, 8 Met. 466.

The right to use water as a motive power is more than an easement,—it is property; and the courts have always been liberal in considering and guarding the interests of manufactures, as appears by *Gould v. Boston Duck Co.* 18 Gray, 452.

See also *Ashley v. Pease*, 18 Pick. 268; *Gould, Waters*, 360.

The owners of mills below were entitled to the natural flow of the stream, as a motive power to drive their mills.

Davis v. Getchell, 50 Me. 602; *Gould v. Boston Duck Co. supra*; *Hinckley v. Nickerson*, 117 Mass. 213; *Clark v. Rockland W. P. Co.* 52 Me. 78.

Per Curiam:

Nothing herein is involved which is dependent upon or affected by the Mill Act. The gravamen of the plaintiff's complaint is that the defendants, during several of the six years next preceding the date of the writ, maliciously drew off the water through their dam, and thereby let his ice, which formed on the millpond, down into the mud, and destroyed it.

The case presents an ancient milldam, though the mill on the dam has been idle for the past nine years, with three or more ancient mills below on the same stream, one of which belongs to two of the owners of the dam, all of them operated by water vented through the dam, and coursing along the natural channel, and the plaintiff's land flowed by the dam, covered with ice in the winter season, which the plaintiff has more or less frequently harvested.

So long as the dam rightfully stands, it is the bounden duty of its owners to vent the water thereof for the use of the millowners below, so that each shall have the natural flow of the stream, except so far as that flow is modified by the reasonable use of the water by the successive riparian proprietors. The jury have found that the defendants were guilty of no malicious intent, since they only vented such water as had been done for the long series of years during which the mills have existed. If the defendants had let less water from their dam, they would have been liable to the lower mills' owners for the injury caused by unlawful detention. We think, therefore, that the instruction was not prejudicial to the plaintiff, and that the verdict is neither against law nor the 1 ME.

evidence. *Stevens v. Kelley*, 8 New Eng. Rep. 230, 78 Me. 445; *Davis v. Winslow*, 51 Me. 264; *Davis v. Getchell*, 50 Me. 602; *Gould v. Boston Duck Co.* 18 Gray, 442, *Gould, Waters*, § 218.

Motion and exceptions overruled.

STATE of Maine

v.

Henry F. CONWELL.

The allegation of prior conviction in a complaint under the liquor law is bad when it avers the former conviction to have been at a term of the court which ended before the decision was received from the law court in that cause.

(Cumberland—Decided January 27, 1888.)

ON report. Judgment for the State, but not for prior conviction.

The following were the facts as agreed to by counsel:

This is a search and seizure complaint under the liquor law.

It contains the following allegation of a prior conviction: "And the said complainant, on his oath aforesaid, further alleges and complains that the said Henry F. Conwell has been before convicted in the superior court, at a term of said court begun and holden at Portland, within and for the county of Cumberland, on the first Tuesday of May, A. D. 1885, to wit, on the 10th day of August, A. D. 1885, of unlawfully keeping and depositing in this State, in said county of Cumberland, intoxicating liquors, with the intent that said liquors should be sold in this State in violation of law, against the peace of the State and contrary to the form of the statute in such case made and provided."

It is agreed that said superior court adjourned *sine die* on Monday, the 1st day of June in the year 1885, being the twenty-second day of the term, and was not again in session till the first Tuesday of September following; that the decision from the law court was received in the superior court on the 10th day of August, A. D. 1885.

It is agreed that if the prior conviction in the superior court on the 1st Tuesday of May, A. D. 1885, to wit, on the 10th day of August, A. D. 1885, is not well laid, there shall be "judgment for the State, but not as to the prior conviction,"—otherwise, "judgment for the State."

Mr. George M. Seiders, County Atty., for the State:

Rev. Stat. chap. 27, § 27, abrogates the common-law technicalities of pleading in a great measure, and provides that in such cases as this, among others, "it is not requisite to set forth particularly the record of a former conviction, but it is sufficient to allege briefly that such person has been convicted of a violation of any particular provision or as a common seller, as the case may be."

For the construction see *State v. Wentworth*, 65 Me. 247; *Jones v. Roberts*, 65 Me. 275; *State v. Dolan*, 69 Me. 576.

If all that portion of this allegation, to wit: "at a term * * * on the 10th day of August, A. D. 1887," be rejected as surplusage, there will

be left an allegation of a prior conviction in all respects identical in force, and answering every condition of the statute provision, with those set out in *State v. Wentworth*, and *State v. Dolan*, *supra*, and in *State v. Gorham*, 65 Me. 278.

That this portion of the said allegation may be so rejected as surplusage, see 1 Bish. Cr. Proc. §§ 229, 230, which says: "Whatever is immaterial to the indictment is surplusage, which may be wholly disregarded or rejected."

Also see *State v. Noble*, 15 Me. 476; *State v. Staples*, 45 Me. 320; *State v. Jackson*, 89 Me. 296.

A conviction is had on a criminal case when the jury finds the defendant guilty, or the defendant confesses or pleads guilty.

4 Bl. § 362.

"Where the time when a fact happened is immaterial, and it might as well have happened at another day, there, if alleged under a *scilicet*, it is absolutely nugatory, and therefore not traversable; and if it be repugnant to the premises, it will not vitiate, but the *scilicet* itself will be rejected as superfluous and void."

1 Bish. Cr. Proc. § 406; Gould, Pl. chap. 3, § 40.

Mr. Dennis A. Meaher, for the defendant:

As the superior court adjourned on the first Tuesday of June, 1885, and was not again in session till the first Tuesday in September following, it is quite apparent the words and figures setting out a prior conviction are repugnant; still the time, when attempted to be set

out, is an essential descriptive averment, and must be proved as alleged. The preceding matter is of direct averment, that under the *scilicet* is material and traversable and must be proved.

See *People v. Jackson*, 8 Denio, 101; *Orrickton v. People*, 6 Parker, Cr. 863; *Mallett v. Stetson*, 26 Conn. 428; Whart. Cr. Ev. 9th ed. § 141; Whart. Prec. Indict. 4th Rev. ed. 14, 15.

Haskell, J., delivered the opinion of the court:

The May Term of the superior court adjourned *sine die* June 1, 1885. The former conviction is laid at that term, "to wit, on the 10th day of August, A. D. 1885," when a certificate of decision was received by the clerk from the law court.

The May Term had ended before the cause had been decided in the law court. The defendant's recognizance, taken when his cause was marked "law," required his attendance "from term to term until and including the term of said court next after the certificate of decision shall be received" from the law court. Rev. Stat. chap. 134, § 26. Until that term his attendance was not required, and no judgment could be rendered against him.

Judgment for the State, but not for prior conviction.

Peters, Ch. J., Walton, Virgin, Libbey, and Foster, JJ., concurred.

1 Mr.

RHODE ISLAND.
SUPREME COURT.

John E. BURROUGHS *et uz.*

v.

George J. KNUTTON *et al.*

1. The only authority given to courts of probate to make allowance for the support of the family of the deceased out of the estate of the deceased is in settling the accounts of executors and administrators.
2. Where there is a surviving partner, an allowance will not be made for the support of the family of a decedent out of funds which are, or are claimed to be, co-partnership property.

(Providence—Decided January 14, 1888.)

UPON petition of Laura M. Knutton for payment of allowance to her as widow of George S. Knutton. *Petition dismissed.*

It appears from the bill and petition that the petitioner, Laura M. Knutton, is the widow of George S. Knutton, who died November 23, 1882, leaving a last will and testament, which was duly approved and allowed by the Municipal Court of the City of Providence, December 19, 1882. Letters of administration with the will annexed were, on the same day, granted by said court to William W. Nichols, one of the parties respondent to the bill. Said municipal court subsequently, by order, allowed the petitioner, out of the estate of her said husband, the sum of \$300 for the support of his family, which said sum had not been paid at the time of filing the petition. In 1886 John E. Burroughs and his wife, who was a legatee under the will of said George S. Knutton, filed their bill of complaint in this court against said Nichols, administrator as aforesaid, George J. Knutton, and another, setting out that George S. Knutton was, at the time of his death, the owner (1) of a valuable leasehold estate; (2) of the buildings and improvements on said estate; and part owner (3) of a grocery store and market, with stock and fixtures in partnership with said George J. Knutton; and that, after the death of the said George S. Knutton, said George J. Knutton took and held exclusive possession of said buildings and improvements, and received all of the rents, and refused to account; by reason of which the administrator has never received or been able to possess himself of any part of the estate of the testator. The bill prays, among other things, for a settlement of the estate of said George S. Knutton in a due course of administration under the direction of this court, and for the appointment of a receiver. This court, by its decree, appointed Walter F. Angell receiver of the personal estate mentioned in the bill; and said receiver now has in his possession, derived from such estate, the sum of \$667.73, of which sum at least one half is of the estate of George S. Knutton.

The petition prays for an order of this court directing the receiver in said cause to pay over to her out of said estate in his hands said sum of \$300.

Mr. George B. Barrows, for petitioner,
1 R. I.

cited *Bush v. Clark*, 127 Mass. 111; Pub. Stat. chap. 134, § 8.

Messrs. Charles H. Page and Franklin P. Owen, for George J. Knutton.

Per Curiam:

The court is of the opinion that the so-called allowance cannot be made out of the money in the hands of the receiver, for two reasons: 1. Because the only authority given to courts of probate to make such allowances is in settling the accounts of executors or administrators. Pub. Stat. chap. 190, § 6. This allowance here was not so made. 2. Because the money in the hands of the receiver is, or is claimed to be, co-partnership property, and not part of the estate of George S. Knutton, deceased.

In *Bush v. Clark*, 127 Mass. 111, cited for petitioner, the intestate was himself surviving partner, and the partnership effects were treated as part of his estate for that reason.

Petition denied and dismissed.

Halsey J. BRIGGS

v.

Pardon HOPKINS, Town Treasurer of the Town of West Greenwich.

1. At a town meeting it was voted that B "be collector of taxes * * * he giving bond to the satisfaction of the town treasurer." By another vote the amount of the bond was fixed at \$6,000. *Held*, that the condition of the bond was prescribed by R. I. Pub. Stat. chap. 37, § 20, and that the town treasurer had only to judge of the sufficiency of the sureties on the bond.
2. B filed his bond with the town treasurer, and demanded a copy of the assessment and a warrant of collection. The town treasurer refused the bond, and B took it away. It did not appear that the town treasurer refused the bond because the sureties were unsatisfactory. *Held*, that mandamus should not issue, compelling the town treasurer to give a copy of the assessment and a warrant of collection, unless B filed his bond again.

(Providence—Decided January 21, 1888.)

PETITION for mandamus. On respondent's return to the alternative writ, *peremptory writ granted upon condition.*

The facts are sufficiently stated in the opinion of the court.

Mr. Samuel W. K. Allen, for relator.

Mr. George T. Brown, for respondent.

Per Curiam:

The record shows that at the annual town meeting of West Greenwich, May 23, 1887, it was "voted that Halsey J. Briggs be collector of taxes, for the sum of seven dollars, he giving bond to the satisfaction of the town treasurer;" that November 15, 1887, he tendered to the respondent, town treasurer, a bond "in the sum of \$6,000, which was the sum fixed by the town of said West Greenwich as the amount to be put in said bond, and with sureties satis-

factory to said Pardon Hopkins, town treasurer as aforesaid, conditioned that the said Halsey J. Briggs shall faithfully perform his said trust as collector of taxes as aforesaid." Upon due qualification for the office, it is the duty of the town treasurer to deliver to the collector the copy of the assessment transmitted to him by the town clerk, and a warrant to collect the tax. The petitioner prays for a writ of mandamus commanding the respondent to issue such copy and warrant, and upon this petition an alternative writ has issued. The respondent contends that as the bond, by the vote of the town, was to be satisfactory to him, his action in regard to it is discretionary, and not within the purview of a writ of mandamus. The town prescribed the amount of the bond; and the statute (R. I. Pub. Stat. chap. 87, § 20*) prescribed the condition. If any bond at all was filed, the only thing for the treasurer to pass upon, therefore, would be the sufficiency of the sureties. It was held in *Capnell v. Hopkins*, 10 R. I. 878, that the treasurer was to judge of the sufficiency of the sureties; and we do not think the vote in this case can mean anything more. It cannot mean to leave the amount of the bond discretionary with the treasurer, for that would nullify the vote of the town; nor can it mean to leave to him the form or condition, for that is prescribed by statute. Evidently the words, "giving bond to the satisfaction of the town treasurer," meant giving bond with sureties satisfactory to him. The petition avers that the sureties were satisfactory to the treasurer. The return does not deny this, nor show that they were insufficient. It simply avers that the respondent "believed said bond to be insufficient and defective, and so informed said Briggs said bond was not satisfactory." All that he says about the sureties is that, as to four of them, he "has not been able to discover that there are any such persons in the town of Cranston," they being described as of that town. He says nothing about the other surety. If the respondent was not satisfied with the sureties, he acted within his discretion, and we cannot compel him to exercise that discretion one way or the other. But, if the sureties were satisfactory, nothing remained for him to do but the ministerial act of issuing the warrant, which this court may command. We do not think it appears from the record that the respondent's refusal was based upon his discretion as to the sufficiency of the sureties, and consequently the petitioner was entitled to the warrant and copy of assessment.

Inasmuch, however, as the petitioner took away the bond after the respondent's refusal to receive it, the order for a *peremptory writ* will not issue except upon condition that the bond be refilled.

*§ 20. Every collector of taxes shall give bond, with sufficient surety, for the faithful performance of such trust, to the town treasurer of the town for which he is chosen, in such sum as the said town or the town council of said town shall appoint, not exceeding double the amount of the tax with the collection of which he shall be charged. Whenever any town shall elect its town treasurer collector of taxes for such town, the bond to be given by such collector under the provisions hereof shall be given to the town, and shall be delivered to the town council for safe keeping, and, upon the happening of any breach of the condition of the said bond, an action thereon may be commenced in the name of the town to which it was given."

John SHEPARD

Gustavus TAYLOR *et al.*

1. A rehearing of a suit in equity may, in the discretion of the court, be granted on petition, even when the error alleged is simply error of law; and this discretion is to be exercised liberally in favor of a rehearing. (*Hodges v. New England Screw Co.* 3 R. I. 9.)
2. Where one who had received an equitable estate in land by devise from his parent receives the legal estate from a trustee (who was also of kin to him), merely by virtue of his ownership of the equitable estate, just as a stranger would have done, the legal estate so obtained is not an ancestral estate within the meaning of the Rhode Island statutes of descent.
3. When the equitable and legal estates in land, derived from different sources, unite in a single owner, the equitable estate is merged in the legal; and the descent from such owner follows the legal title.

(Providence—Decided February 18, 1888.)

BILL of interpleader. On petition for rehearing. *Petition dismissed.*

After the proceedings in this case reported in 4 New Eng. Rep. 751, 15 R. I. 204-208, the respondents, other than Martha O. Taylor, filed a petition for a rehearing. This petition Martha O. Taylor moved to dismiss, a reargument having already been allowed. After hearing counsel, the court filed the following receipt:

November 10, 1887. *PER CURIAM*: The case, *Hodges v. New England Screw Co.* 3 R. I. 9, decided in 1883, has always since then been regarded as settling the practice of this State in regard to the rehearing of suits in equity on petition. The court then decided that a rehearing would be granted, upon petition, by the court in its discretion, if it thought the case ought to be reheard, even when the error alleged was simply error of law; and the court added that the discretion should be exercised liberally in favor of a rehearing. We think that, under this decision, the petitioners are entitled to be heard on their petition, and that the motion to dismiss should be overruled.

Order accordingly.

The petition for rehearing was heard December 31, 1887, before the chief justice and the four associate justices.

For statement of facts, see the opinion formerly delivered in the case, and reported in 4 New Eng. Rep. 751, 15 R. I. 204.

Mr. James Tillinghast, for petitioning respondents:

In *Taylor v. Taylor*, 9 R. I. 119, the court held that the legal title of Gustavus's fifth part was in William H. as trustee, but that he was "not charged with any active trust or duty in the management or disposition of the estate, which calls for a retention of the legal title," and that the *cestus que trust* had the full equitable estate and was entitled, against the ob-

jection and refusal of the trustee, to have the title surrendered to him whenever he chose to call for it.

The ancestral clause of the law of descent of Rhode Island discards entirely the fiction of the English law that every estate acquired otherwise than by descent is an estate by purchase, a *fœdum antiquum*, creating its holder a new stock of descent in his own blood; and provides in effect that only estates acquired for value; that is, by purchase in its primary and proper sense, or from a stranger, shall have this effect, by providing that all acquired by gift or devise, as well as by descent "from the parent or other kindred," shall descend as ancestral. "Gift" means, or at least includes, gifts *inter vivos*, conveyances by way of gratuity, without actual valuable consideration. A conveyance by gift is simply a feoffment, wherein the estate thereby limited or created is one in tail. This is applying the term in its stricter sense; for, in its broader meaning, the word "gift" imports no more than the transferring of the property of a thing from one to another, without a valuable consideration.

3 Washb. Real Prop. 8d ed. 305; *Re Hartman's Estate*, 4 Rawle, 89; *Eckert's Estate*, 12 Phila. 98.

While it is true as a general principle that, where the legal and equitable estates entirely commensurate with each other, but seldom, if ever, otherwise meet in the same person, the equitable will merge in the legal, it may well be doubted whether, in such cases as *Goodright v. Wills*, Doug. (Eng.) 770; *Selby v. Alston*, 3 Ves. 389; and *Nicholson v. Halevy*, 1 Johns. Ch. 417, the principle would or should be applied to break the descent under such a statute as ours.

See notes to *Selby v. Alston*, 3 Ves. Sumner's ed. 342, and cases; *Watk. Desc.* *178.

The court never regards anything but the equitable interest; and it would not allow any legal interest that might exist in the heir to prevent the devolution of the equitable interest in the same course as it would pass if the legal interest were outstanding in a stranger.

Buchanan v. Harrison, 1 Johns. & H. 662; *Langley v. Sneyd*, 1 Sim. & S. 54.

The trust in this case is an executed, as distinguished from an executory, trust (*Tillinghast v. Coggeshall*, 7 R. I. 388); that is, the testator was "his own conveyancer," leaving it only discretionary with the trustee as to the time when, and possibly as to the person to whom, conveyance of the legal title should be made.

The trust in itself was the barest, most naked, trust imaginable; under which the trustee was most clearly a "bare trustee," within the English Vendors and Purchasers Act of 1874, and the Land Transfer Act of 1875, as defined in *Christie v. Ovington*, L. R. 1 Ch. Div. 279-281; and it was a passive, as distinguished from an active, trust.

Tiedeman, Real Prop. §§ 494-514.

But to this trust, whatever it was, was added a "power," so expressly termed in the will itself, and so called and treated in 9 R. I. 127,—a power to the trustee to "convey," that is, to appoint (1 Sugd. Pow. ed. 1856, 120), the legal estate to the *cestui* whenever he saw fit.

If the power be exercised, it operates under 1 R. I.

the Statute of Uses as an appointment of the estate, vesting it in the children as if devised to them directly by the will itself.

Every power given in a will is considered in a court of chancery as a trust for the benefit of the person for whose use the power is made, and as a devise or bequest to that person.

2 Washb. Real Prop. ed. 1864, 328; *Wms. Real Prop.* 5th ed. 807-310.

Whenever a power is given, whoever takes the estate takes from the grantor by whom the power is created, and not from the power itself.

Cook v. Duckenfield, 2 Atk. 565. See also *S. C.* 2 Atk. 568. See 1 Sugd. Pow. 242; 2 Sugd. Pow. 28 *et seq.* 81-88; *Tiedeman*, Real Prop. §§ 559, 560; *Maundrell v. Maundrell*, 10 Ves. 255; *Cholmondeley v. Clinton*, 2 Jac. & Walk. 147; *Doolittle v. Lewis*, 7 Johns. Ch. 45; *Glass v. Richardson*, 2 De Gex M. & G. 658, affirming 9 Hare, 566; *Withers v. Yeadon*, 1 Rich. Eq. 324; *Collins v. Carlisle*, 7 B. Mon. 13, 14; *Weston v. Weston*, 125 Mass. 268.

These powers may be executed by a married woman.

1 Perry, Tr. §§ 48, 49; *Bradish v. Gibbs*, 8 Johns. Ch. 523; *Gridley v. Wynant*, 64 U. S. 23 How. 500 (16 L. ed. 411); *Gridley v. Westbrook*, 64 U. S. 23 How. 508 (16 L. ed. 412); *Cranston v. Crane*, 97 Mass. 459.

Or under them one may convey directly to his wife or to himself.

Wms. Real Prop. 800 *et seq.*; *Hall v. Bliss*, 118 Mass. 559; *Woonsocket Sav. Inst. v. American Worsted Co.* 13 R. I. 255.

The same principle governs as to descents, even under the English doctrine of estates by purchase.

Watk. Desc. 159; 1 Perry, Tr. §§ 357-377. See *Sprague v. Sprague*, 18 R. I. 704; *Reynolds v. Hennessy*, 4 New Eng. Rep. 103, Index Z, 139; *Tillinghast v. Coggeshall*, 7 R. I. 393.

It is a new doctrine that the conveyance—appointment—by the trustee operates out of his estate, and not out of the creator of the trust or power. The latter has been the doctrine of the common law from the earliest time.

Tomlinson v. Dighton, 1 P. Wms. 149. See 1 Sugd. Pow. 191, 192.

When William made his deed to Alexander, Jr., in execution of the power, as confessedly he did, it passed the legal estate to Alexander, Jr., as an estate derived directly by devise from his grandfather, and precisely with the same effect as if it had been limited to him by his grandfather's will. That this deed was an execution of the power, there can be no doubt. It expressly refers to the will, and could have no other operation.

Tomlinson v. Dighton, *supra*; 1 Spence, Eq. Jur. 549; 2 Perry, Tr. 511 c.

The effect of this deed, combined with the will, was to put Alexander, Jr., into the full estate, legal as well as equitable, by descent.

Wood v. Skelton, 6 Sim. 176; *Buchanan v. Harrison*, 1 Johns. & H. 673.

If one can take by descent, the law makes him take so.

Selby v. Alston, 3 Ves. 342; *Philips v. Dashfield*, 1 Har. & J. 478; *Hoover v. Gregory*, 10 Yerg. 444; *Ellis v. Page*, 7 Cush. 161.

The devise to William is, in terms, but a life estate. The powers, both that to appoint a successor and that to surrender the trust, are

purely personal to William, and must die with him. And there was no purpose whatever of the trust to be served beyond the lines of William and Alexander, Sr. If the estate, therefore, devised to William, had been, in terms even, in fee, it would, upon settled principles, have been cut down to his life estate. *A fortiori*, it would not, by implication, be enlarged to a fee to serve no purpose.

2 Jarm. Wills, 5th Am. ed. Boston, 291 *et seq.* 305, 306, and notes; 1 Perry, Tr. § 812; *Heardson v. Williamson*, 1 Keen, 33; *Parks v. Parks*, 9 Paige, 110; *Dodson v. Bull*, 60 Pa. 496.

And the remainder vested under the will directly in Alexander in fee.

Tiedeman, Real Prop. § 564, and cases; *Shapland v. Smith*, 1 Bro. Ch. 75; *Doe v. Ironmonger*, 3 East, 583; *Doe v. Hicks*, 7 T. R. 433; *Hawker v. Hawker*, 3 Barn. & Ald. 537; *Ward v. Amory*, 1 Curt. 419; *Ellis v. Page*, 7 Cush. 161, 165.

Indeed, upon any other construction it is doubtful, to say the least, whether both the trust and the power would not be void for perpetuity, if there is no other limit except the whole line of heirs *ad infinitum*.

Ware v. Polhill, 11 Ves. 257-283; Gray, Perpetuities, §§ 483, 484.

When, therefore, the legal estate was surrendered to Alexander, Jr., so far from merging this remainder in itself, it, as the lesser estate, fell into and was merged in this remainder, which Alexander, Jr., already held by descent from his father, who held it directly under the will as a remainder, because, being legal, it could not coalesce with his equitable life estate.

Thurston v. Thurston, 6 R. I. 297; *Ward v. Amory*, 1 Curt. 419; *Richardson v. Stodder*, 100 Mass. 528; *Moore v. Stinson*, 4 New Eng. Rep. 654, 144 Mass. 594.

The devise in this case is simply unto "my son William Henry for the use and benefit of my son Alexander Viets Griswold Taylor and his heirs."

This language taken by itself created an executed use.

Nightingale v. Hidden, 7 R. I. 115, 131, 132; 2 Jarm. Wills, 5th Am. ed. Boston, 290, 291.

The mere fact of different expressions in the other devises should not be seized upon to convert this estate into an active trust. And if it was not that, the great weight of authority is that it remained an executed use.

2 Jarm. Wills, 291; Tiedeman, Real Prop. §§ 468-470; Wms. Real Prop. 217; *Ward v. Amory*, 1 Curt. 424; *Richardson v. Stodder*, 100 Mass. 528, and cases cited; *Warner v. Sprigg*, 62 Md. 14; *Lynch v. Suayne*, 88 Ill. 336; *Moore v. Stinson*, 4 New Eng. Rep. 654, 144 Mass. 594.

While, undoubtedly, to a certain extent the intention of the testator is to be sought by a comparison of the different portions of the whole will, yet the use of technical language cannot be ignored, much less words interpolated to effect a merely supposable intention not clearly expressed or necessarily deducible from the language used.

Nightingale v. Hidden, 7 R. I. 120; 2 Jarm. Wills, 488, 489; 1 Redf. Wills. 2d ed. 438-436, § 3.

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Mr. Nathan W. Littlefield, for respondent Martha O. Taylor:

1. The act of the trustee in making the conveyance did not narrow or prejudice the infant's title, but enlarged it, and was a benefit to him; and if he had lived to his majority, he would have affirmed the deed. Consequently a class of persons who are not his heirs cannot disaffirm the conveyance for the purpose of making themselves his heirs.

Langley v. Sneyd, 1 Sim. & Stu. 427, and cases cited under point 2.

2. The equitable estate came to the infant by descent from his father, and the legal estate by the conveyance from the trustee. The two estates were exactly commensurate.

In such a case the equitable is merged in the legal estate, and the legal estate controls the course of descent.

Selby v. Alston, 3 Ves. 339; *Goodright v. Wells*, 2 Doug. 770; *Philips v. Brydges*, 3 Ves. 120; *Donisthorpe v. Porter*, 2 Eden, 162; *Wade v. Paget*, 1 Bro. Ch. 363; *Wood v. Douglas*, L. R. 28 Ch. Div. 331, affirming *Selby v. Alston*, *supra*; *Nicholson v. Halsey*, 1 Johns. Ch. 417.

3. The legal estate did not come to the infant by gift. The word "gift" in our statute means a gift *inter vivos*. It also means a voluntary conveyance, a gratuity.

Hartman's Estate, 4 Rawle, 39; *Eckert's Estate*, 12 Phila. 93.

4. In no sense did this title come by descent from John Taylor or from A. V. G. Taylor, Sr.

The rule contended for by the petitioners, that the testator cannot make the heir take by devise what he would have taken by descent, has no application whatever in this case. It applies to a devise by the testator to his own heirs of a fee simple.

Ruchanan v. Harrison, 1 Johns. & H. 662, and other cases cited by the petitioners. See also *Swayne v. Burton*, 15 Ves. 369.

5. Under our statute, only the immediate descent and the immediate act by which the intestate derives title will be regarded.

Smith v. Smith, 4 R. I. 1; 7 R. I. 333; 9 R. I. 266; 10 R. I. 531; 12 R. I. 466; *Gardner v. Collins*, 27 U. S. 2 Pet. 90 (7 L. ed. 358).

6. If, as contended by the petitioners, the trustee had only a power of appointment under the will, he has not used it, but has conveyed the estate without regard to the power. Where a grantor has an estate and a power, the instrument, being a conveyance in form, will be construed as a conveyance, and not an appointment.

4 Kent, Com. 335, and note 1; *Cler's Case*, 6 Coke, 17; *Mory v. Michael*, 18 Md. 241; *Johanson v. Stanton*, 80 Conn. 297; *Bingham's App.* 64 Pa. 345.

But in no sense can this deed be considered as operating out of the estate of John Taylor. John Taylor conveyed the entire legal estate to the trustee. The trustee had in himself the whole title which he conveyed.

It is only (1) naked common-law powers which operate out of the estate of the donor of the power (*Rodgers v. Wallace*, 5 Jones, L. 181; *McArten v. McLaughlin*, 88 N. C. 391; Sugd. Pow., 1); or (2) a power under the Statute of Uses to create a new estate, the execution of which operates as a limitation of a use.

This is not a common-law power.

Sugd. Pow. p. 1; chap. 1, § 111.

It is not power under the Statute of Uses.

If the will conferred a mere power, whether naked or coupled with an interest, the court could not have compelled William H. Taylor to convey the estate as it did in *Taylor v. Taylor*, 9 R. I. 119. The decree in that case was not that he execute a power, but that he convey the estate; and the deed executed in conformity with that decree was a conveyance, not an appointment.

1 Perry, Tr. §§ 248, 489, and cases cited; 4 Kent, Com. 328; *Brown v. Higgs*, 8 Ves. 574; *Atty-Gen. v. Downing*, Wilm. 23.

Stiness, J., delivered the opinion of the court:

The opinion given in this case at the October Term, 1885, 4 New Eng. Rep. 751, 15 R. I. 204, rested upon three points: (1) that Alexander Taylor, Jr., inherited an equitable estate, from his father, in the land referred to in the bill; (2) that the conveyance of the legal estate to him was not a gift or devise from the testator, his grandfather, nor a gift from the trustee, his uncle; (3) that the legal title was the controlling title, in determining the descent, where the equitable estate had merged in the legal.

The first point is not disputed. As to the second, we must reiterate that Alexander, Jr., took nothing under the will. Certainly not by devise; for the will, in terms, gave him nothing. An equitable fee was given to his father, and this he inherited. He then got the legal estate from the trustee by virtue of his inheritance of the equitable estate, which was a right existing outside, and independent of, the will. If a stranger had bought the equitable fee of Alexander, Sr., he would equally have been entitled to a conveyance from the trustee. But no one would claim, in such a case, that he took either by devise or gift under the will, or by gift from the trustee. Whether the word "gift," as used in the statute, be taken in a technical or popular sense, it does not cover this case, since Alexander, Jr., took the legal estate independently of the will, by virtue of his ownership of the equitable estate, just as a stranger would have done had he become the owner of it. In other words, he acquired the legal estate as a new estate, by purchase.

The uncles of Alexander, Jr., contend, however, that William H. Taylor did not convey an estate by his deed, but only executed a power of appointment under the will, and hence that Alexander, Jr., took his estate under the will, by virtue of the appointment, and not by purchase, under the deed. We do not think this is so. The will contained no limitation of an estate in favor of Alexander, Jr., individually or as one of a class, so as to leave to the trustee either a direction or discretion when to convey. If it had, undoubtedly the grantee in a deed from the trustee would take under the will, by virtue of the limitation in his favor. Neither did the will indicate any intention to give a mere power of appointment. The trustee had no power of selection outside of the ownership of the equitable estate.

The estate was devised to him in trust, to hold, and, in his discretion, to convey. This 1 R. I.

discretion, at most, could only apply to the time and circumstances of the conveyance; and the decision in *Taylor v. Taylor*, 9 R. I. 119, was to this effect. It was also held in that case that the legal estate vested in the trustee, and was not taken out of him by the execution of the uses. We do not think it was the intention of the will to vest anything less than a fee in the trustee. The separation of the legal and equitable estates, the power to appoint a successor, and the trust to convey, indicate that the trustee was to hold a fee. It is implied that the trustee under a will takes a legal estate sufficient for the purposes of the trust, whether the limitation be to him and his heirs or not. Perry, Tr. § 812, and cases cited. Moreover, this point was made in the case of *Taylor v. Taylor*, *supra*, where it seems to have been assumed, without the necessity of decision, that the legal estate was a fee. The trustee, then, had a legal estate, commensurate with and attendant upon the equitable estate. When the equitable estate was in a person *sui juris*, he could demand the legal estate of the trustee, as in *Taylor v. Taylor*, *supra*.

The conveyance of the trustee, therefore, was not an execution of a power, operating out of the estate of the testator, but a conveyance of the estate in execution of a trust. If, then, Alexander, Jr., inheriting the equitable estate from his father, received the legal estate on that consideration and in execution of the trust, he became the owner of the entire estate, neither by gift or devise from the testator nor by gift from the uncle. Upon the union of the two estates in him,—the equitable by inheritance, and thus ancestral; the legal by purchase, and thus in him as a new stock of descent,—the question comes whether the descent is to follow the equitable or the legal title.

It is to be observed that the two estates did not come from the same person. Alexander, Sr., never had the legal title; but, if anything could have descended from John Taylor, it must have gone to him; for Alexander, Jr., was not the heir of his grandfather. Hence the rule followed in *Wood v. Skelton*, 6 Sim. 176, and in *Buchanan v. Harrison*, 1 Johns. & H. 662, that an heir will not be held to take by devise what he would have taken by inheritance, does not apply. In this case the two titles come from distinct sources. In their devolution, by the provisions of the will, the ancestral character of the legal estate has not been preserved, within the terms of the statute. If the legal estate controls, the descent is to the mother; if the equitable, to the uncles. Upon the authorities cited in the former opinion, no decisions to the contrary having been brought to our attention, we must adhere to the conclusion that the legal estate controls. The following passage from *Hopkinson v. Dumas*, 42 N. H. 296, shows how the notion that the equitable estate should control arises. After citing *Goodright v. Wells*, 2 Doug. 771, the court says: "It was there very learnedly argued that before the Statute of Uses the use was considered, in most respects, as the complete ownership of the land; that the estate of the feoffee was subservient to the *cestui qui use*, and that the former could do nothing to defeat the interest of the latter, unless by alienation for a valuable consideration without notice; that the Statute of

Uses completed this subseviency by consolidating the legal estate with the use, or by merging the legal estate in the equitable; and that, by analogy to uses thus considered, trust estates had been, and should be, held to be the solid and substantial ownership of the land, and the trustee the mere instrument of conveyance; that, where a party holds by two titles, the law considers him as taking by the best; that the trust estate, being the best, must control the legal estate. But the court held otherwise, deciding that the legal estate was the better title, and that the equitable title was merged the moment the two became united in the same person; that the legal drew after it the equitable estate, and that the latter was lost in the former." Accordingly, the court in New Hampshire, following this and the cases cited in our former opinion, applied this rule to a case of dower.

There are *dicta* to the contrary of this rule, but we know of no case which has decided that, upon the union of the legal and equitable estates, the latter controls the descent.

The petition for rehearing is dismissed.
Decree accordingly.

Zechariah CHAFEE, Trustee,

v.

William SPRAGUE, Admr.

1. Where personal property is contracted to be delivered to a trustee in aid of a trust mortgage, equity has jurisdiction of the subject-matter of a bill for the specific performance of such contract, although there is ordinarily an adequate remedy at law for the breach of a contract relating to personal property.
2. An executory contract for the transfer of corporate stock as collateral security for a trust deed will not, after the death of the debtor-contractor insolvent, be enforced in equity to the injury of the general creditors of such debtor.

(Providence—Decided February 18, 1888.)

BILL in equity to compel the transfer of certain corporate stock and for a receiver. *Dismissed.*

Fanny Sprague, in her lifetime, became an executing party to a certain deed of trust to Zechariah Chafee, dated November 1, 1873, and printed in *Austin v. Sprague Mfg. Co.* 14 R. I. 464. This deed of trust contained the clause (14 R. I. 469): "Excepting from this conveyance all shares of capital stock in any and every corporation, wherever located, belonging to any or either of the parties of the first part, the same to be transferred to said party of the second part upon his request in writing, by way of pledge and collateral security to secure the performance of the conditions of this instrument." Fanny Sprague died October 13, 1883, and William Sprague was appointed administrator of her estate. December 30, 1884, Chafee demanded of Sprague the transfer of certain bank stock standing in the name of Fanny Sprague, and February 11, 1885, filed this bill in

equity to compel the transfer of the stock, and for the appointment of a receiver of the stock pending the suit. The respondent demurred to the bill, which demurrer was overruled January 23, 1886, as follows:

PER CURIAM: Although the bill prays for the specific performance of a contract relating to personal property for breach of which there is ordinarily an adequate remedy at law, the court is of opinion that, as the property in question was contracted to a trustee in aid and enforcement of the provisions of a trust mortgage, a court of equity has jurisdiction of the subject-matter of the bill. The stock in question was to be transferred upon request, but no request was made upon the intestate during her lifetime. As against a solvent estate, we think this would not render the bill demurrable, and, as we construe the bill, no specific allegation of insolvency appears. Demurrer overruled.

The case then came on for hearing on bill, answer, and proofs.

Messrs. C. Frank Parkhurst, James Tillinghast, Charles Hart, and Benjamin F. Thurston, for complainant:

The personal representative takes the estate of the deceased, subject to all equities to which the deceased was subject in her life.

See *Berry v. Van Winkle*, 2 N. J. Eq. 260.

Even if the estate of Fanny Sprague is proved to be insolvent to the satisfaction of this court, that fact can make no difference to the equity of the complainant.

Clark v. Flint, 22 Pick. 231.

By virtue of the contract for the conveyance of this stock contained in the trust mortgage, duly executed and recorded, the shares of stock here in controversy became subject to an equitable lien or mortgage in favor of the complainant, which is superior to the rights of any subsequent creditor.

White Water Valley Canal Co. v. Vallette, 62 U. S. 21 How. 414 (16 L. ed. 154); *Fedor v. Philpott*, 12 Price, 197; *Seymour v. Canandaigua & N. F. R. Co.* 25 Barb. 284, and cases cited; *Wheeler v. Factors & T. Ins. Co.* 101 U. S. 439 (25 L. ed. 1055); *Nichols v. Baxter*, 5 R. I. 491; *Groton Mfg. Co. v. Gardiner*, 11 R. I. 626, and cases cited; *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *Butt v. Ellett*, 86 U. S. 19 Wall. 544 (23 L. ed. 183); *Pennock v. Coe*, 64 U. S. 23 How. 117 (16 L. ed. 436); *Williams v. Briggs*, 11 R. I. 476, and cases cited 478; *Williams v. Winsor*, 12 R. I. 9. See also *Mechanics Bank v. Seton*, 26 U. S. 1 Pet. 299 (7 L. ed. 152); *Owles v. Whitman*, 10 Conn. 121.

That the record of the trust mortgage in this case was sufficient, see—

Anthony v. Butler, 38 U. S. 13 Pet. 423 (10 L. ed. 239); *Groton Mfg. Co. v. Gardiner*, 11 R. I. 626.

All unpaid dividends should go, upon the transfer of the stocks, to the complainant, under the well-settled principle that dividends or stocks under pledge belong to the pledgee.

Merchants Bank v. Richards, 6 Mo. App. 454; *Gaty v. Holliday*, 8 Mo. App. 118; *Hill v. Newichawanick Co.* 48 How. Pr. 423; *Herrman v. Maxwell*, 15 Jones & S. 349; *Jones, Pledge*, § 398; *Cook, Stock & Stockh.* § 468.

Mr. Andrew B. Patten, for respondent:
The covenant inserted in the trust deed is a

dependant or conditional covenant which conferred upon Chafee a mere naked power,—a power not coupled with a present interest, and which could not operate to give Chafee any rights in the property until he had made request in writing to transfer the stock. No interest could arise under the power until the power was exercised, not even an equitable lien; and having no equitable lien, he had no standing in court, either at law or in equity, to enforce the covenant in the lifetime of the decedent.

Holmes v. Hall, 8 Mich. 66; *Groton Mfg. Co. v. Gardiner*, 11 R. I. 626.

The stock having passed into the hands of William Sprague, administrator, free and clear of any equitable lien, his duty and rights in regard to the same are prescribed by law. The parties could make no covenant to bind their administrators in derogation of the statute.

The liability of a deceased stockholder is a claim against the estate of the decedent, and the statutes prescribe the mode of payment.

Moies v. Sprague, 9 R. I. 558; Rev. Stat. chap. 123, § 23.

The estate is insolvent. This must deprive the complainant of the specific relief sought for in the bill.

City F. Ins. Co. v. Olmsted, 33 Conn. 476.

Chafee having no claim to the stock, the dividends declared due and payable belong to the administrator.

Jermain v. L. S. & M. S. R. Co. 1 Am. & Eng. Corp. Cas. 111.

Per Curiam:

It appears from the proof in this case that there are debts outstanding against the estate of the intestate beyond the amount of the assets that have come to the hands of the administrator. The defendant as administrator is as much bound to distribute the estate of the intestate among her creditors as the complainant is under the mortgage. The complainant might at any time during a period of ten years in the lifetime of the intestate have required a transfer of the stock to him, but he did not see fit to do so. At her death it went to her administrator by operation of law, and we do not see that the complainant has any claim in equity superior to that of the defendant to receive and distribute its proceeds among her creditors. The case of *City F. Ins. Co. v. Olmsted*, 33 Conn. 476, is in point, and we think its reasoning is conclusive.

Bill dismissed.

Durfee, Ch. J., and *Matteson, J.*, did not sit in this case.

PROVIDENCE COUNTY SAVINGS BANK

v.

Charles E. HALL.

1. If a tenant holds over without any new contract, it is optional with the landlord to treat him either as a trespasser or as a tenant from year to year or term to term, as the case may be, whether the tenant actually agrees to it or not. In such case an election to treat him as tenant may be inferred as well from any unreasonable delay in

proceeding against him as trespasser, as from words or acts directly recognizing him as such.

2. But if the tenant remains in possession for some particular purpose, by permission of the landlord, he will only be liable for rent for the period of occupation, unless he exceeds the permission; and if the landlord accepts a surrender from a tenant holding over, the tenant will be liable for rent only up to the time of such acceptance.

(Providence—Decided February 18, 1888.)

ON defendant's petition for a new trial. *Dismissed.*

The facts are sufficiently stated in the opinion of the court.

Mr. James C. Collins for defendant.

Mr. W. B. Tanner for plaintiff.

Durfee, Ch. J., delivered the opinion of the court:

This is a petition for the new trial of an action of assumpsit for the use and occupation of a small farm, with dwelling-house thereon, for one year. The action was tried in the court of common pleas. It appeared on the trial that the defendant entered into occupation in 1877, hiring for a year, from April 1, 1877, to April 1, 1878, at \$300 per annum; and continued to occupy at the same rent until the year 1883-84; that on October 1, 1883, he received written notice from plaintiff bank to quit April 1, 1884, but continued, notwithstanding, to occupy until the latter part of November, 1884, when, without written notice to the bank, he quitted, leaving the key with a neighbor, from whom he got it when he first entered as tenant. He testified that about April 1, 1884, he saw the treasurer of the bank, who had charge of the letting, and asked permission to remain a few months, until a house then building for him could be completed; and that the treasurer refused to give it, saying that it would be an injury to the bank, which wanted to sell; and that in August the bank had a board set up on the premises with "For sale" painted thereon. He also testified that the farm contained only about 18 acres, mostly poor land; that he did not plough or plant in 1884, because he expected to leave, and only mowed the lawn in front of the house, getting not over a quarter of a ton of hay. This testimony was not contradicted. He had, however, been accustomed to pay the taxes and to have the amount deducted from the bill for rent. He paid the tax of 1884.

The bank claimed on this testimony that it was entitled to recover \$300 rent for the year ending April 1, 1885. The defendant contended that, under the notice to quit, his yearly tenancy ended April 1, 1884, and that he was not liable for a year's rent for the year ensuing. He asked the court to charge the jury that, if they should find that the bank gave the proper notice to terminate the letting April 1, 1884, the letting did then terminate, and the bank, if it did not afterwards recognize him as tenant,—by taking rent or otherwise,—was absolved from giving him further notice, and he was absolved from giving notice to the bank in order to quit legally; and also to charge that,

if the letting came to an end April 1, 1884, and the bank refused to let further, there could be no yearly letting or tenancy afterwards until a new contract was entered into, either by implication or otherwise. The court refused so to charge, but did charge in effect that, if the bank delayed to act on the notice to quit, for an unreasonable time, it lost the benefit of it, and could only terminate the letting at the end of the going year by another notice, and the defendant could only terminate his tenancy in like manner; and left the jury to determine, as a matter of fact, whether the bank did unreasonably delay. The jury returned a verdict for the bank for a year's rent. The question is whether the rulings and refusals to rule were erroneous.

The purport of the charge was that, if a tenant from year to year holds over after his tenancy has been terminated by notice to quit, it is optional with the landlord either to follow up the notice by ejectment or to waive the notice and hold the tenant for another year whether the tenant actually agrees to it or not. The charge is supported by numerous American cases. *Hemphill v. Flynn*, 2 Pa. 144; *Bacon v. Brown*, 9 Conn. 384; *Conway v. Starkweather*, 1 Denio, 118; *Schuyler v. Smith*, 51 N. Y. 309; *S. C.* 10 Am. Rep. 609; *Witt v. Mayor of N. Y.* 5 Robt. 248; *S. C.* 6 Robt. 441; *Noel v. McCrory*, 7 Cold. 628; *Schuisler v. Ames*, 16 Ala. 78; *Wolfe v. Wolfe*, 69 Ala. 549; *S. C.* 44 Am. Rep. 526; *Clinton Wire Cloth Co. v. Gardner*, 99 Ill. 151. Some of these cases are very strong. Thus, in *Conway v. Starkweather* the tenant held over fourteen days, having refused to renew the tenancy before his time expired; in *Schuyler v. Smith* tenants of a wharf held over twenty-one days, while another wharf was preparing for them, they having given notice before their time ended that they should not continue the tenancy; in *Wolfe v. Wolfe* the tenant held ten days after his time expired, under notice, previously given, that he could not quit at once but would pay a reasonable rent for the unavoidable occupancy; and in *Clinton Wire Cloth Co. v. Gardner* the tenants held over eleven days, under notice that they should not remain without a reduction for rent, their holding over being in part the result of expectation that the rent would be reduced. It is true that in the cases cited the tenant was in for a definite term, but, so long as the letting is terminated, we do not see that it matters whether it be terminated by effluxion of time or notice to quit. In *Schuyler v. Smith* the tenant contended that the relation of landlord and tenant could only be created by agreement, and there could be no agreement without mutuality. The court replied that the tenant held over at his peril, the landlord having the option to treat him as trespasser or tenant for a year longer on the terms of the prior lease, so far as applicable, the tenancy arising by operation of law, regardless of the tenant's assent. In *Clinton Wire Cloth Co. v. Gardner* the court said that the rule laid down in *Schuyler v. Smith* "is the one established by the current of American decisions." The ground of decision is that, when a tenant holds over, he presumably holds over for another year if the prior tenancy was for one or more years, or, if the term was shorter, for another term, in case the landlord as-

sents; and he cannot be permitted to overthrow this presumption by setting up that he intended to hold over as a wrongdoer, and not as a tenant; and the doctrine is urgently defended on the ground that the tenant, being in possession, has the landlord at disadvantage, and can greatly embarrass or even defeat his arrangements for a new letting by holding over, and therefore should not do so without the risk of being held himself.

The English cases are more lenient to the tenant, and hold that by holding over he becomes simply a tenant at sufferance and cannot be held for another year or term without his assent, express or implied,—the question of assent being a question of fact for the jury. *Ibbe v. Richardson*, 9 Ad. & El. 849; *Jones v. Shears*, 4 Ad. & El. 882; *Waring v. King*, 8 Mees. & W. 571. The English rule is recognized in Massachusetts and Missouri. *Delano v. Montague*, 4 Cush. 42; *Edwards v. Hale*, 9 Allen, 462; *Emmons v. Scudder*, 115 Mass. 367; *Neumeister v. Palmer*, 8 Mo. App. 491. In *Edwards v. Hale* the court held that, for the creation of a new tenancy, "there must be a new contract, either express or inferable from the dealings of the parties;" and remarked that *Conway v. Starkweather* was not well sustained by authority. The remark could not now be repeated very well.

There is no reported decision in this State which is in point. We think it has been generally supposed that where a tenant holds over he is presumed to become a tenant for another year, or, if the prior term was shorter, for another term, if the landlord consents. On the question whether the presumption is rebuttable or conclusive, we are not aware that there is any prevalent opinion.

We decide, in accord with what we consider to be the greater weight of American authority, that if a tenant holds over without any new contract, it is optional with the landlord to treat him either as a trespasser or as tenant from year to year, in case the prior term was for a year or longer, and, if the prior term was shorter than a year, then from term to term according to such shorter time,—an election to treat him as tenant, however, being inferable from any unreasonable delay to proceed against him as a trespasser, as well as from words or acts directly recognizing him as tenant. *Conway v. Starkweather*, *supra*; *Moshier v. Reding*, 12 Me. 478; *Douglass v. Whitaker*, 32 Kan. 381.

Of course, if a tenant remains in possession for some particular time or purpose, by permission of the landlord, he will only be liable, unless he exceeds the permission, for the period of occupation. And so, if the landlord accepts a surrender of the premises from the tenant holding over, the tenant will be liable for rent or use and occupation only up to the time of said acceptance.

Petition dismissed.

Mortimer H. HARTWELL et al.
v.

Joseph B. GURNEY.

1. It is a fraudulent act for a trustee, at an auction sale held by him, to employ a

puffer or bidder to enhance the price, even if the trustee's intention was thus to secure the best price for his *cestuis*.

2. Hence, when an assignee at his auction sale employed a puffer or bidder to run up the price, and the property was struck off to the puffer,—*Held*, that the creditors were entitled to hold the assignee as the purchaser at the sale, and to compel him to account for the amount of his puffer's bid.

(Providence—Decided January 21, 1888.)

BILL in equity brought by the complainants for themselves and other creditors of the respondent's assignor for an account, for the removal of the respondent as assignee, and to charge him with the amount bid at an auction sale held by him as assignee. Heard on bill, answer, and proof. *Decree for complainant.*

The facts appear in the opinion.

Mr. Simon S. Lapham for complainants.

Mr. Edward C. Dubois for respondent.

Durfee, Ch. J., delivered the opinion of the court:

The question here presented arises upon the following facts disclosed by the pleadings and evidence, to wit: On August 27, 1884, Smith Shaw made a general assignment to the defendant for the benefit of his creditors. A part of the assigned property consisted of a summer hotel or shore resort, with the buildings connected therewith and the furniture therein, situated on leased land in East Providence, and was subject to a mortgage for \$1,500 with accrued interest, which the defendant satisfied to prevent foreclosure. This property was advertised for sale at auction. At the auction sale it was struck, for \$3,500, to David Goff, he being the highest bidder. Goff, however, was employed by the defendant to bid for the purpose of enhancing the price and preventing a sacrifice, and his bid was made accordingly. The next highest bid was \$3,475. The testimony shows to our satisfaction that this bid was *bona fide*, that the bidder was responsible, and that he would have taken the property and paid for it if he had not been overbid by Goff. After the auction was over the property was offered to him for the price bid, and refused. The defendant was himself the largest creditor; and we are satisfied that he acted for what he supposed to be the interest of the creditors when he employed Goff, having been informed by Smith Shaw that the next highest bidder had not long before offered him \$4,500 for the property, and he, Smith Shaw, considered it worth \$5,000. The defendant had no authority to act for the creditors except his authority as assignee. The creditors who bring this suit ask that the defendant may be decreed to account, and that he be charged in account either with the \$3,475 which he might have received but for Goff's bid, or the \$3,500 bid by Goff; and that the property so sold to Goff may be the defendant's property by virtue of the sale. The question is whether they are entitled to the relief asked for.

The defendant contends that Goff, in making the bid, acted not for him individually, but for him in his capacity of assignee, and for the 1 R. I.

benefit of the creditors, and that he cannot, therefore, be charged as purchaser. This raises the question whether, as assignee, he had any right to employ a puffer or by-bidder to protect the property for the creditors. Formerly in England, there was a conflict between the law and the equity courts, the law courts holding that by-bidding or puffing was a fraud, and that any highest bidder who had been deceived by it could avoid his contract or refuse to carry it out; whereas the equity courts were disposed to countenance it so long as it was employed defensively to prevent a sacrifice. The doctrines at common law and in equity have recently, 1867, been assimilated in England,—at least, so far as regards auction sales of real estate,—by statute, making the rule at common law likewise the rule in equity. 2 Add. Cont. 868; Batem. Auctions, 181–186.

In this country there are cases which, following the old English chancery rule, hold that the vendor may employ a by-bidder if he does it *bona fide*, to prevent a sacrifice of the property under a given price. Benj. Sales, §474, note r. But, in our opinion, the rule which is the more authoritatively established is that by-bidding is illegal, and that the vendor cannot hold the purchaser where the price has been run up by means thereof. Benj. Sales, §470, note k; Batem. Auctions, 181, note i; *Venise v. Williams*, 49 U. S. 8 How. 184 (12 L. ed. 1018); *Moncrieff v. Goldsborough*, 4 Har. & McH. 288; *Toule v. Leavitt*, 23 N. H. 360; *Baham v. Bach*, 18 La. 287; *Smith v. Greenlee*, 2 Dev. L. 126; *Morehead v. Hunt*, 1 Dev. Eq. 85; *Trust v. Delaplaine*, 3 E. D. Smith, 219; *Metropolis Nat. Bank v. Sprague*, 20 N. J. Eq. 159; *Pennock's App.* 14 Pa. 446, 449; *Staines v. Shore*, 16 Pa. 200; *Peck v. List*, 28 W. Va. 338; S. C. 48 Am. Rep. 398.

The last-named case very ably reviews the decisions, with copious quotations from them.

It seems to us that the stricter rule is the just and honest rule, and that it ought to prevail; for an offer to sell at auction is an offer to sell to the highest bidder, and every bid is an inchoate acceptance, entitling the bidder to the property offered, if it turns out to be the highest and there is no retraction on either side before the hammer falls; and therefore it is a breach of faith, a falsehood, a fraud, for the vendor to have a person employed to make a feigned bid for the purpose of beguiling the real bidder into virtually over-bidding himself. By-bidding, in other words, is a violation of the terms on which the people assembled at the sale are invited to compete with one another for the property exposed.

The language used by Lord Mansfield in the leading case of *Bezwel v. Christie*, 1 Cowp. 395, is specially apt. "The basis of all dealing ought to be good faith," said he; "so, more especially, in these transactions where the public are brought together upon the confidence that the articles set up to sale will be disposed of to the highest real bidder; which could never be the case if the owner might secretly and privately enhance the price by a person employed for that purpose."

In *Howard v. Castle*, 6 T. R. 642, Lord Kenyon, approving Lord Mansfield's decision in *Bezwel v. Christie*, pronounced his reasoning to be "founded on the noblest principles of

morality and justice; principles which are calculated to preserve honesty between man and man." And in *Pennoek's App.* 14 Pa. 446, 449, Gibson, *Ch. J.*, well says: "Common honesty requires that all should be fair and above board. To screw up the price, as it has been aptly termed, by secret machinery, can be no less than a fraud, and a sham bidder can be used for no other purpose."

If it be said that without by-bidding the property offered may be sacrificed, the answer is that it is not necessary to offer it without reserve; and the risk of sacrifice may be avoided by publicly reserving the right to bid, or to make one or more bids, in the conditions of sale, or by starting the sale at an up-set price. In this or some similar way good faith may be kept with the bidders and at the same time the property be protected.

The conclusion is unavoidable, that the defendant had no authority, simply because he was an assignee, to employ a by-bidder; since he could have no right to deceive or defraud, in whatever capacity he acted. It follows, as it seems to us, that he cannot be permitted to shelter himself from liability under the claim that Goff's bid was made, not for himself individually, but for himself as assignee; and, consequently, that the creditors are entitled to disavow the bid as a bid in their behalf, and to hold him personally to it. That he supposed he was acting for their benefit may afford him a strong ground of appeal to them for forbearance; but we do not see how the court can regard it as a valid defense, without virtually countenancing the illegal practice which the supposition induced. On the contrary, we think the court must hold that he assumed the risk of the bid when he made it, and that he must abide by it if the creditors so demand. The bid necessarily involved a double risk either for himself or for the creditors; namely, the risk which actually befell, that the real bidder would not rise upon his bid, or, if he did rise, the risk that he would subsequently discover the deception and avoid the contract. In either event the property would be thrown back either to be kept by the defendant at the price bid by him, or to be again offered for sale; and it is a matter of common experience, amounting to common knowledge, that if a first auction miscarries, and especially if it miscarries for any such cause, a second auction is thereby discredited, and frequently results in heavy sacrifice. In the case at bar a very considerable loss has already resulted in consequence of keeping the property. This loss should not fall on the creditors. It was the defendant's duty to sell, not keep, it for them. Indeed, his offer to the *bona fide* bidder after the auction shows that his purpose in bidding was not to keep it for them but to puff the price.

Let him be decreed to have the property and to account for it at the price bid by him.

RHODE ISLAND HOSPITAL TRUST CO.,
Exr. and Trustee,

Frank F. OLNEY *et al.*

1. Where an article in a will makes a be-
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quest to institutions similar to those mentioned in the next previous article, the institutions named in the next previous article are not capable of becoming legatees under the subsequent article.

2. It is not sufficient to make one a legatee that a testator intended to include him in a class of legatees, if the will leaves the intention unrevealed.
3. The "Yearly Meeting of Friends in New England" and "East Greenwich Academy" are institutions similar to Brown University, in matter of instruction, endowment, and corporate management.
4. The "Home for Aged Women" and the "Home for the Aged of the Little Sisters of the Poor" are charitable institutions similar to the "Home for Aged Men."
5. The "Saint Elizabeth Home," the "Butler Hospital for the Insane," the "Rhode Island Lying-in Hospital," and the "Newport Hospital" are institutions similar to the "Rhode Island Hospital."
6. Under a bequest to charitable uses, the "Rhode Island Homoeopathic Hospital," being fully organized and in operation, and ready to receive and make immediate use thereof, is capable of becoming a legatee thereunder.
7. The "Rhode Island Catholic Orphan Asylum," the "Providence Association for the Benefit of Colored Children," of Providence, the "St. Mary's Orphanage," of East Providence, the "Bristol Home for Destitute Children," and the "Home for Friendless and Destitute Children," of Newport, R. I., are institutions similar to the "Children's Friend Society," and as such are qualified to be recipients under the said article in said will.

(Providence—Decided February 18, 1888.)

BILL in equity to obtain a judicial construction of parts of the will of Stephen F. Olney and for instructions. On exceptions to the master's report.

The parts of the will of which construction was sought are as follows:

"18. There is now, by this instrument, a provision made for the payment of annuities amounting to a minimum sum of \$3,500 up to a maximum of \$4,900 per annum. There shall be kept an income account, the credit side of which shall show the receipts from earnings on my investments, and the debit stands charged with the payment of the annuities. Whenever this income account shall show a credit balance of \$4,000, then the sum shall be paid to the Rhode Island Hospital, for the endowment of a free bed in that humane institution, which sum shall be charged to said income account. Whenever this income account shall show a further balance of \$25,000, then my said trustees shall pay over to any institution that may be established as a home for aged men the said sum of \$25,000; and if this donation be the largest

made, then a suggestion is here made that it should be called the 'Olney Home for Aged Men.' Whenever a further balance shall be shown of \$10,000, then such sum of money shall be paid to the Children's Friend Society by my said trustees. Whenever a further balance of \$10,000 shall be shown on said income account, then said sum of \$10,000 shall be paid to Brown University as a fund, the income of which shall be spent for an increase of plants and botanical books donated to said Brown University. Whenever a further sum of \$25,000 shall be shown on said income account, then the said sum of \$25,000 shall be paid to Brown University for the endowment of a professorship of natural history in said institution; one of the duties of the professor shall be to give regular courses of botanical lectures.

"14. When my nephew Stephen T. Olney shall arrive at the age of twenty-five years, and a decision shall be made as to the payment of the sum provided by section 12, article 6, then such annuities as are provided for, after such decision, in this will, may be changed by purchase in some sound trust company, guarding all such purchases, that the annuitant in all such cases shall not have the power of disposing of the same, and the annual sum only shall be paid to the annuitant. Then the entire trust property remaining shall be divided as follows: One-quarter part to be paid to my nephew Frank F. Olney, if living; if not, to his surviving male children or child (male); one-quarter part to be paid to my nephew Stephen T. Olney, if living; if not living, to his surviving male child or male children.

"In the event of the decease of either of my said nephews without surviving male issue, the half part of said remainder of my trust estate is to be paid to the surviving nephew; if not surviving, male child or male children; and if there be no nephew, or male child of such nephew, then this half of the trust property is to be divided with the portion next to be mentioned; one-quarter part of my trust property to be given to educational institutions similar to those mentioned in article 13, and the remaining quarter part of my trust property to be given to charitable institutions similar to those mentioned in article 13."

Mr. James Tillinghast for complainant, and for the Friends' School of Providence.

Messrs. Charles S. Bradley, J. C. B. Woods, and Walter F. Angell for Brown University.

Mr. Joseph C. Ely for the Home for Aged Men.

Mr. Charles Hart for the Rhode Island Hospital.

Messrs. Benjamin T. Eames and J. C. B. Woods for the Children's Friend Society.

Mr. Charles E. Gorman for the Rhode Island Catholic Orphan Asylum, and for the Home for the Aged of the Little Sisters of the Poor.

Mr. William H. Clapp for the Rhode Island School of Design.

Messrs. Charles F. Robinson and John F. Lonsdale for the Home for Aged Women.

Messrs. Francis Colwell and Walter H. Barney for the Bristol Home for Destitute Children, the Rhode Island Homeopathic Hospital, and the East Greenwich Academy.

1 R. I.

Per Curiam :

This is a suit in equity, instituted by the complainant as executor and trustee under the will of the late Stephen T. Olney, for instructions in regard to its duties under the fourteenth article of the will. The fourteenth article makes reference to the thirteenth, and cannot be construed apart from it. By the thirteenth article the testator bequeaths \$4,000 to the Rhode Island Hospital for the endowment of a free bed; \$25,000 to any institution that may be established as a home for aged men; \$10,000 to the Children's Friend Society; and \$10,000 to Brown University for the increase of plants and botanical books, and \$25,000 to it for the endowment of a professorship of natural history. These sums were directed to be paid out of the income of property held in trust under the will by the complainant, as trustee, for the purposes of the will, and were so paid. The fourteenth article disposes of the remainder of said trust property in quarters,—two quarters to relatives, and the remaining two quarters as follows, to wit: "One quarter * * * to educational institutions similar to those mentioned in article 13, and the remaining quarter * * * to charitable institutions similar to those mentioned in article 13." The questions presented by the bill relate to this clause. This court decided at a former term (*Rhode Island Hospital Trust Co. v. Olney*, 14 R. I. 449) that the clause was not void merely on account of indefiniteness, and sent the case to a master to make inquiry and report what institutions there were in the State qualified, or claiming to be qualified, to take under it, together with information on certain points in regard to them. The master has reported, and certain other questions now come up under the report for decision.

The first question is whether the institutions which are legatees under article 13 are capable of becoming legatees under article 14. We think not. Under article 14 bequests purport to be made, not to them, but to institutions similar to them. A thing cannot, strictly speaking, be similar to itself; for similarity is not identity, but resemblance between different things. The question, however, is not a question of definition, since men do not always express themselves accurately, but of intention. What did the testator intend? If he intended to include the institutions named as legatees in article 13 among the institutions designated as similar to them in article 14, they should have the benefit of the intention, however incorrectly, as a matter of verbal criticism, the intention may have been expressed. But, inasmuch as things are not similar to themselves, it seems to us that it is for them to make it appear that such was the intention. We do not think they have been successful in their attempts to do this. The great difficulty is that, having been named as objects of the testator's bounty under article 13, they are referred to in article 14 as objects of comparison to guide the selection of the executor; and it is a strained and far-fetched construction,—a going out of the way,—to hold that they are themselves proper objects for selection. The substance of the argument in their favor is that the same reason which led the testator to wish to benefit institutions similar to them must necessarily have

led him to wish to benefit them, and, therefore, they should be included among institutions qualified to take under article 14. There would be great cogency—perhaps a convincing cogency—in this argument if the testator had not already given largely to them in article 13; but, having so given, it seems to us that the argument recoils upon itself. If the testator had intended to include them under article 14 it would have been natural for him to say so in so many words. It is not enough that he may have intended to include them, if his will leaves the intention unrevealed.

The master reports in favor of only two educational institutions as similar to Brown University, namely, the Friends' School, so called, in Providence, an institution which is under the charge of a corporation denominated "Yearly Meeting of Friends in New England," and the East Greenwich Academy, an incorporated educational institution. It is objected that these institutions are not similar to Brown University because they are not colleges. They are, however, institutions of learning, like Brown University, supplying instruction in the higher branches of education, and, like Brown University, enabled to supply it at less than it would otherwise cost, by reason of the endowments bestowed upon them, though it is true the studies taught by them are narrower in range and lower in grade, to some extent, than those which are taught in Brown University. They are also, like Brown University, managed by corporations capable of taking the bequests and holding them for educational purposes in perpetuity, though the corporation managing the Friends' School was not incorporated exclusively for that purpose. It seems to us that the resemblances between these institutions and Brown University are such that they may justly be held to be similar to it, within the meaning of article 14. They resemble it in matters of instruction and endowment, and in that they are incorporated or are under corporate management, and these are the principal points to be looked to for similarity. It was apparently the purpose of the testator to advance the higher education of the people of his native State, and we think we are deciding in furtherance of this purpose when we decide in favor of the institutions named.

There is a feature of the management of the Friends' School which has caused us some perplexity. It appears that the managers make a difference between the children of Friends, so called, and the children of those who are not Friends. The difference is greatly in favor of the children of Friends, and so greatly in their favor as to have the appearance of sectarian exclusiveness. The managers have not succeeded in explaining away this appearance to our satisfaction. We have come to the conclusion, however, that the feature is not such as necessarily to exclude the institution from participation under article 14, though it is something which the complainant may properly consider in determining what or how much it will do in its behalf.

The master reports the names of other institutions claiming to be qualified to take under article 13 as educational institutions similar to Brown University, and the grounds of their

claims. We do not think the grounds sufficient.

The master reports in favor of the following institutions as similar to the Home for Aged Men, to wit: the Home for Aged Women, the Home for the Aged of the Little Sisters of the Poor. The first of the two latter institutions is designed to be, what its name indicates, a home with suitable care for aged women who, on account of their poverty or straitened means, would suffer from want or neglect, or both, without it. The other is designed to furnish a similar home for aged and needy persons of both sexes. It is objected that the first is not similar to the Home for Aged Men, because it affords a home only to aged women. We do not think there is much force in the objection. Of course an aged woman is physically different from an aged man, but as objects of charity, when they are poverty-stricken, falling into decrepitude, and destitute of home and of the attention and comforts of home, they are pathetically similar. We concur in opinion with the master in regard to these two institutions.

The master reports in favor of the Saint Elizabeth Home, the Butler Hospital for the Insane, the Rhode Island Lying-in Hospital, the Rhode Island Homoeopathic Hospital, and the Newport Hospital, as similar to the Rhode Island Hospital. The location of the first four is Providence, of the last Newport. Some question has arisen in regard to the Rhode Island Homoeopathic Hospital, because, though chartered before, it was not completely organized until more than two years after, the testator's death. We think it is enough, the bequest being to charitable uses, that said hospital is now fully organized and in operation, and will therefore be ready to receive and make immediate use of whatever may be allowed to it.

The master reports in favor of the following institutions as similar to the Children's Friend Society, to wit: The Rhode Island Catholic Orphan Asylum and the Providence Association for the Benefit of Colored Children, of Providence, the St. Mary's Orphanage, of East Providence, the Bristol Home for Destitute Children, and the Home for Friendless and Destitute Children, of Newport. We agree with the master that said institutions are similar to the Children's Friend Society, and as such are qualified to be recipients under article 14.

The master reports the names of several institutions which claim to be similar to one or other of the charitable institutions named in article 13, in favor of which he has not reported. He reports the grounds of their claims. We do not think the claims are valid, and we disallow them.

We think the institutions which are selected as recipients under article 14 should be subject to the jurisdiction of this court, and should therefore be located somewhere in the State, but not necessarily in Providence.

In answer to the fourth question propounded by the bill, we say that it is for the complainant, as trustee, to select from among the qualified institutions those which are to become recipients under article 14. The fund to be distributed must be divided into two equal parts:

one part must be given to qualified educational institutions, not necessarily in equal shares, and not necessarily to both, the selection within the limits specified and the apportionment being both left to the judgment of the trustee; the other part must go to proper charitable institutions: It will be for the trustee to select the institutions to which it shall go, and to determine in what proportion it shall go to them, except that we advise that some portion should go to one or more of the institutions in each of the three classes. Such distribution being, even if not necessary, apparently accordant with the purposes of the testator.

Daniel J. DUGGAN *et al.*

v.

Timothy J. MCCARTHY.

1. The granting or refusal of a motion to dismiss an action in the court of common pleas, for want of jurisdiction because of deficiency of value, being a matter of discretion with the court, depending upon the circumstances of each case, is not a proper ground of exception to this court.
2. Where the defendant assumed a contract which another had made with the plaintiffs, and agreed to carry it into effect, but afterwards rescinded it, he can not set it up as a defense to an action for work and labor done.

(Providence—Decided December 15, 1887.)

ON defendant's petition for a new trial. *Denied.*

This is a petition for a new trial of an action of assumpsit for work and labor done and materials furnished by the plaintiffs for the defendant in the construction of a house. The action was tried in the Court of Common Pleas of the County of Providence, before Mr. Justice Tillinghast and a jury. The declaration contained counts in *indebitatus assumpsit* for book account, for goods sold and delivered, work and labor, and the money counts, each claiming \$500.

At the trial in the court below the plaintiffs submitted testimony to show that some time in 1885 they agreed with one Howard, a carpenter, who had contracted to build a house for the defendant, to dig the cellar and do the mason work for the same, and to furnish the material required for this purpose. Under this agreement and a subsequent variation thereof, the said Howard agreed to pay the plaintiffs \$425 for their services,—the first installment of which was to be \$182.50, and was to be paid when the cellar was built and the chimney finished. Howard, the carpenter, rescinded his contract to build the house at a time when the plaintiffs had nearly finished the cellar and chimney. One of the plaintiffs testified that at this time the defendant told him to go on with the work, and "he would see that my money was all right." Upon this assurance the plaintiffs went on with the work, completed the first portion of it, and got sand on the premises to do the plastering. During the pro-

gress of the work, the defendant gave directions to the plaintiffs as to the manner in which the work should be done. The first installment was paid the plaintiffs by the defendant, but the receipt was taken in said Howard's name. This installment was not a fair compensation for work done up to that time. The plaintiffs could not proceed further with their work until part of the carpenter work was done. The defendant told the plaintiffs that, as soon as he had let the contract for the carpenter work, he would notify them to finish their work. The defendant then entered into a contract with another party to build the house, and notified the plaintiffs of this; and the plaintiffs, though ready and willing, were not allowed to complete their contract. The plaintiffs filed their account, which showed a balance of \$80.55 due them from the defendant.

At the close of the plaintiffs' testimony defendant's counsel requested the court to dismiss the case on the ground of want of jurisdiction, because there had been no attachment of real estate, and the amount sued for was not enough to give the court jurisdiction. The court overruled the motion, and exception was taken.

Pub. Stat. chap. 198, § 8, which gives jurisdiction to courts of common pleas, is as follows: "The said court shall have original jurisdiction of all civil actions at law, which shall be commenced by attachment of real estate, or which relate to real estate or to some right, easement, or interest therein, the title to which is in dispute, or which shall be of \$100 value or upwards, of what kind or nature soever,—except when the proceedings must be commenced by writs exclusively issuable by the supreme court,—with full power to give judgment in such actions, when legally before said court, and to award execution thereon."

Defendant's counsel asked the court to charge the jury:

"1. That, in order to assume the contract of Mr. Howard, there must be a special promise,—there can be no implied promise."

The Court: I will say that, if the language was used which the plaintiffs say was used, that would amount to an express promise.

"2. That the plaintiffs cannot recover for any loss sustained by them before the alleged promise by the defendant, as the same is without consideration."

The Court: He could assume the liability upon the consideration that they would go on and finish the job. That would be a sufficient consideration for that promise.

"3. That the plaintiffs have not proved by any testimony what profit they would have made in case they had been allowed to finish the contract, and cannot do so under the counts in this declaration."

The Court: I must leave it to the jury to say what the testimony is. The declaration I think is sufficient.

To these rulings the counsel for the defendant excepted.

The jury rendered a verdict for the plaintiffs for \$80.55. The defendant now petitions for a new trial on the ground that the verdict was against the evidence, and that the presiding justice erred in the above rulings.

Mr. E. D. McGuinness, for petitioner.

Mr. E. C. Mowry, for respondents.

Per Curiam:

The court is of the opinion that the exception for the refusal to dismiss the action for want of jurisdiction must be overruled, under the authority of *Edwards v. Hopkins*, 5 R. I. 188.

The court does not think a new trial should be granted on the ground that the verdict is against the evidence. The defendant, after assuming the contract between plaintiffs and Howard, and agreeing to carry it into effect, having rescinded it while the plaintiffs were ready to perform it, cannot set it up as a defense to the action for work and labor done. 2 Greenl. Ev. § 104.

The petition is denied and dismissed, with costs.

WOONSOCKET INSTITUTION FOR SAVINGS

v.

Stephen W. BALLOU *et al.*

A testator, after giving in his will certain pecuniary legacies, bequeathed and devised all the rest and residue of his estate to his three sons in fee, "they paying out of the same all my just debts, funeral charges, and expenses of settling my estate." After the personal estate in the hands of the administrator with the will annexed was exhausted, a creditor of the estate filed a bill in equity against the residuary devisees and the administrator, **praying** for an account and **that his claim might be decreed to be by said will charged upon the lands devised to said residuary devisees.** To this bill the administrator demurred. *Held*, that the administrator was a proper party to the bill.

(Providence—Decided January 7, 1888.)

BILL in equity to establish a lien and for an account. On demurrer to the bill. *Demurrer overruled.*

The bill alleges that Warren J. Ballou died April 1, 1876, leaving a last will, in which, after giving certain pecuniary legacies to be paid by his administrator within six months after his decease, he devised and bequeathed all the rest and residue of his estate to his three

sons, parties responding to this bill, in equal portions, to them and their heirs forever, they paying out of the same all my just debts, funeral charges, and expenses of settling my estate," with devises, in the event of the death of either son without issue prior to the death of the testator, of the share of each to the survivors or survivor. This will was duly probated, and the respondent Ellis W. Blake was duly appointed administrator with the will annexed. The testator, at the time of his death, was indebted to the complainant corporation on a promissory note. Interest was paid on this note by the testator to the time of his death, and subsequently by the administrator Blake. At the time of bringing this bill the personal estate in the hands of the administrator had been exhausted in the payment of debts, legacies, and the expenses of administration, and in the payment of large sums to the residuary devisees. The bill prays for an account, and that the debt might be decreed to be by said will charged upon the lands devised, and upon the devisees. To this bill the respondent Ellis W. Blake demurred on the ground that the bill did not state such a case as entitled the plaintiff to discovery from, or relief against, him.

Messrs. F. G. Jillson and James Tillingham for complainant.

Messrs. Nicholas Van Slyck and Cyrus M. Van Slyck, for respondents:

The prayer is that the real estate in the hands of the residuary legatees may be held to be subject to a trust to pay the debt, and that an account of the amount due may be taken. As there are no assets in the hands of the administrator, he is in no way interested in the account, and he is certainly not interested in the application of the real estate.

Olegg v. Rowland, L. R. 3 Eq. 368.

If, under the prayer for general relief, it is sought to charge the administrator for maladministration, the remedy at law upon the administrator's bond is sufficient.

Per Curiam:

The bill shows that the defendant Blake, as administrator, is—*prima facie*, at least—interested in the subject-matter of the suit; the residuum under the will being charged with the payment, not only of the debts, but also of the expenses of administration; and therefore, for this reason if no other, he is a proper party.

Demurrer overruled.

1 R. I.

MASSACHUSETTS.
SUPREME JUDICIAL COURT.

Samuel A. B. ABBOTT

v.

Henry W. FOOTE *et al.*

1. Courts of equity follow courts of law in matters of set-off, unless by agreement or otherwise there is an equitable lien.
2. In an action by the assignee of a *cestui que trust* against the trustee to recover the income of the trust, a claim against the *cestui que trust* for money loaned can not be set off in the absence of an agreement or other circumstances creating an equitable lien.
3. Where the account of a trustee, crediting himself with a part of the income applied on his own debt against the *cestui que trust*, is allowed by a probate court, without personal notice to the *cestui que trust* or his assignee, such assignee is not bound thereby.
4. The claim of a trustee to a right of set-off against the *cestui que trust* cannot be adjudicated in a probate court.

(Suffolk—Filed March 2, 1888.)

ON report. Decree for plaintiff.

Bill in equity to compel the defendant Foote to account for the income of a certain trust fund in his hands, and to pay over the same to the plaintiff.

It was admitted that:

1. On the 8d day of March, 1888, Eliza A. Dwight, of Brookline, in the county of Norfolk, died, leaving a will.

2. The defendant Chapman Dwight is a son of said Eliza Dwight, and in her said will it was provided that one quarter of the residuary estate left by her should be held in trust and the income thereof paid to the said Chapman Dwight during his natural life.

3. The said will of Eliza A. Dwight was duly admitted to probate in the Probate Court for the County of Norfolk on the 2d day of May, 1888. And the defendant Henry W. Foote was duly appointed executor thereof, and was thereafter duly appointed trustee to hold in trust the one quarter of the residuary estate of the said Eliza A. Dwight, to the income of which the defendant Chapman Dwight was entitled under the provisions of the will, as heretofore set forth, and the said Foote has ever since acted as such executor and trustee.

4. The defendant Foote was duly notified that the defendant Dwight had assigned and sold all his interest under said will to the plaintiff, as aforesaid, and was informed of the contents of said assignment and furnished with a copy thereof.

5. The defendant Foote has, as trustee and executor as aforesaid, held in trust the said quarter part of the residuary estate of Eliza A. Dwight ever since his appointment as aforesaid, and has received and collected the annual income thereof.

6. Plaintiff, both for himself and as attor-

ney of defendant Dwight, under the power given in the assignment, has often requested defendant Foote to account for and pay over to him the net annual income of said trust fund; but the defendant Foote has always refused to account for and pay over said income; that Chapman Dwight has no property in this Commonwealth except such as may be in this trust fund; that the plaintiff, at the time of taking the assignment set out in his bill, knew that the defendant Foote had a claim against said Chapman Dwight, but not the nature or amount of it; that before the allowance of the account of the defendant Foote, as set up in his answer, public notice by advertisement was given, but no personal notice to the plaintiff or to Chapman Dwight.

The defendant Foote alleged that said Chapman Dwight, on or about July 2, 1880, borrowed of this defendant the sum of \$500, and executed and delivered to this defendant, in consideration of the loan to him by this defendant of said sum of \$500, a written contract for the repayment of said sum to this defendant; that said Chapman Dwight has never repaid to this defendant any part of the principal or interest due this defendant upon said written contract, but that this defendant, on June 16, 1886, sued out of the Superior Court for Suffolk County, within the Commonwealth of Massachusetts, returnable in said court on September 6, 1886, a writ requiring said Chapman Dwight to answer to this defendant in a suit upon said written contract; which suit is now pending in said court for judgment.

That said Chapman Dwight was actually indebted to him upon said written contract when this defendant was duly appointed trustee under the will of said Eliza A. Dwight, as alleged in said bill, and has been ever since, and now is, indebted to this defendant thereon; and this defendant claims the right to apply to the payment and discharge of his said debt from said Chapman Dwight, under said written contract, all sums now or hereafter received by him, or in his hands, and which would otherwise be payable as income of said trust fund to said Chapman Dwight.

That on March 25, 1885, having income in his hands payable under the provisions of said will to said Chapman Dwight, to wit, the sum of \$116.38, he applied said sum of money toward the satisfaction of his said debt due him from said Chapman Dwight, and thereupon made and rendered in the Probate Court within and for the County of Norfolk an account of his management of said trust, in which account he duly entered said sum of \$116.38 as received by him, and accounted for the same by crediting the same to himself as paid and applied by him toward the discharge of said debt due from said Chapman Dwight to him, in partial satisfaction thereof; and thereupon, in due course and after due notice, said probate court, having full and exclusive jurisdiction of the settlement of said account, duly allowed the same, and adjudicated that this defendant had rightfully applied said sum of \$116.38 to the satisfaction of this defendant's said debt.

The case was heard before Charles Allen, J.; decree was ordered for the plaintiff, and, on request of the defendant, the case was referred to the full court.

Messrs. J. G. Abbott and J. S. Dean, for plaintiff:

The defendant's claim to set off a private debt due him from the *cestui que trust* against money in his hands as trustee, due to the *cestui que trust*, is in direct violation of the law.

"In suits brought by or against executors, administrators, or trustees in their representative character, no demand shall be set off that is due to or from such executors, administrators, or trustees in their own right."

Pub. Stat. chap. 168, § 15.

It has been holden that a debt due the intestate from the heir cannot be set off against the distributee's share as such heir.

Procter v. Newhall, 17 Mass. 98; *Hancock v. Hubbard*, 19 Pick. 167.

The same rule has been extended to all cases where the debt claimed to be set off is not in the same right as the debt against which it is to be set off.

Smith v. Rice, 11 Mass. 507; *Lovell v. Nelson*, 11 Allen, 101; *Stickney v. Clement*, 7 Gray, 170; *Talbot v. Frere*, L. R. 9 Ch. Div. 572.

By becoming trustee, the defendant can gain no precedence over other creditors in reference to any debt of his own against the *cestui que trust*.

The claim that the defendant Foote has settled his account as trustee in the probate court, in which he claimed to set off the sum then due the *cestui que trust*—about \$108—against his private debt, cannot avail, because:

1. Neither the plaintiff nor the *cestui que trust* was a party to that settlement or received any notice of it so that they could object.

No attempt was made to give personal notice either to Dwight or to the plaintiff. An advertisement is not such a notice as is required to affect the rights of either the plaintiff or Dwight.

The plaintiff, not being a party to the decree allowing the account, and not having been notified of the hearing, is not concluded or affected by it.

Crosby v. Leavitt, 4 Allen, 411; *Smith v. Rice*, 11 Mass. 507; *Procter v. Newhall*, 17 Mass. 98.

2. The matter, so far as the claim of the plaintiff was concerned, and so far as the set-off of the trustee's private debt against money in his hands due the *cestui que trust*, was entirely beyond the jurisdiction of the probate court. That court had no right to pass upon, or sanction in any way, such a claim of set-off; it was not within the terms of the trust, but in contravention of it. This has been expressly decided by this court:

Hancock v. Hubbard, 19 Pick. 167; *Procter v. Newhall*, 17 Mass. 98; *Smith v. Rice*, 11 Mass. 507; *Coudin v. Perry*, 11 Pick. 508, 511; *Dawes v. Head*, 8 Pick. 128.

When the probate court passed upon the claim of set-off by the trustee, it adjudicated upon a matter entirely foreign to, and not growing out of, the trust.

The probate court had no jurisdiction of the question whether the trustee had paid over the income to the *cestui que trust*. The fact that the trustee should state that he had so paid it would not bind the *cestui que trust*.

For a still stronger reason, the statement in the account of the trustee, that he had appropriated the money in his hands as trustee to pay a debt

due to him from the *cestui que trust*, even if the account was allowed by the court, could not conclude or affect in any way the latter or anyone claiming under him. Clearly it was a matter beyond the jurisdiction of the court.

Coudin v. Perry, 11 Pick. 508-511; *Dawes v. Head*, 8 Pick. 128.

Messrs. M. & C. A. Williams, for defendants:

We contend that Pub. Stat. chap. 168, § 15, has no application in this case; because (1) that statute relates only to set-off in actions at law; and (2) because it applies only to suits between third persons and trustees, etc., and not to a suit by the *cestui que trust* or his assignee against the trustee, like the case at bar. This statute simply meant to provide that if A should sue an administrator upon a debt of the intestate to A, the administrator should not set off a private debt due by the plaintiff A to him in his private capacity.

Stickney v. Clement, 7 Gray, 170.

It did not mean to provide that a *cestui que trust* who was actually in debt to his trustee could by bill in equity compel the trustee to pay him money under the trust, before the trustee had reimbursed himself for his debt against the plaintiff. It never intended to make a trustee pay money twice. We submit that this court has no jurisdiction of the plaintiff's bill, because the settlement of the defendant's account as trustee is wholly a matter for the probate court, and can come to this court only by appeal. The matter has already been partly adjudicated by the probate court. If, however, this court has jurisdiction by reason of its general jurisdiction of trusts, it will, in dealing with this case, do substantial justice between the parties according to equitable principles, without regard to any statute relating to set-off in actions at law.

See *Spaulding v. Backus*, 122 Mass. 554.

That there is a peculiar equity in cases like the present is well shown in *Taylor v. Taylor*, L. R. 20 Eq. 160.

Public notice by advertisement was given, and the fact that no personal notice was given to Dwight or the plaintiff is immaterial. The probate court has power to order such public notice as it may see fit of the hearing upon the settlement of an account, and must itself judge how far, and whether, its order has been complied with.

Abbott v. Bradstreet, 8 Allen, 587.

If every body who is affected by the settlement of a probate account can ignore the decree on the ground that he had no personal notice of the hearing, ninety-nine out of every hundred of such settlements heretofore made can be set aside. When a case in equity is heard upon bill and answer, the allegations of the answer are to be taken as true.

Perkins v. Nichols, 11 Allen, 542.

Morton, Ch. J., delivered the opinion of the court:

Mrs. Dwight, by her will, gave to the defendant as trustee a fund upon the trusts to pay the income to her son Chapman Dwight during his life, and, upon his death, to divide the principal among his children. After her death, Chapman Dwight for a valuable consideration assigned to the plaintiff all his interest

under his mother's will; and this suit is brought to require the trustee to pay to the plaintiff the income of the fund. The defense is that Chapman Dwight owes the defendant, in his individual capacity, a sum of money borrowed before Mrs. Dwight's death, and the defendant claims the right to apply the income as it accrues, by way of set-off, to the payment of his debts until it is extinguished.

The statute provides that, "in suits brought by or against executors, administrators, or trustees in their representative character, no demand shall be set off that is due to or from such executors, administrators, or trustees in their own right." Pub. Stat. chap. 168, § 15.

It is clear that in a suit at law such a set-off as the defendant claims could not be allowed. As is stated in *Spaulding v. Backus*, 122 Mass. 554: "In the matter of set-off, courts of equity follow the courts of law, except where there is some equitable ground, growing out of the transaction or the relation of the parties, which brings the case within the general jurisdiction of a court of equity, and justifies granting relief beyond the rules of law. The existence of cross-demands is not a sufficient ground for interference; the party seeking the benefit of the set-off must show some peculiar equity which entitles him to be protected against his adversary's demand." There may be cases in which a court of equity will practically extend the right of set-off existing at law. For instance, if a *cestui que trust* and a trustee, before any rights of other parties have attached, agree that the income coming to the former may, as it accrues, be applied to a debt due by him to the trustee, it may be that this would create an equitable lien in favor of the trustee, which a court of equity would enforce against the *cestui que trust*, or anyone claiming under him. But equity will not enlarge the right of set-off at law unless, by agreement or otherwise, such an equitable lien exists. *Spaulding v. Backus*, *supra*; *Holbrook v. Bliss*, 9 Allen, 69, 77; *Upham v. Wyman*, 7 Allen, 499.

In the case at bar there was no such agreement and no other circumstances which create an equitable lien or right of set-off in favor of the defendant. The fact that he is a creditor of the *cestui que trust* is not sufficient. His appointment as trustee does not give him any advantage or superior rights over other creditors. His rights as a creditor remain unchanged. *Stickney v. Clement*, 7 Gray, 170.

In *Davis v. Newton*, 6 Met. 537, which was a suit in equity, it was held that an administrator who had in his hands a distributive share of his intestate's estate belonging to an insolvent debtor cannot withhold it from the debtor's assignee for the purpose of paying himself, by way of set-off, a debt due to him in his own right from such debtor. The same principle applies in this case; and we are of opinion that as the defendant has no equitable lien and no legal or equitable claim superior to that of the other creditors or assignees of the *cestui que trust*, he has no right to retain the income given to Chapman Dwight under the will, and apply it to the debt due him in his private right. On the contrary, the plaintiff has the superior right and equity to this income, and is entitled to a decree in his favor.

The defendant contends that his right to a
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part of the income has been conclusively settled by a judgment of the probate court, and that this adjudication binds the plaintiff. The facts, as stated in the answer, are, that the defendant, having in his hands income to the amount of \$116.38 payable under the will to Chapman Dwight, rendered an account to the probate court, in which he credited himself with this amount as paid and applied towards the discharge of his debt; and that this account was duly allowed by the probate court. Notice of this account was given by publication, but no personal notice was given to the plaintiff or to Chapman Dwight. The plaintiff was not a party to this proceeding, and is not bound by it; but further than this the probate court had no jurisdiction of the question whether the plaintiff or the trustee had the right to the income. *Coudin v. Perry*, 11 Pick. 508; *Hancock v. Hubbard*, 19 Pick. 167.

The claim of the defendant to a right of set-off was a matter which the probate court has no power to hear and determine, and the allowance of the defendant's account is, so far as it can be regarded as an adjudication of this question, extrajudicial and void.

Decree for plaintiff.

J. W. CORCORAN *et al.*, Assignees, etc.,
v.

F. M. WHITE.

One of two or more joint owners of a chattel cannot maintain replevin for it without joining the other part owners as plaintiffs.

(Suffolk—Filed March 3, 1888.)

ON defendant's exceptions. *Sustained.*

This was an action of replevin to recover three horses, which were alleged to be the property of the plaintiffs as assignees in insolvency of George W. Davis.

At the trial Davis testified that the horses replevied were bought by his order in May or June, 1886, and boarded at the stable of the defendant, who was a stable-keeper; that thereafter they were sold and taken away from the stable of said White; that later in the year, through one Bridges, said horses were repurchased and brought to the stable of the defendant by Bridges. On cross-examination he said he did not know the terms of the second purchase; that he (said Davis) lived in Shirley, and bought and sold horses through said Bridges; that he furnished the money, and Bridges transacted the business; that if there was a profit Bridges and himself shared it, and if there was a loss they divided it; that Bridges had no salary or fixed commission, though he denied that there was any partnership between Bridges and himself. The evidence showed that while the three horses were in the stable of the defendant the second time, they were attached, October 4, 1886, on a writ against said Davis and in favor of one Richardson; that thereafter, to wit, November 4, 1886, the plaintiffs, as assignees of said Davis, brought this writ of replevin. The defendant claimed a lien for board for the time the horses had been there up to October 4, and thereafter up to

November 4, 1886, at the rate of \$6 a week, the time from October 4 to November 4 being while they were under attachment on the Richardson writ, wherein the defendant was keeper. The evidence was contradictory as to the length of time the horses were at the stable after the second purchase; Bridges, who brought the horses to the stable, testified that two of the horses were there three weeks before October 4, 1886, and the other horse was there most of the summer. The plaintiffs introduced evidence tending to show that before they replevied the horses they tendered to the defendant all that was due.

On these facts the court charged the jury: "The plaintiffs must show that they are either the owners or part owners of the property replevied. If you find that the assignees were entitled to the possession of the property by being owner or part owner, they are entitled to verdict in their favor. If Davis was not owner or part owner, plaintiffs cannot maintain their action. If the defendant had no title to the property, a part owner would be entitled to maintain replevin. Whether Bridges was a part owner or not in the property has nothing to do with the case, if you find Davis was a part owner. The title of Davis passes to his assignees in insolvency. I instruct you that the plaintiff must show that he is the owner, part owner, or partner. Unless he maintains this affirmatively, he could not maintain his action as against a stranger."

The defendant excepted.

Messrs. E. B. Callender and Lewis Girardin, for defendant:

The defendant contends that if Bridges was a part owner in the property, then he should have been joined as plaintiff.

In replevin, all the joint owners of a chattel must join.

Morris, Replevin, ed. 1878, p. 125.

In *Fay v. Duggan*, 185 Mass. 248, the court says: "Both parties should have joined in the action of replevin." And the court cites with approval *Hart v. Fitzgerald*, 2 Mass. 511.

Although the case of *Hart v. Fitzgerald*, *supra*, was a case of replevin for an undivided share, and turned on a question of pleading, nevertheless it has been considered as authority for the position that in replevin the plaintiff's right must be exclusive in order to warrant a delivery of the property to him.

Reinheimer v. Hemingway, 85 Pa. 432, 438. See cases cited in *Fay v. Duggan*, *supra*; *Rogers v. Arnold*, 12 Wend. 30, 34.

In *Wells on Replevin* (ed. 1880, p. 89, § 156) the author says: "It is true, also, that one of two joint tenants is owner of the half of the whole, and, as against all but his cotenant, would seem to have a better right to the exclusive possession than any stranger; but it must be remembered that his right extends only to half, and not to the whole, and that, as against a stranger in possession, he has no greater rights to his cotenant's interest than any other third person. Therefore, when he relies on his title, and not on his prior possession, his title will not avail in an action against a stranger."

In the case at bar the plaintiffs relied simply on their title as assignees; they never had possession. Nor did Davis, unless the possession

of Bridges be considered the possession of Davis; and if it is so considered, then the plaintiffs must fail, because, if Davis and Bridges were partners, then plaintiffs succeeded only to the interest of Davis in the firm after the firm debts were paid. They could not claim the right to any specific chattel. Plaintiffs had nothing to do with the partnership concerns. They simply had the right to ask an account from the surviving partner.

Reinheimer v. Hemingway, *supra*.

Hence the superior court erred in stating that "whether Bridges was a part owner or not in the property has nothing to do with the case." And the ruling that it was sufficient for the plaintiff to show "that he is the owner, part owner, or partner" was misleading.

Mr. Seth J. Thomas, for plaintiffs:

This action is replevin to recover three horses. The right to maintain the action depends upon the plaintiffs' right to possession; and they had the right to possession at the date of their writ, unless the defendant has a lien upon all or either of the horses. He makes no other claim. The plaintiffs were the assignees of Davis, an insolvent debtor under the law of Massachusetts. Davis was the owner; Bridges, whose name is mentioned in the report, was only interested in the profits on a sale if there were any profits. The presiding justice instructed the jury that the burden was on the defendant to establish his lien; and if there were anything due to him for board of the horses, the plaintiffs could not maintain this action. The presiding justice added that the lien attaches to each horse separately, during the time that each remained in the defendant's keeping. I suggest it may be that the lien is both joint and several; but whether joint or several, or joint and several, is wholly immaterial in this case, because the jury have found there was nothing due to the defendant for keeping all or either of the horses. The presiding justice instructed the jury that, having once parted with the possession of these horses without fraud, the defendant could not, after a sale and repurchase, annex to his present lien his claim for board before the horses were taken away and sold. And this, it is submitted, is the law. When they were so taken away, his lien was gone, and a return, under such circumstances, would not revive it.

Knowlton, J., delivered the opinion of the court:

At the trial, the plaintiffs rested their claim to the replevied horses solely upon their title and right of possession as assignees in insolvency of George W. Davis. There was evidence tending to show that one Bridges was a part owner of the horses, but the jury were instructed, in effect, that it was immaterial whether Bridges was or was not a joint owner with the plaintiff, and that, if the plaintiffs showed that they were owners or part owners of the property replevied, they could recover. In the recent case of *Fay v. Duggan*, 185 Mass. 248, it was held, upon a review of the authorities, that one of two or more joint owners of a chattel cannot maintain replevin for it without joining the other part owners as plaintiffs. That case is decisive of the one at bar.

Exceptions sustained.

Edwin A. ALGER, Admr.,
v.

NORTH END SAVINGS BANK; Achsie J.
Wood, Claimant.

1. The provision of Pub. Stat. chap. 116, § 82,—that, when a bank deposit is made by one in trust for another, and no other notice of the terms of the trust has been given in writing, the deposit may, in the event of the death of the trustee, be paid to the person for whom it was made,—is intended solely for the protection of the bank; and the rights of those who deem themselves entitled to the deposit are not thereby affected as between themselves.
2. If a deposit made in a savings bank by one in his own name, as trustee for another, continues under the control of the depositor until his death, and is only intended to become the property of such other person in the event that the depositor shall leave it undisturbed at his death, then such deposit is an attempt to make a testamentary disposition without observing the forms of law, and, on the death of the depositor, his personal representative will be entitled to it.
3. If, however, one deposits money in a savings bank in his own name, as trustee for another, intending it to be at the time a gift to such other person, and declares the making of the gift to such other person, who assents to it, this, although the depositor keeps the deposit book himself, will be equivalent to a delivery, and an acceptance of a chattel on delivery; and the gift will be perfect; and, on the death of the depositor, the person to whom he had given the deposit will be entitled thereto.

(Suffolk—Filed March 6, 1888.)

ON report. *Judgment for claimant.*

The action was brought to recover \$1,000 deposited by George C. Trumbull, in his lifetime, with the defendant bank. Achsie J. Wood intervened as a claimant, alleging that the money was deposited by Trumbull in trust for her. The case was tried in the Superior Court without a jury, and the court, Mason, J., found for claimant, and reported the case for the consideration of this court.

Further facts appear in the opinion of the court.

Meers, J. G. Abbott and A. B. Alger, for plaintiff:

The case comes here precisely in the same way as *Sherman v. New Bedford Sav. Bank*, 188 Mass. 581, came before this court, under Pub. Stat. chap. 116, § 14.

The only question is whether the deposit in question was given to the claimant by Trumbull, in his lifetime, so that she can claim it against Trumbull, if living, and, he being dead, against his administrator.

There was never a perfected gift; there never existed even the intention, on the part of Trumbull, to put the control of the deposit out of his power during his lifetime; at most, it was

but an attempt to make a testamentary disposition of the money without complying with the provisions of law required to make a valid will. The whole evidence to sustain the gift comes from the claimant. An intention to make a gift, or even the most clear and distinct promise to make one, is never sufficient to pass the title to personal property. There must be an actual delivery of the thing, if capable of delivery; and in all other cases some act, by law, equivalent to delivery.

Sherman v. New Bedford Sav. Bank, *supra*; *Nutt v. Morse*, 2 New Eng. Rep. 248, 142 Mass. 1; *Hayden v. Hayden*, 3 New Eng. Rep. 82, 142 Mass. 448; *Snowden v. Reid*, 8 Cent. Rep. 886.

The deposit of money in a savings bank in the owner's name as trustee for another is never sufficient to make a gift; there must be other acts proved to make a perfected gift.

Nutt v. Morse, *supra*, and cases cited.

The burden to prove a perfected gift or conveyance is upon the defendant.

Mr. William C. Williamson, for claimant:

There was evidence in this case of a deposit in trust for the claimant.

In 1876 the following law was passed: "When a deposit is made * * * by anyone in trust for another, * * * in the event of the death of the trustee, the deposit, with the interest thereon, may be paid to the person for whom such deposit was made, or to his legal representative."

Pub. Stat. chap. 116, § 82.

The deposit in the case at bar was made in strict accordance with the provisions of the above statute.

In *Gerrish v. New Bedford Inst. for Sav.* 128 Mass. 159, the claimants were sustained on the ground that the depositor had declared to them that he had put the money in the bank for them, although he never had delivered the deposit books to any of them.

And in *Eastman v. Woronoco Sav. Bank*, 186 Mass. 208, the deposit was made in the name or Eastman, but "subject to the order of Parley Hutchins," the latter being the depositor, and the latter retained the book; yet, on evidence of the oral statements of the depositor, the gift was held to have been perfected.

In the present case, however, the money deposited by Trumbull was not a gift, but a payment. Trumbull does not merely tell her to take the book "when I am gone," and draw the money, as was the case in *Nutt v. Morse*, 2 New Eng. Rep. 248, 142 Mass. 1.

Devens, J., delivered the opinion of the court:

This is an action of contract for \$1,000 deposited by the plaintiff's testator with the defendant,—Achsie J. Wood intervening as claimant, under Pub. Stat. chap. 116, § 81. The court before which the cause was tried without a jury found for the claimant, and has reported it for the determination of this court on the question whether the evidence is sufficient in law to sustain this finding.

This sum of money, which was Trumbull's own, was deposited by him in the defendant bank, of which he was treasurer, in his own name as trustee for Achsie J. Wood. The

question presented is whether there was evidence of a perfected gift of the sum thus deposited in his lifetime, to Mrs. Wood, or whether it continued under the control and in the possession of Trumbull until his death, and was only intended to become the property of Mrs. Wood in the event that he should see fit to leave it undisturbed at the time of his death. If the deposit was of the latter character, it would be an attempt to make a testamentary disposition of the sum without observing the forms of law, and the administrator would be entitled to the possession of it. *Nutt v. Morse*, 2 New Eng. Rep. 248, 142 Mass. 1.

Pub. Stat. chap. 116, § 82, provides that when a deposit is made by one in trust for another, and when no other notice of the terms of the trust has been given in writing, the deposit may, in the event of the death of the trustee, be paid to the person for whom such deposit is made. But this is intended solely for the protection of the bank, and the rights of those who deem themselves entitled to the deposit are not thereby affected as between themselves.

The difficulty in this, as in similar cases where deposits have been made by one in his own name as trustee for another, is rather in the application of the law to the facts than in the principles which should govern. The very large number of deposits in the savings banks of this Commonwealth, and the convenience, in many instances, of adopting this form of deposit, has caused it often to be carefully considered. While, if Trumbull retained the control over this fund until his death, intending that no title to or interest in it should pass until that time, there would have been no perfected gift, it is also true that if he deposited the money in the bank, intending it to be at the time a gift to Mrs. Wood, although he himself kept the deposit book, informed her of it, and she assented to it,—this would be equivalent to a delivery, and an acceptance of a chattel on delivery, and the gift would have been perfected. *Scott v. Berkshire County Sav. Bank*, 1 New Eng. Rep. 221, 140 Mass. 157.

In *Gerrish v. New Bedford Inst. for Sav.* 128 Mass. 159, it is said that it is enough, for the purpose of making a party trustee for the benefit of another, "if it be unequivocally declared in writing,—or orally, if the property be personal—that it is held in trust for the person named. When the trust is thus created, it is effectual to transfer the beneficial interest, and operates as a gift perfected by delivery." It was there held that evidence which the claimants offered of declarations which the testator, the alleged trustee, made to them at different times, in language which fairly implied that he intended to give to them an immediate equitable title in the principal fund, reserving to himself only the income for life, should have been admitted. But a mere declaration of trust by the owner, not communicated to the donee and assented to by him, or a mere deposit of the fund in his own name as trustee, or a deposit in the name of another, will not be, of themselves alone, sufficient to prove a complete gift or voluntary trust. *Sherman v. New Bedford Sav. Bank*, 188 Mass. 581, and authorities.

The case at bar, although the evidence as to the ownership of the deposit is fully stated, does not require us to decide whether we should

have found as did the presiding judge who has reported the case, but only whether there was sufficient evidence, as matter of law, to sustain his finding. If all the declarations were of the character of that first testified to by Mrs. Wood, this would be difficult. The claimant testifies that the compensation she was receiving in the way of weekly wages was nominal; that it was always understood that some provision would be made for her in addition. In November or December of 1883, Trumbull recited to her the provisions of his will by which he had bequeathed to her 25 shares of the Vermont & Massachusetts Railroad, adding: "And if I live until the 1st day of January, there will be \$1,000 in the North End Savings Bank in trust for you; and if I die, and leave that as I intend to, you will call for the book, and it will be yours." The money was not then in the bank, and this conversation only indicates an intention to put it there and to leave it there, so that the claimant might receive it at his death. It is of the same character as the conversations to which the claimant testifies, when she states: "Mr. Trumbull told me, a good many times, that he would make a provision for me." But the statement made by the claimant as to what was said by Trumbull shortly before his death, and after the deposit of the \$1,000 was actually made, is of a different character. He explained to her (referring to a deposit made by another, and for the benefit of another person than the claimant) that money put in trust in a savings bank for a person would go to that person, saying: "That is on the same principle as the \$1,000 that I put in for you in the North End Savings Bank." He said: "The law is strict in that way, and that money is yours." The claimant in her testimony repeated this declaration, with some slight change of phraseology, but each time as an explicit statement by Trumbull that the money then in the North End Savings Bank was hers. Thus she states: "He told me, just before he died, that it was there and it was mine." She was inquired of in cross-examination: "He said * * * that he had put \$1,000 in for you, and if he left it there, if he died, as he expected he should,"—and the claimant, interrupting, said: "No, sir; he didn't at all. He said it was there. The last time he spoke of it, he said it was there, and it was mine." These statements, if believed, establish a perfected gift of the \$1,000, assented to by the claimant. They are made when the money is actually in the bank, and they assure the claimant, without qualification, that it is hers. There is no reason, as matter of law, why the court might not have placed confidence in them. We cannot review the evidence or the argument by which it was sought to show that they were not in fact worthy of credence. *Haywood v. Stiles*, 124 Mass. 275.

Judgment on finding for claimant.

James COULTER

v.

Warren A. HAYNES.

1. In an action of contract for services, the assignment of the claim is not a defense.

2. Where an action is brought on a claim for services which has been assigned, it is not necessary that the assignee should indorse the writ.

(Middlesex—Filed March 19, 1888.)

ON defendant's exceptions. *Overruled.*

This was an action of contract for services for labor performed by the plaintiff for the defendant in the years 1885 and 1886. The answer alleged that on the 15th day of October, 1885, the plaintiff assigned in writing all his wages then due or that might become due from the defendant, to one J. K. Harriman, until October 1, 1886; that plaintiff was not entitled to maintain the action. At the time of the commencing the action the plaintiff owed said Harriman, and was still owing him at the time of the trial.

At the trial before Knowlton, J., and a jury, said Harriman testified that he never authorized the plaintiff or anyone to bring said action, and had not to the present time consented to the maintenance of said action; but he further testified that he had known for a long time that the action had been brought, and had seen the plaintiff frequently, and had never objected to it. He also afterward testified that, if there was anything due from the defendant, he did not desire, through his assignment, to prevent the recovery of it in this action. It appeared that the assignment was given to secure him for a grocery bill which the plaintiff owed him.

The defendant asked and prayed for the following rulings and instructions: (1) that a suit brought in the name of an assignor of wages without the consent of the assignee, and not sanctioned by said assignee before trial, cannot be maintained by the plaintiff, the assignor still being in debt to the assignee; (2) that said action could not be maintained and carried on unless the assignee indorsed the writ and became liable for taxable costs of suit,—all of which rulings and instructions were refused and denied, and the defendant excepted; verdict for plaintiff.

Mr. Joseph W. Reed, for defendant:

By the deed of assignment the assignor transferred all his legal title and interest in the chose in action to the assignee, and the assignor is not a proper party to the suit thereon.

See *Ward v. Van Bokkelen*, 2 Paige, 295; *Hawes, Parties*, § 24, div. 41; *Crooker v. Rogers*, 58 Me. 342; *James R. & K. Co. v. Littlejohn*, 18 Gratt. 88.

In the present action, the defendant was deprived, by the pleadings, of any legal set-off he might have against the assignee.

See Pub. Stat. chap. 188, § 39; Id. chap. 192, § 4.

The recording of the assignment, and the payments thereon made by the defendant to the assignee, made the assignment expressly accepted by the defendant, and the assignor, still being in debt to the assignee, had no legal title or interest in the amount, if any, due from the defendant to the assignee. None of the authorities give the assignor, after making a deed of assignment of a chose in action, such a legal interest in the same as to commence suit thereon without the authority and consent of

the assignee. The proof of the making and delivery of the deed of assignment was a full and complete bar to the maintenance of the action by the assignor. The defendant was entitled to be secured for costs, if he should prevail.

Spicer v. Todd, 1 D. P. C. 306; *Dacey, Parties*, p. 72.

Mr. J. T. Joslin, for plaintiff:

This action was properly brought by the plaintiff, notwithstanding the assignment set out in defendant's answer. In fact, it could not be legally brought otherwise.

Skinner v. Somes, 14 Mass. 107; *Day v. Whitney*, 1 Pick. 508; *Moore v. Coughlin*, 4 Allen, 385.

The fact that a third party may have a beneficial interest in the result of a suit at common law does not make it essential that such third party should be made a party to the action. Neither is it a matter of defense if he is not. The interest of such third party is a matter personal to himself, and does not affect the defendant.

Walcott v. Boston Faucet Co. 9 Gray, 376; *Goodrich v. Stevens*, 116 Mass. 170; *Chace v. Chapin*, 180 Mass. 128.

The case is within the principles laid down in *Moore v. Spiegel*, 8 New Eng. Rep. 421, 143 Mass. 417.

The plaintiff is an inhabitant of the Commonwealth and so described in the writ. The statute in such cases does not require an indorser of the writ.

Pub. Stat. chap. 161, § 24.

Furthermore the question cannot be raised in this form. It should be by motion to the court under Pub. Stat. chap. 167, § 30.

See *Feneley v. Mahoney*, 21 Pick. 214; *Smith v. Castles*, 1 Gray, 114; *Pettiteler v. Willis*, 99 Mass. 460.

By the Court:

The suit was properly brought in the name of the plaintiff although he had assigned his claim to Harriman. The assignment is not a defense to the action. If any authority from the assignee was necessary to enable the plaintiff to maintain the action, the appearance of the assignee in court, and his statement that "he did not desire, through his assignment, to prevent the recovery in this action," ratified the bringing of the suit, and was sufficient authority to the plaintiff to prosecute the action. *Moore v. Spiegel*, 8 New Eng. Rep. 421, 143 Mass. 418. The assignee is not required to indorse the writ, but, if it was a case where an indorser for costs ought to be required, the defendants' remedy was by an application to the superior court, under Pub. Stat. chap. 67, § 30.

Exceptions overruled.

Lawrence RILEY, *Petitioner for Review*,
v.

William E. HALE.

Where a writ has been personally served upon a defendant and he enters his appearance, and judgment is thereafter rendered against him by default, such judgment is not rendered in his absence, within the meaning of Pub. Stat.

chap. 187, § 22, providing for a petition for review where a judgment has been rendered in the absence of the petitioner and without his knowledge.

(Middlesex—Filed April 2, 1886.)

ON petitioner's exceptions. *Overruled.*
This was a petition by Lawrence Riley, for review, in which the petitioner alleged that he was defendant in an action of contract in which William E. Hale was plaintiff, and that at a term of the Superior Court for Middlesex County on the first Monday of June, 1883, petitioner was defaulted in said action, and thereafter, on June 30, 1883, judgment was entered for the plaintiff in said action. The petitioner, in support of a prayer for a review, declared that after service of the writ upon him he called upon the attorneys of the plaintiff, stating to them that he had a defense to the action, and was informed by them that no appearance was necessary, that the petitioner could confer with the said Hale, and, if anything further was done he would be notified; that thereafter the petitioner rested in full confidence and belief, as assured, that no further steps would be or thereafter were taken in the matter, and took no action looking to the defense of the action, save the entry of his own personal appearance and a communication to the plaintiff stating the circumstances of the case, which he was led to suppose was a full compliance with the mandate of the court, and all that was required of him to do, after the interview with the plaintiff's attorneys. The petitioner then alleged that he never at any time prior to August 1, 1886, knew of the existence of said judgment or of any of the proceedings had in the cause; and also alleged that he had a good defense to the action. The plaintiff in the original action filed a demurrer and answer to the petition; and in the supreme judicial court, after hearing, the court found that the petitioner had shown such probable ground of defense to the original action as might entitle him to a writ of review, but that he had not used such diligence as to entitle him, to it; that the writ in said action was duly served on him and he entered his personal appearance therein, and said action was continued and he did nothing further about it, under the mistaken belief that it was not necessary to do anything further; and that nothing was done by the plaintiff in said action, or by his attorney, to induce that belief. The court ruled, as matter of law, that the petition could not be maintained; and the petitioner excepted.

Messrs. H. N. Allen and Willard Howland, for petitioner:

At the time that the judgment was rendered against the petitioner in the original action, he was absent within the meaning of the statute. The mere fact of his entering his personal appearance did not operate to make him present in court at the time of judgment, inasmuch as it was waived and practically withdrawn by his subsequent failure to do anything more, under the honest belief that nothing more would be required of him.

Pub. Stat. chap. 187, § 22; *Hutchinson v. Gurley*, 8 Allen, 23.

The petition for review was brought within

one year of the time that the petitioner had actual notice of the judgment. Both presence in court and knowledge of the judgment must concur in order to deprive him of the privilege of bringing his writ of review within one year from such actual notice.

See Pub. Stat. chap. 187, § 22.

Mr. W. F. Slocum, for respondent:

The party asking for a writ of review must satisfy the court that he had not been guilty of laches.

Bowditch Mut. F. Ins. Co. v. Winslow, 3 Gray, 415, 480.

The petitioner was guilty of gross negligence, which justified the finding that he had not used such diligence as to entitle him to a writ of review.

Clark v. Brigham, 22 Pick. 81, 83.

The petition was not filed in season.

Smith v. Brown, 136 Mass. 416, 418.

The judgment was not rendered in the petitioner's absence, within the meaning of the statute.

James v. Townsend, 104 Mass. 367; *Matthewson v. Moulton*, 135 Mass. 123, 124; *Smith v. Brown*, 136 Mass. 416, 418; *Manning v. Nettleton*, 1 New Eng. Rep. 718, 140 Mass. 421.

Per Curiam:

This is a petition filed August 5, 1886, to review a judgment of the superior court rendered August 18, 1883. In the original suit personal service was made upon the petitioner and he entered his personal appearance therein. The judgment was not rendered in his absence within the meaning of Pub. Stat. chap. 187, § 22*, and therefore the presiding justice who heard this petition for review properly ruled that it could not be maintained. *Matthewson v. Moulton*, 135 Mass. 123; *Smith v. Brown*, 136 Mass. 416.

Exceptions overruled.

Hannah SULLIVAN

v.

Cornelius O'LEARY.

1. In an action for **slander, evidence** tending to show that defendant had slandered other persons some years before is inadmissible.
2. Discretion in regard to **cross-examination** should not ordinarily permit the introduction of **evidence** which has no legitimate relation to any of the issues on trial, and which is likely to be so applied by the jury as to improperly affect the verdict.

(Suffolk—Filed March 3, 1886.)

ON defendant's exceptions. *Sustained.*

This is an action of tort for slander. The writ and pleadings may be referred to.

The plaintiff introduced evidence tending to show that on September 3, 1886, defendant,

*This section provides that, "if the judgment complained of was rendered in the absence of the petitioner, and without his knowledge, the petition for review shall be filed within one year after the petitioner first had notice of the judgment, otherwise within one year after the judgment was rendered." [Ed.]

while standing in a public street in Boston, uttered in presence of bystanders the words set forth in the declaration.

The defendant then testified in his own behalf, denying that he uttered the words complained of.

Plaintiff's counsel, in cross-examining defendant, asked him the following questions and received the following answers, defendant's counsel objecting and excepting to the admission of each and all of same:

Q. Has any person other than plaintiff made complaints against you for foul and abusive language?

A. Yes, sir.

Q. Did not one McCann, two or three years ago, sue you for foul language about his wife?

A. Yes, sir.

Q. Did you not pay him \$50 to settle that suit?

A. Yes, sir.

The jury returned a verdict in favor of the plaintiff, and defendant excepted.

Messrs. Ranney & Clark, for defendant:

The issue raised by the pleadings is simply whether defendant did or did not utter the words alleged in the declaration, and therefore the evidence objected to must, in order to be admissible, be competent for one of the following purposes: as tending to prove that defendant did utter the words alleged in the declaration; to show malice; or to affect defendant's credibility as a witness.

1. The issue being whether defendant did or did not do a certain thing, no evidence is admissible of other similar acts, which, by their general resemblance thereto, suggest an inference that defendant did the thing in issue. This is the well-settled rule.

Best, Ev. 487, note 1; 1 Greenl. Ev. § 52; *Boyle v. Burnett*, 9 Gray, 251, 253; *Maguire v. Middlesex R. Co.* 115 Mass. 239.

3. It is decided in this Commonwealth that, in actions of slander, the utterance of similar words, or words of similar import, concerning the plaintiff, may be admitted in evidence on the issue of actual malice (*Com. v. Damon*, 136 Mass. 448, and cases there cited); but evidence of a distinct and different calumny of plaintiff is inadmissible (*Bodwell v. Sean*, 8 Pick. 376; *Watson v. Moore*, 2 Cush. 133).

The rule certainly has never been extended so far as to admit evidence of slanders uttered by defendant of third persons in no way connected with the suit, as was done in the case at bar.

In actions for fraud, evidence of fraudulent transactions with third persons is not admissible on question of intent, or otherwise, unless there appears to be some connection between the fraud in issue and the other transactions, from which the jury can find a purpose common to all.

Jordan v. Osgood, 109 Mass. 457; *Haskins v. Warren*, 115 Mass. 514; *Com. v. Jackson*, 182 Mass. 16.

3. The only remaining reason for the admission of this evidence is its effect on defendant's credibility, under the general scope of cross-examination. We submit that where questions, put on cross-examination, as to collateral matters,—as affecting only the credibility of the

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witness,—go too far, there is proper ground for exception.

Smith v. Castles, 1 Gray, 112; *Holbrook v. Dow*, 12 Gray, 358; *Com. v. Moore*, 8 Pick. 194; 1 Greenl. Ev. § 461.

The refusal of the court to admit such a question is not open to exception.

See *Com. v. Shaw*, 4 Cush. 598.

But the admission of incompetent evidence because it may affect credibility is another matter. The obvious effect of the admission of this evidence was injurious to defendant, in disparaging his testimony by proving particular acts of alleged misbehavior in matters wholly unconnected with any questions involved in the trial; and, being incompetent, it is ground for a new trial.

Brown v. Cummings, 7 Allen, 507; *Maguire v. Middlesex R. Co.* 115 Mass. 241.

Mr. Thomas J. Gargan, for plaintiff:

The admission of the evidence on cross-examination was within the discretion of the trial judge.

The questions set forth in the bill of exceptions were admissible for the purpose of testing defendant's credibility, or of shaking his credit, by inquiries as to his character. A witness may be compelled to answer any question, however irrelevant it may be to the facts in issue, and however disgraceful the answer may be to himself, unless it exposes him to a criminal charge.

Steph. Ev. art. 129.

The modern cases show a tendency towards great liberality in cross-examination for the purpose of ascertaining who and what the witness is.

1 Greenl. Ev. § 448.

Great latitude of interrogation is allowed in cross-examination, by the judge in the exercise of his discretion, where, from the temper and conduct of the witness, or other circumstances, such course seems essential to the discovery of the truth.

Id. § 449.

In *Mayhew v. Thayer*, 8 Gray, 176, the court says there are no positive and fixed limits to a cross-examination. Matters wholly irrelevant are, of course, to be excluded; but, subject to that rule, much must be left to the judgment and discretion of the court under whose supervision the trial takes place.

Lord Eldon said in *Parkhurst v. Lowten*, 2 Swanst. 216: "It used to be said that a witness could not be called on to discredit himself, but there seems to be something like a departure from that. I mean that in modern times the courts have permitted questions to show, from transactions not in issue, that the witness is of impeached character, and therefore not so credible."

See *Alcock v. Royal Exchange Assur. Corp.* 18 Q. B. 292.

In *Taylor on Evidence*, § 1461, there appears the following language: "It has been termed a harsh alternative to compel a witness either to commit perjury or to destroy his own reputation; but, on the other hand, it is obviously most important that the jury should have the means of ascertaining the character of the witness, and of forming something like a correct estimate of the value of his evidence. Moreover, it seems absurd to place the mere feelings of a profligate witness in competition

with the substantial interests of the parties in the cause."

In *Murphy v. Stanley*, 136 Mass. 185, Allen, J., in giving the opinion, says: "The defendant's motive in removing the sleeper was immaterial; and on cross-examination such evidence may be admitted or excluded, in the discretion of the presiding judge."

In *Jones v. Smith*, 121 Mass. 16, 17, the question was as to the amount of the income of the demandant, as bearing upon the question whether the tenant had performed her contract to support him. The court held that, although the question was immaterial, the regulation of the cross-examination was within the discretion of the presiding judge.

See *Williams v. Taunton*, 125 Mass. 84.

Immaterial evidence gives no exception.

Springfield v. Harris, 107 Mass. 532.

The extent to which a witness may be cross-examined as to facts otherwise immaterial, for the purpose of testing his bias and credibility, is ordinarily within the discretion of the judge presiding at the trial.

Com. v. Lyden, 118 Mass. 452; *Com. v. Kelley*, Id. 453.

In *Com. v. Silk*, 111 Mass. 431, Morton, J., says: "In the cross-examination of witnesses great latitude is ordinarily allowed to test their accuracy and credibility, but the extent to which cross-examination upon collateral matters should be pursued is a matter within the discretion of the presiding judge. The previous difficulty between the witness Haynes and the defendant was a collateral matter which the court was not required to try, and the limitation of the cross-examination and the testimony as to that difficulty was within the discretion of the presiding judge."

See *Com. v. Nash*, 135 Mass. 541; *Com. v. Sturtevant*, 117 Mass. 123; *Wallace v. Taunton Street R. Co.* 119 Mass. 91; *Jennings v. Whitehead & A. Mach. Co.* 138 Mass. 594; *Sewell v. Robbins*, 139 Mass. 164; *Barrett v. Murphy*, 1 New Eng. Rep. 223, 140 Mass. 133; *Warren v. Spencer Water Co.* 3 New Eng. Rep. 502, 143 Mass. 164.

If the evidence was material and relevant, it was clearly admissible. If it was immaterial, it was within the discretion of the presiding justice, and there can be no exception.

Knowlton, J., delivered the opinion of the court:

Upon the question whether the defendant had uttered slanderous words in relation to the plaintiff, evidence was permitted to be introduced tending to show that he had slandered another person two or three years before. This was contrary to the well-established rule of the common law, that one cannot be proved to be guilty of an offense for which he is on trial, by showing that at another time he committed a similar offense. *Jordan v. Osgood*, 109 Mass. 457; *Com. v. Jackson*, 132 Mass. 160.

If the testimony be considered in reference to contradiction of the defendant, it comes within the same rule; for it had no tendency to disprove his denial of the charge in the present case.

The discretion exercised in regard to cross-examination should not ordinarily go so far as to permit the introduction of evidence which has no legitimate relation to any of the issues

on trial; and which is, at the same time, of such a character as to be likely to be applied to them by the jury, and to improperly affect the verdict. *Holbrook v. Dow*, 12 Gray, 357; *Smith v. Castles*, 1 Gray, 108.

The evidence excepted to in this case may have led the jury to believe that the defendant was accustomed to slander people, and that he probably slandered the plaintiff.

Exceptions sustained.

William PRAY

v.

Emma WASDELL *et al.*, and Trustees.

1. An appeal bond, in an action to recover possession of real property, conditioned that appellant shall enter and prosecute his appeal with effect, and satisfy any judgment which may be entered against him in the appellate court, and all rent due or to become due, damages, and costs, upon said appeal for costs within thirty days of entry of such judgment, is a binding contract at common law.
2. In an action upon such bond, the plaintiff is entitled to recover rent up to the time when he obtained possession under his execution, including rent during the term of his second lease as well as the first.
3. An appeal bond dated August 13, 1884, which recites proceedings in court as having occurred August 16, 1884, and which was filed and approved September 1 following, is not misleading, nor invalid for ambiguity.
4. Where, after service of notice to quit possession of premises, the occupant makes an arrangement with another whereby such other occupies the premises in exchange for premises vacated to the person so notified, a ruling of the court that the jury might regard such occupancy of the premises as that of the person notified was correct.
5. In an action to recover possession of premises, a misdescription in the writ as to the name of the street on which the premises are located is not fatal if the same is sufficient to clearly describe the premises.
6. Where an appeal has been prosecuted to final judgment, without objection to the appeal bond, neither the principal in the bond nor his sureties can dispute the validity of the judgment on the ground of variance between the language of the bond and that prescribed by the statute.

(Middlesex—Filed March 2, 1888.)

ON defendants' exception. *Overruled.*

This is an action of contract upon an appeal bond.

To prove a breach of the bond, the plaintiff offered in evidence a lease dated June 27, 1884, executed by Orice K. Stebbins to him, of cer-

tain premises on Myrtle Street, Melrose, at that time owned by said Stebbins and his wife, Ann, as joint tenants thereof, and occupied by them for the term of one year from its date; a notice dated and served the same day on Charles Stebbins, one of the defendants; also a complaint under Pub. Stat. chap. 175, dated July 10, 1884, to recover of said Charles possession of one room of the premises described in said lease, entered in the First District Court of Eastern Middlesex on July 19, 1884; and, on August 16, 1884, a judgment against said Charles Stebbins for possession thereof, and for costs taxed at \$11.12, and appeal taken by said Charles to the Superior Court for said County of Middlesex, and the giving of the bond in suit by the defendants; also the recovery of final judgment in the superior court on February 26, 1886; the issuing of an execution out of said court on March 16, 1886, on said final judgment for the possession of said room, and for costs of suit, amounting to \$68.06; and the taking possession of said room by the officer, under his execution, on the 16th day of March, 1886. The costs were paid in full to the officer after the beginning of this action.

The plaintiff then offered evidence of the weekly rental value of said room from June 27, 1884, to the date of the return of the officer upon his writ of execution for possession of said room as aforesaid, which evidence the defendants objected to, but it was admitted.

Upon the above evidence and documents, the defendants then asked the court to rule that the plaintiff could not maintain his action against the defendants on said bond:

1. Because the bond in suit was not a proper bond, or one required by the statute, and was invalid. It appeared that the bond in suit was dated August 13, 1884, was approved September 1, 1884, which was the first Monday of September, 1884, and was conditioned to appear on the first Monday of September next, at the superior court to be holden at Lowell, within and for the county of Middlesex; also, that it included all the costs of both the courts, and not of the court appealed to; also that the bond was in the alternative "for all rent due or to become due, damages, and costs," and not as provided by § 6 of said statute.

2. Because the plaintiff's evidence shows that, Charles Stebbins having paid the entire costs demanded of him, there was nothing due the plaintiff on said bond for costs; and there was nothing due for rent, as it was uncertain what rent the bond referred to, not being in accordance with the terms of the statute.

3. Because the original writ was defective and was of no force, in not describing the premises or any part of the premises mentioned in the lease offered in evidence,—not being on Vine, but on Myrtle, street.

The court declined so to rule, but did rule that the bond was good and valid in law; that the date—August 13, 1884—did not render it invalid; that the appeal to the next superior court meant the court held on the first Monday of September, 1884, and was rightfully entered on that date, September 1, 1884; that the plaintiff could recover for damages only, and not the costs of court; and that the damages which could be recovered would be the rent only from the date of the lease until its expiration, June

27, 1885, upon the evidence then introduced; and that the description of the premises as on Vine Street was not fatal if the description was sufficient to clearly describe the premises,—to which refusal and ruling the defendants objected.

The plaintiff thereupon offered in evidence a second lease, executed by Orice K. Stebbins to the plaintiff, dated June 22, 1885, for one year from June 27, 1885, of the premises on Myrtle Street, but no evidence that the plaintiff or said Orice K. Stebbins gave the said Charles Stebbins any notice of the execution of such lease; to which offer of evidence the defendants objected; but the court admitted it, and ruled that under the new lease the plaintiff might recover as damages the rent of said room until the date when the officer took possession under his said execution. The defendants objected to said ruling, and excepted.

The defendants offered evidence tending to show that, within forty-eight hours after the date and service of said notice of June 27, 1884, Charles Stebbins vacated said room and took and remained in possession of another room in the same house; and that said Ann Stebbins, wife of said Orice K., took possession and occupied the same room named in said complaint ever after,—and, upon this evidence, asked the court to rule that the plaintiff could recover no damages, or rent, or costs, under the terms of the bond, if valid and in force; that there had been no breach of the bond,—which the court declined to do.

The evidence also tended to show that the said Charles Stebbins put his mother, the said Ann Stebbins, wife of Orice K. Stebbins, into the room in question, and exchanged the room in question for another room in the same house in consideration of permitting his mother to occupy the room in question; and that he remained in the room until March 16, 1886, and his mother occupied the room in question up to the last-named date under said arrangement. And the court ruled that, if Charles Stebbins exchanged the room he occupied and was notified to quit with another person, and put such person in possession thereof, that would not be a vacating of the premises in accordance with such notice; and that the occupation by such person under him upon such an agreement might be regarded by the jury as the occupation of said Charles Stebbins; and left it to the jury, as a question of fact, whether he did vacate said premises within a reasonable time after receiving said notice; and ruled that forty-eight hours would be a reasonable time under the circumstances of this tenancy and notice; and that, if the said Charles Stebbins did vacate the premises within forty-eight hours after receiving such notice, the plaintiff could not recover.

The jury returned a verdict for the plaintiff.

The defendants, being aggrieved by the admission of evidence, and rulings, and refusals to rule, alleged exceptions.

Mr. A. V. Lynde, for defendants:

1. The bond in suit,—with the condition "to satisfy any judgment which may be entered against him in the superior court, and all rent due or to become due, damages, and costs, upon said appeal for costs,"—which was required to be given by defendants in the lower court, was

such an enlargement of the liability of the defendants, and so contrary to the true intent of the statute, as to render it invalid.

Pub. Stat. chap. 175, § 6; Stat. 1883, chap. 95; *Newcomb v. Worcester*, 7 Allen, 198; *Com. v. Kelly*, 9 Gray, 259.

The case of *Shaw v. McIntier*, 5 Allen, 423, only decides that the conditions of the bond in that case, though not in strict compliance with statute requirements, did not injure the defendant; but in the case at bar the defendants are liable for any judgment which may be entered against the principal of the bond.

The objection was seasonably taken at the trial in the appellate court.

Granger v. Parker, 2 New Eng. Rep. 415, 142 Mass. 189, 190.

The bond is otherwise contrary to the requirements under the statute, it being conditioned in the alternative, making the character of the defendant's liability uncertain.

Nor is the bond a valid one at common law, as the condition therein exceeds the requirements of the statute.

Conant v. Newton, 126 Mass. 109.

Besides, the bond is irregular in reference to recitals and date.

2. The defendants objected that the plaintiff, at the time of his writ, was not entitled to recover of the sureties the total amount of the execution (\$68) for costs, but only the costs of the appellate court, under the terms of the bond, if a valid bond. The fact that the costs demanded on the writ of execution were paid after suit does not affect the rights of the sureties on the bond.

Robinson v. Masterson, 136 Mass. 560.

3. The defendants also claimed at the trial that the second lease, dated June 22, 1885, given to the plaintiff, was inadmissible to charge the principal, without notice to him of its existence, with rent to become due for which the sureties were liable.

Pratt v. Farrar, 10 Allen, 520; *Curtis v. Galvin*, 1 Allen, 215.

And the instructions of the court were therefore erroneous as to the measure of damages, under the terms of the bond, and should not have included rent after the expiration of the first lease, expiring June 27, 1885.

Mr. William Schofield, for plaintiff.

The defendants allege that the action in which the appeal bond was given was not entered at the proper term of the superior court.

A party aggrieved by the judgment of a trial justice in a civil action may, within twenty-four hours after the entry of the judgment, appeal therefrom to the superior court then next to be held in the county.

Pub. Stat. chap. 155, § 28.

The judgment appealed from when the bond in suit was given was the judgment of a district court in Middlesex County; but appeals from the judgments of district courts "shall be had, entered, conducted, and disposed of in all respects like appeals from trial justices."

Pub. Stat. chap. 154, § 89.

No special provision is made, as to time, for appeals in actions brought to recover possession of land.

Pub. Stat. chap. 175, § 6.

Therefore, as the judgment appealed from was dated August 16 1884, and as "the supe-

rior court then next to be held in the county" was the term beginning September 1, at Lowell, the appeal was required by law to be entered at that term, and could not legally be entered at any other term.

Melville v. Wheelock, 1 Gray, 600.

The appeal in that action was not perfected by the filing of a bond until the entry day, September 1; but the district court has power (Pub. Stat. chap. 155, § 29) to extend the time for taking a recognizance or filing a bond, and no objection was made at the trial, or exception taken, as to the time when the bond in suit was filed.

It is contended by the defendants that the appeal bond filed by them was invalid because of certain informalities, viz.: (1) that it was dated August 18, whereas the judgment appealed from was not rendered until August 16; (2) that it included all the costs of both the courts, and not of the court appealed to; (3) that the bond was in the alternative,—"for all rent due or to become due, damages, and costs,"—and not as provided by the statute.

1. The date written in a bond cannot render the obligation invalid, because the date of any written instrument may be explained and controlled by parol evidence.

Battles v. Fobes, 21 Pick. 239; *Shaughnessy v. Lennie*, 180 Mass. 355; *Reffell v. Reffell*, L. R. 1 P. & D. 139.

2. Upon the question of costs, if the bond did include the costs of both courts,—which, in view of the language used, is a doubtful question of construction, not ruled upon by the court at the trial, and which is not admitted by the plaintiff,—it is contended that a recognizance given under Pub. Stat. chap. 175, § 6, as altered by Stat. 1883, chap. 95, § 1, substituting a bond for a recognizance, is required to include the costs of both courts.

If the words of the statute were doubtful, then the obvious purpose of the Legislature,—viz., to give the plaintiff a security for every liability incurred by the defendant in wrongfully withholding possession of his property,—would require a construction in his favor.

See *Davis v. Alden*, 2 Gray, 309, 311, 312.

But, further, the statute provides: "Upon final judgment for the plaintiff, all sums of money then due to him may be recovered by writ of *scire facias* or action of contract upon the recognizance." The costs in the district court form one item of the taxable costs in the superior court, for which the plaintiff recovers judgment; and those costs are therefore a part of "all sums of money" which he may recover in the manner above set forth.

The decision in *Robinson v. Masterson*, 136 Mass. 560, to the effect that an appeal bond given under Pub. Stat. chap. 155, § 29, includes only the costs incurred after the appeal, has no application to a bond given under Pub. Stat. chap. 175, § 6; for the words of the two statutes are different, and their purposes are different.

The case of *Harrington v. Brown*, 7 Pick. 232, arose on a bond given on an appeal from the court of common pleas to the supreme judicial court, and the obligation in such a bond was, by the statutes then in force, more limited than in case of a bond on an appeal from justice of the peace to the court of common

pleas. The latter corresponds to the one in suit, but was more limited.

See Stat. 1825, chap. 89, §§ 2, 3; Rev. Stat. chap. 104, §§ 9, 10.

3. A bond given in pursuance of a statute is not invalid if it varies from the words of the statute, provided it creates no liabilities greater than, or different in kind from, those which the statute imposes, and which the parties, by attempting to comply with the statute, intended to assume.

Brighton Bank v. Smith, 5 Allen, 413; *Conant v. Newton*, 126 Mass. 105.

In *Martin v. Campbell*, 120 Mass. 126, it was held that the words "rent to become due," in a recognizance under Pub. Stat. chap. 175, § 6, meant "intervening rent," and that the expression "rent due and to become due" was in substantial conformity to the statute. So, in this case, the words of the bond, "all rent due or to become due," are equivalent to the expression "all rent, whether now due or hereafter to become due," the word "or" being taken conjunctively instead of disjunctively.

See *White v. Crawford*, 10 Mass. 183; *Addison v. New England Commercial Travelers Assn.* 4 New Eng. Rep. 639, 144 Mass. 591, 593.

If the bond filed was valid, and if the appeal was entered at the proper term of the superior court, the final judgment rendered by that court for possession and costs, on February 26, 1886, was valid, and is binding upon the sureties.

Melvin v. Bird, 131 Mass. 561; *Granger v. Parker*, 2 New Eng. Rep. 415, 142 Mass. 186.

Consequently the misdescription of the premises, which was matter merely in abatement in the original action, cannot be set up by the defendants. If it could, the court ruled that, "if the description was sufficient to clearly describe the premises," the error was not fatal; and upon that ruling, which was as favorable as the defendants were entitled to, the jury found for the plaintiff.

The second lease was properly admitted in evidence to show that the plaintiff was entitled to the premises during the whole time the action was pending.

The bill of exceptions does not show clearly the nature of the defendant's possession in the original action, but he was treated and proceeded against as a tenant at will.

See *Pray v. Stebbins*, 1 New Eng. Rep. 521, 141 Mass. 319.

If a tenant at will, the first lease to Pray determined the tenancy, and left him a tenant at sufferance, and as such liable to pay rent to the lessee.

Pub. Stat. chap. 121, § 3; *Bunton v. Richardson*, 10 Allen, 260.

The lessee, Pray, was entitled to rent without notice to the tenant of the lease, although payment of rent to the grantor, in ignorance of the lease, would be a defense against the grantee.

Burden v. Thayer, 3 Met. 76.

The lessee, Pray, was required to give notice before bringing his action for possession, not for the purpose of completing his right to the premises (*Benedict v. Morse*, 10 Met. 223; *Hildreth v. Conant*, Id. 298), but on the principle of equity and fair dealing, "that where a right of action depends on a fact peculiarly within the

knowledge of the plaintiff, and which the other party may not be presumed to know, and does not in fact know, the plaintiff must give the defendant notice of such fact."

Purlong v. Leary, 8 Cush. 409.

Applying these principles, the defendant, Charles Stebbins, at the time of the making of the second lease, was not entitled to notice thereof, even for the purpose of laying a foundation to recover the possession under it in a new action; for he already had a notice to quit under a lease precisely similar, which he refused to obey, and was defending an action for the possession. A second notice would be useless and nugatory. Neither was he entitled to notice of the lease in order to render him liable for rent, because rent was due, from the mere fact of possession by him and title in the plaintiff.

So long as the plaintiff is entitled to rent, the sureties on the bond are bound to pay it, by the express words of the statute. They enter into their obligation entirely without reference to the title upon which the plaintiff brings the action, or to any fixed rent (*Jackson v. Richards*, 16 Gray, 497), and were not, therefore, affected injuriously by the admission of the second lease in evidence.

If the defendant Charles Stebbins was a trespasser, or one holding adversely to the owner, at the time of the original lease, he was not liable to pay rent to the plaintiff, but was liable to pay damages in an action of tort (*Sargent v. Smith*, 12 Gray, 426), and no notice was necessary to make him liable for damages. Such damages are included in the appeal bond.

See *Davis v. Alden*, 2 Gray, 309.

Knowlton, J., delivered the opinion of the court:

The defendants do not contend, and we think they could not successfully contend, that the security to be furnished upon an appeal under Pub. Stat. chap. 175, § 6, in a suit to recover possession of land, should be by recognizance, and not by bond. See *Granger v. Parker*, 2 New Eng. Rep. 415, 142 Mass. 186; Stat. 1882, chap. 95.

The condition of the bond in this case differs in its language from that called for by the statute. A defendant, upon taking an appeal in a case of this kind, should bind himself "to enter the action, and to pay to the plaintiff, if the final judgment is in his favor, all rent then due, all intervening rent, and all damage and loss which he may sustain by reason of the withholding of the possession of the demanded premises, and by reason of any injury done thereto during such withholding, together with all costs until the delivery of the possession thereof to him." Pub. Stat. chap. 175, § 6. The condition of this bond is to "enter and prosecute his said appeal at said superior court with effect, and satisfy any judgment which may be entered against him in said superior court, and all rent due or to become due, damages, and costs, upon said appeal for costs, within thirty days of the entry of such judgment."

If this were not a bond, but a recognizance, which would be void for want of jurisdiction in the magistrate if it purported to secure performance of more than the recognizer could lawfully be required to do, we should hesitate

to declare it invalid by reason of its departure from the language of the statute. A change of form not affecting the substance of the condition would not render it so (*Martin v. Campbell*, 120 Mass. 126), nor a failure to include in the statement of the obligation all that the statute prescribes (*Shaw v. McIntier*, 5 Allen, 428). And it is difficult to see what greater obligation as to rent, damages, or costs is stated in the bond than is described in the statute which we have quoted. But it is unnecessary to decide whether the contract is valid under the statutes; for, if not, it is binding at common law. It was entered into voluntarily, it contains nothing in conflict with the statute, and is not otherwise illegal. Obligor who sign such an instrument are bound by it. *Conant v. Newton*, 126 Mass. 105; *Brighton Bank v. Smith*, 5 Allen, 413; *Sweetser v. Hay*, 2 Gray, 49; *Morse v. Hodgson*, 5 Mass. 314.

The date of the bond does not affect its validity. The paper upon its face shows an error in date: for it is dated August 13, and it recites proceedings in court as having occurred August 16. But it took effect when it was filed and approved; and the mistake created no ambiguity, and was not misleading. *Battles v. Fobes*, 21 Pick. 289; *Shaughnessey v. Lewis*, 180 Mass. 355.

The presiding judge correctly ruled that if the mother of the defendant in the original suit occupied the premises described in the writ, under an arrangement with him that she should have them in exchange for other premises which she gave up to him, that might be regarded by the jury as his occupation. The ruling as to the description of the premises was also correct.

Neither the principal defendant, nor his sureties, after having given this bond as a means of obtaining an appeal which has been prosecuted to final judgment without objection, can now be permitted to dispute the validity of that judgment on account of the difference which appears between the language of the bond and that prescribed by the statute. *Granger v. Parker*, 2 New Eng. Rep. 415, 142 Mass. 186; *Fall River v. Riley*, 1 New Eng. Rep. 742, 140 Mass. 488.

The only remaining question is whether the plaintiff was entitled to rent after the expiration of his first lease, while his title and right of possession continued under a second lease which took effect from the expiration of the first. It does not appear how this could have affected the rights of either party at the trial of the question of liability; for, upon showing a breach of the bond in any particular, the verdict and judgment should have been for the penal sum named in it, and the amount for which execution was to be awarded should have been ascertained in a subsequent proceeding. Pub. Stat. chap. 171, §§ 9, 10. In determining that the rental value of the premises was to be considered up to the time when the plaintiff obtained possession under his execution, it is unnecessary to determine what would have been the effect, as to judgment and execution in the original suit, if the plaintiff had not taken his second lease, and if the expiration of the first had been pleaded while the suit was pending. His right to recover when he commenced his action was established, and

that entitled him to judgment and execution. In the absence of anything to show a change, his right continued under the new lease, and judgment and execution followed.

A fair construction of the language of the bond, "all rent due and to become due," includes rent during the term of the second lease as well as of the first.

Exceptions overruled.

Joshua M. SEARS

v.

Charles F. CHOATE *et al.*, Trustees.

1. Where a will left property in trust to pay an annuity from the income thereof to testator's sole heir at law, and contained no limitation over of the estate in any contingency to any other person, and there was no discretion given to the trustees, and no provision that the income or the estate should not be alienable by the beneficiary or attachable by his creditors, and it appeared that the beneficiary had the absolute equitable title both to the income of the trust property and to the property itself,—*Held*, that the trust should be terminated and the property conveyed to the beneficiary.
2. In such a case the trust will not be continued on the theory that the testator intended to give the beneficiary only a qualified equitable estate in the trust property, so that he could not alienate it nor his creditors reach it, in the absence of clear and unequivocal language to that effect in the will.

(Suffolk—Filed March 6, 1888.)

BILL in equity for the termination of a trust.
Decree for plaintiff.

Joshua Sears died February 7, 1857, leaving a last will and testament, containing the following clauses:

"All the rest, residue, and remainder of my estate I give to said Alpheus Hardy, Horatio Harris, and Hugh Montgomery (executors and trustees named in the will), their heirs and assigns, as joint tenants in trust, to hold, invest, manage, and take care of the same according to their best knowledge and discretion; and I wish them to invest one half part of my estate in favorable purchases of real, productive estate, stores to be preferred, looking well to the value and titles thereof. And I wish them to invest one half part of said estate in bottom mortgages on estates which shall be considered of twice the value of the money loaned thereon, the title of such estates to be well examined.

"I give to my son Joshua M. Sears the sum of \$30,000 to be paid to him at the age of twenty-one years. All such parts of the income of my estate which may be necessary for the support and education of my son, I order to be used for that purpose; and when he shall be twenty-one years old I direct that \$4,000 be paid to him annually; when he shall be twenty-five years old, \$6,000 per year; and

\$10,000 per year when he shall be thirty years old."

The complainant in this case alleged that plaintiff was the only child and sole heir of Joshua Sears; that at the time of testator's death plaintiff was a minor, and, upon his reaching the age of twenty-one years, the court had directed the trustees to pay over to him all the property in their hands and constituting the residuary trust fund, not required to pay plaintiff the annuity bequeathed to him by the will, and such amount had been paid; that, under the provisions and operation of the will, plaintiff had the entire beneficial interest both in the income of the property held by the trustees and in the property itself; that no reason existed for the perpetuation of said trust; and prayed that it might be terminated, and the trustees directed to convey to him, for his absolute use and benefit, all the trust property now held by them for his benefit.

The defendants are the present trustees under the will, the original trustees named therein having died.

The case came on to be heard on bill and answer, and was reserved by C. Allen, J., for the consideration of the full court.

Mr. R. Olney, for plaintiff:

In this case the plaintiff's bill does not draw in question the propriety of the decree in *Sears v. Hardy*, 120 Mass. 524, and does not seek to revise or reverse it. On the contrary, the validity and full operation of the former decree being admitted, what the plaintiff now puts in issue is the character of the trust, whose existence the former decree rightfully affirmed. This case involves a different issue of law from that; to wit: whether the trust created for the purpose of producing the plaintiff's annuity is not of such a character that, upon the plaintiff's demand, it may not rightfully be terminated.

The power and duty of this court, as a court of equity, to decree the termination of a trust, and a conveyance of the trust estate to the beneficiaries, when all the interests under it are vested, when all the beneficiaries request, and the trustee consents, and there is no object or purpose of the trust to be accomplished or satisfied by keeping it alive, is well settled.

Smith v. Harrington, 4 Allen, 566; *Bowditch v. Andrew*, 8 Allen, 339; *Odell v. Odell*, 10 Allen, 1; *Inches v. Hill*, 106 Mass. 575; *Harlow v. Cowdrey*, 109 Mass. 188; *Chesman v. Cummings*, 2 New Eng. Rep. 350, 142 Mass. 65, 69.

If it be true that the will shows an intent to secure the plaintiff an annuity during life,—“as an honorable support, not exposed to the risks of his improvidence and misfortunes,”—then there is a purpose of the trust not fulfilled and requiring its continuance. But such intent is not to be found there,—is neither manifested in express terms nor capable of being legally implied.

1. If the intent of the will be as assumed in *Sears v. Hardy*, it follows that the equitable life estate of the plaintiff in the annuity of \$10,000 is inalienable by him, and cannot be made liable for his debts, either at law or in equity, before he has the money actually in hand.

2. And it is true that, since the decision in 3 Mass.

Sears v. Hardy, this court, rejecting the English rule, has held that a testator may give an equitable life tenant a qualified estate in income, which he cannot alienate by anticipation, and his creditors cannot reach at law or in equity,—even without a provision operating as a cesser or limitation of the life estate itself.

Broadway Nat. Bank v. Adams, 138 Mass. 172.

8. But in every such case the intent of the donor to give a qualified and limited, and not an absolute, estate in the income, must appear from the terms of the gift.

4. In the case at bar, the gift of the annuity is absolute.

“A will cannot be safely interpreted upon mere probabilities as to the testator's meaning and objects.

See *Dove v. Johnson*, 1 New Eng. Rep. 729, 141 Mass. 291.

Mr. John F. Colby, for defendants:

Trusts created by will cannot be terminated until the purposes for which they were made have been accomplished, except all the parties who are or may be interested in the trust property are in existence and *sui juris*, and all consent and agree thereto. Such agreements can be ratified and confirmed by the court, and a decree made for their determination.

Perry, Tr. chap. 32, § 920; *Smith v. Harrington*, 4 Allen, 566-568; *Bowditch v. Andrew*, 8 Allen, 339; *Inches v. Hill*, 106 Mass. 575; *Norris v. Thomson*, 19 N. J. Eq. 314.

No agreement for the termination of this trust has ever been made, and the purpose for which the trust was made cannot be accomplished during the life of the plaintiff. This purpose was “to secure to the son an honorable support during his life, not exposed to the risks of his improvidence or misfortune.”

Hardy v. Sears, 120 Mass. 541, 542.

Such intention could be carried out by the trustees without violating any well-settled principles of law.

Morton, Ch. J., delivered the opinion of the court:

In *Sears v. Hardy*, 120 Mass. 524, two cases were considered together,—one was a bill in equity by the only child and heir of Joshua Sears, the prayer being that the trustees be ordered to convey to the plaintiff so much of the estate in their hands, and the surplus income thereof, as was not required for the payment of the annuities provided for by the will; the other was a bill by the trustees, asking for instructions as to their duties under the will. The fourth prayer was broad enough to include the question raised in the case at bar, but the question was not in fact raised; both parties conceding that the trustees were to retain in their hands enough to support the annuities; and the only question discussed being whether the surplus of the estate should be paid over to the heir at law, discharged of the trust. The question now presented was not raised or decided in those cases. Under the decrees in those cases the trustees retained in their hands sufficient of the property to produce a net income of \$10,000, being the amount of the annuity payable to the heir at law.

The present bill alleges that the plaintiff has the entire beneficial interest both in the income of the property held by the trustees for his

benefit, and in the property itself, and prays that this trust may be terminated and the property conveyed to him.

The trustees now hold the trust estate upon the simple trust, as defined in the will, to pay the plaintiff \$10,000 per year. There is in the will no limitation over of the estate in any contingency, to any other person; there is no discretion given to the trustees, and there is no provision that the income of the estate shall not be alienable by the plaintiff, or attachable by his creditors.

It cannot be doubted that under this rule the plaintiff took an equitable estate, which he might alienate, and which equity would apply to the payment of his debts. *Sparhawk v. Cloon*, 125 Mass. 268.

It is said in the opinion in the former case that "it is conceded by all parties that, in order to carry out the plain intention of the testator to secure to his son an honorable support during his life, not exposed to the risks of his improvidence or misfortunes, the trustees should retain in their hands enough of the estate to produce, beyond question, the annuity provided for in the will."

It is quite probable that the testator had this idea or intention in his mind; but, if he had, he failed to frame his will in such a way as to carry out his intention. This court has held that the founder of a trust may give an equitable life tenant a qualified estate in income which he cannot alienate, and which his creditors cannot reach. *Broadway Nat. Bank v. Adams*, 138 Mass. 172. But in order to give such a qualified estate, instead of an absolute one, the language of the founder must be clear and unequivocal to that effect. Taking this will as it is, we should not be justified in holding that the plaintiff took anything less than an absolute estate, both in the income and in the corpus of the trust.

There is no doubt of the power and duty of the court to decree the termination of the trust, where all its objects and purposes have been accomplished, where the interests under it have all vested, and where all parties beneficially interested desire its termination.

Where property is given to certain persons for their benefit, and in such a manner that no other person has or can have any interest in it, they are, in effect, the absolute owners of it; and it is reasonable and just that they should have the control and disposal of it, unless some good cause appears to the contrary. *Smith v. Harrington*, 4 Allen, 566; *Borditch v. Andrew*, 8 Allen, 339; *Stone, Petitioner*, 138 Mass. 476; *Inches v. Hill*, 106 Mass. 575; *Underwood v. Boston Sav. Bank*, 2 New Eng. Rep. 80, 141 Mass. 305.

In the case before us, the trustees hold the fund in question upon a simple trust; the plaintiff is the absolute equitable owner of the fund and the income; he may alienate them, and they can be reached by his creditors. If the testator had the intention of guarding against his possible improvidence or misfortune, he failed to carry his intention into effect, and thus the reason for the existence of a trust fails.

We are of opinion that the plaintiff is entitled to a decree terminating the trust, according to the prayer of his bill.

Decree for plaintiff.

George M. BAKER

c.

Joseph D. BROWN *et al.*

Moses E. ROWE c. SAME.

1. The income of a trust may, by the founder thereof, without technical terms, be made inalienable by the object of the bounty, and exempt from his debts.
2. Where the residue of an estate is devised to the children of the testatrix impressed with a trust for the support of their father during life,—the amount to be devoted thereto, and the means of applying it, by continuing or receiving him as a member of their own household, by personal care and attention to his wants, or otherwise, resting wholly in their discretion so long as they do not abuse their trust,—a court of equity will not put a valuation upon the father's necessary support, and order the daughters to pay it over to his creditors, leaving him to be supported by charity or by the town.

(Middlesex—Filed March 3, 1886.)

ON appeals from judgments sustaining demurrers and dismissing bills in equity. *Bills dismissed.*

Bills to require residuary devisees, charged with the support of their father, to pay over to judgment creditors such sums as may be equivalent to the fair expense of his support.

The plaintiff Baker obtained judgment against defendant Joseph D. Brown, the elder, and execution thereon was returned unsatisfied.

The plaintiff Rowe obtained judgment against the same defendant, and execution thereon was returned unsatisfied in part.

The bills respectively alleged that, on the 24th day of March last past, one Lucy R. Brown, of said Concord, the wife of said above-named judgment debtor, Joseph D. Brown, died, leaving a will, which said will was duly proved and allowed as the last will and testament of said deceased on the fourth Tuesday of April, 1886, and letters testamentary duly issued to said Joseph D. Brown, the younger of that name, as executor thereof, in and by the probate court for said county; that the said Lucy R. Brown died seised of certain real estate in said Commonwealth of great value, to wit, as he is informed and believes, of the value of \$10,000, and other real and personal property of a value to the plaintiff unknown.

And the plaintiff says that the said Lucy R. Brown did, in and by said will, provide, among other things, as follows: "It is my desire that my husband shall have his support out of my property during his life; therefore, all the rest, residue, and remainder of my estate, both real and personal, after the payment of my just debts and funeral charges and the legacies before named, which are to be paid within six months after my decease, I give and devise to my daughters, Abby Brown and Mary Brown, and their heirs and assigns forever, subject to the condition that they support their father during his life." And the plaintiff says that the said Joseph D. Brown,

the judgment debtor, under and by virtue of the said will, became entitled to a property right, title, or interest, legal or equitable, in property and estate of said Lucy R. Brown, which cannot be come at to be attached or taken on execution in a suit at law against said judgment debtor; that the said Abby and Mary Brown have accepted the above-recited devise and bequest.

The bills respectively pray that said Joseph D. Brown, the said judgment debtor, and said Joseph D. Brown, the younger of that name, and said Abby Brown and said Mary Brown, may be restrained from the alienation, sale, or transfer, to any person or persons whatever, of the interest of said Joseph D. Brown, the said judgment debtor, under said will of Lucy R. Brown, deceased; and that said Abby Brown and Mary Brown, aforesaid, may be ordered to pay over to the respective orators such sum or sums of money as shall be found by this court to be equivalent to the fair and reasonable expense of the support of the said Joseph D. Brown, the said judgment debtor, at such time or times as to this honorable court shall seem meet, during the lifetime of said Joseph D. Brown, said judgment debtor, until the amount of the said judgments shall have been satisfied, together with all costs of suit.

Joseph D. Brown, Sr., Abby Brown, and Mary Brown, the defendants, demurred to the bills, and for cause of demurrer alleged: (1) that the plaintiffs have not stated such cases as entitle them to any relief in equity against these defendants, or any of them; (2) that said bills do not show that said Joseph D. Brown, the elder, has any right, title, or interest, legal or equitable, in said property or estate of Lucy R. Brown, which can be applied to the payment of said judgment debts as prayed for in the bills; (3) that the plaintiffs do not show by their said bills that defendant Joseph D. Brown, Jr., has any interest in this suit, or is a necessary or proper party thereto.

Mr. E. G. Loomis, for the respective plaintiffs:

The estate is to Abby and Mary Brown in fee, upon a trust in favor of Joseph D. Brown, Sr., and is not an estate upon condition.

2 Washb. Real Prop. p. 8; *Taft v. Morse*, 4 Met. 528; *Stanley v. Colt*, 72 U. S. 5 Wall. 165 (18 L. ed. 509).

In the case at bar, if the devise to Abby and Mary Brown be construed as of an estate or condition, the right of entry for condition broken would be in these daughters and in the other heirs of the testatrix, and not in the judgment debtor. A breach of condition would work a forfeiture, defeat the devise, and let in the heirs.

Stanley v. Colt, *supra*.

The equitable interest of Joseph D. Brown, Sr., in said estate of Lucy R. Brown can be applied to the payment of his debts, as prayed for in said bills.

Snowdon v. Dales, 6 Sim. 524; *Page v. Way*, 8 Beav. 20; *Youngehusband v. Gisborne*, 1 Coll. 400.

The provision in the will of Lucy R. Brown in favor of Joseph D. Brown, Sr., is of the nature of a legacy, and can be enforced either by a bill in equity, or, if in arrears, by an action at law.

3 MASS.

Pub. Stat. chap. 186, § 19; *Farwell v. Jacobs*, 4 Mass. 684; *Baker v. Dodge*, 2 Pick. 619; *Swasey v. Little*, 7 Pick. 296; *Crocker v. Crocker*, 11 Pick. 252; *Pinkerton v. Sargent*, 112 Mass. 110, 118; *Henry v. Barrett*, 6 Allen, 500; *Sheldon v. Purple*, 15 Pick. 528; *Sherman v. Sherman*, 4 Allen, 392.

The judgment debtor is the only *cestui que trust*. Although trustees have a discretion as to the time, mode, or amounts in which a trust fund is to be applied for the *cestui que trust*, yet, if no one else has any interest in the fund, it can be taken for his debts.

Gray, Restraints on Alienation, p. 78, § 115; *Daniels v. Eldredge*, 125 Mass. 356.

In *Forbes v. Lothrop*, 187 Mass. 523, the remedy sought and granted was the right to receive accruing income, which is clearly liable to creditors unless it is so limited as to restrain alienation. The only difference between the case at the bar and that last cited is in the measure of income of legatee. The will affords no evidence of intention that the interest of Joseph D. Brown, Sr., should not be liable for his debts; and such limitation cannot be supplied by implication.

Sparkhawk v. Cloon, 125 Mass. 267; *Pickens v. Dorris*, 2 West Rep. 420, 20 Mo. App. 1.

The annual value of the estate created can be ascertained. It would be an unreasonable and strained construction of this bequest to consider it a provision for mere absolute necessities.

Crocker v. Crocker, 11 Pick. 258.

The annual value of the estate of the judgment debtor is measured, not by the income of the trust estate, but by the reasonable cost of support of the *cestui que trust*; who is not limited as to place of support, but entitled to a reasonable support or its equivalent in cash, notwithstanding he may have the ability to support himself by other means.

Parker v. Parker, 126 Mass. 438; *Hubbard v. Hubbard*, 12 Allen, 586; *Pettee v. Case*, 2 Allen, 546; *Wilder v. Whittemore*, 15 Mass. 262.

The trust property is chargeable with the payment of the support.

Sherman v. Sherman, 4 Allen, 392; *Pinkerton v. Sargent*, 112 Mass. 110.

Mr. S. Hoar, for defendants:

It is now well settled in this Commonwealth that a person having the entire disposal of property may settle it in trust, in favor of another, in such a manner as to secure to the beneficiary the enjoyment of it during his life, without making it subject to be taken by his creditors for the payment of his debts.

Perkins v. Hays, 3 Gray, 405; *Hall v. Williams*, 120 Mass. 344; *Foster v. Foster*, 133 Mass. 179; *Broadway Nat. Bank v. Adams*, Id. 170.

It is a principle of construction, too well settled to need a citation of authorities, that the intention of a testator is to be ascertained by a consideration of the whole will, and that the use of particular technical words is not necessary to give effect to that intention, if it is clearly expressed without them. It has long been an established principle, in England as well as in this country, that a trust fund cannot be reached by creditors when its primary object is the maintenance and support of the beneficiary.

Twopeny v. Peyton, 10 Sim. 487; *Godden v. Crowhurst*, 10 Sim. 642; *Holmes v. Penney*, 8 K. & J. 90; *Foster v. Foster*, 133 Mass. 179; *Holdship v. Patterson*, 7 Watts 547; *Ashurst v. Given*, 5 Watts & S. 323; *Brown v. Williamson*, 86 Pa. 338; *Pope v. Elliott*, 8 B. Mon. 56; *Nickell v. Handly*, 10 Gratt. 336; *White v. White*, 80 Vt. 338; *Russell v. Grinnell*, 105 Mass. 425.

It is to be observed that this case is stronger for the defendants than most of the cases above cited. It is not a gift of the income, or part of the income, of certain property, to be applied to Joseph D. Brown's support, which would give him a vested interest in the income, limited merely as to its application. It is a gift to Abby Brown and Mary Brown on condition that they support Joseph D. Brown. His support from day to day is what has been given by the provisions of the will, and this is not his till he has received it; hence, for this reason also, it is evident that he cannot anticipate it, and his creditors cannot attach it or take it on execution, as it is exempt by statute.

Pub. Stat. chap. 171, § 84.

Moreover, the defendants Abby Brown and Mary Brown cannot fulfill the condition of the demise by supporting anyone else; and neither Joseph D. Brown nor this court can call upon them to do anything else. This court cannot give to the creditors of Joseph D. Brown any larger right than Brown himself has.

Hull v. Williams, 120 Mass. 344, 346; *Broadway Nat. Bank v. Adams*, 133 Mass. 174.

If Joseph D. Brown should voluntarily support himself, or receive his support from any other source for a limited time, it is submitted that neither he nor, in case of his death, his administrator could demand of Abby Brown or Mary Brown the value of his support during such limited time; yet the plaintiff's prayer is that he should get his support from some other source than this property, or starve, and that the money value of that support should be taken from the defendants and given to them. As it does not appear that Joseph D. Brown has any other property or means of support, to grant the prayer of the plaintiff's bill would be contrary to the spirit of our statutes, which is to leave for the personal use of the debtor at least enough for his support.

Pub. Stat. chap. 171, § 34; chap. 162, § 21.

It is submitted that the defendant Joseph D. Brown, Jr., executor, has no interest whatever in this suit, and that he is not a necessary or proper party thereto; and therefore his separate demurrer ought to be sustained, with costs.

C. Allen, J., delivered the opinion of the court:

It was decided in *Broadway Nat. Bank v. Adams*, 133 Mass. 170, that the founder of a trust may secure the income of it to the object of his bounty by providing that it shall not be alienable by him, or be subject to be taken by his creditors. Such provision need not be in express terms, but it is sufficient if the intention is fairly to be gathered from the instrument when construed in the light of the circumstances. The only question in the present case is whether enough appears to show such intention.

The existing circumstances are not so fully disclosed as might be wished, but it appears that the testatrix was a married woman, possessed of real estate in this Commonwealth of the value of \$10,000. The averment of other property is too vague to be considered as of any significance. And in her will she expressed her desire that her husband should have his support out of her property during his life; and therefore, after giving \$2,100 in pecuniary legacies to other persons, she gave all the residue of her estate to two daughters, subject to the condition that they support their father during his life. In one of the two cases now before us, it appears that the plaintiff recovered a judgment against the husband for about \$150, a year before the will was executed, on which less than \$9 had been paid. In the other case, it does not appear when the plaintiff's claim accrued. There is no averment in either case that the real estate was income-producing, or that the husband had any property, income, business, or means of support, except from his daughters. In the absence of anything to show the contrary, it may fairly be inferred that the daughters upon whom this duty of supporting their father was cast were of age, and that they were unmarried and lived with their parents. They retained their maiden names. There is nothing to show how much the estate would be diminished by the debts which are referred to in the will, and by the funeral charges and expenses of administration. The residue must necessarily be quite moderate in amount. The will does not provide that the income of this residue shall be paid to the beneficiary, or devoted in whole to his use. There is no provision for the payment of any money at all to him; but his daughters are to support him. His age is not given, but he had five children, two married daughters, a son old enough to be appointed executor of the will, and the two daughters to whom the residue was given. In the absence of any averment to the contrary, it is a fair inference that he was pretty well along in years, poor, dependent upon the support to be furnished by his daughters. There was probably some good reason why no bequest was made directly to him; it may have been his age, infirmity, incapacity, condition of indebtedness, or other reason not disclosed. It is sufficiently apparent that the testatrix intended that the trust imposed upon her daughters should be discharged by them personally, by furnishing to their father from time to time food, clothing, fuel, shelter, medicines, care and nursing, as he might need them; and probably this support was to be furnished on the premises where they all lived. Assuming it to be true that they lived in a house owned by the testatrix, the case would be stronger for implying that the support was, in their option, to be there furnished, than in *Parker v. Parker*, 126 Mass. 433, or *Dunelley v. Dunelley*, 4 New Eng. Rep. 41, 143 Mass. 509,—in both of which cases it was held that the beneficiary had no right to demand a support elsewhere.

Clearly, the beneficiary has no right to the income of the devised estate, which he can control; but, to use the language of Lord Hatterly, the trustees are to apply the same, "with their own hands, as it were," to the use of their father. *Chambers v. Smith*, L. R. 3 App. Cas. 795.

The amount to be devoted to his support, and the manner of applying it, by continuing or receiving him as a member of their own household, by personal care and attention to his wants, or otherwise, rests wholly in their discretion, so long as they do not abuse their trust. Under this state of things a court of equity will not put a valuation upon his necessary support, and order his daughter to pay it over to creditors, leaving him, it may be, to be supported by charity or by the town. A creditor's claim is not so high as that. *Broadway Nat. Bank v. Adams*, 133 Mass. 170, and cases cited. See also *Thackara v. Mintzer*, 100 Pa. 157; *Steib v. Whitehead*, 111 Ill. 247; *Lamper v. Haydel*, 3 West. Rep. 172, 20 Mo. App. 616; *Chambers v. Smith*, L. R. 3 App. Cas. 795, 806, 807, 811, 812.

Bills dismissed.

Charles H. NORTH *et al.*

v.

MERCHANTS & MINERS TRANSPORTATION CO.

1. Where a carrier's bill of lading provides that the goods were to be delivered at its certain wharf to the shippers or their assigns, on payment of freight and charges, a contract of the carriers to forward the goods to some other place can not be implied from marks and directions on the bill, indicating that the shipper intended some other ultimate destination.
2. Where carriers under such a bill of lading undertake to forward the goods to the destination indicated by the marks, it is a breach of duty to deliver the goods to a connecting line without the instructions contained in their bill; for which they will be liable in case of loss.

(Suffolk—March 3, 1888.)

ON defendant's exceptions. *Overruled.*

Action of contract, with counts in tort.

At the trial it appeared that the defendant was a common carrier by water between the ports of Boston, Mass., Norfolk, Va., and Baltimore, Md.: that the plaintiffs delivered the goods described in their declaration to the defendant, to be transported by steamship B 91, appointed to sail —, or by any other succeeding steamer or vessel, to the wharf of the above mentioned company at Norfolk, and there to be delivered to the order of Charles H. North & Co., or his assigns, if called for by him or them as in this contract provided, he or they paying freight and charges thereon, and average, if any; and received from the defendant a bill of lading or receipt.

The defendant transported the goods to Norfolk in its steamer "Berkshire." The line of the defendant ended at Norfolk. From that point the usual and only practicable route for merchandise destined for Windsor, N.C., was by Lawson's Express from the wharf of the defendant at Norfolk, about 2 or 3 miles, to the station of the Seaboard Railroad Company at Portsmouth, Va., thence by the Seaboard Rail-

road about 80 miles to Plymouth, N. C., and thence by steamer on the river Cashia, about 40 miles, to Windsor. These several connecting lines were independent of each other.

The goods arrived and were landed on the wharf of the defendant at Norfolk on or about August 4, 1884. They were then delivered by the defendants to Lawson's Express without the aforesaid instructions. Lawson's Express delivered the goods to the Seaboard Railroad Company, and gave to it the same instructions which they had received from the defendant, as shown by their receipt. The defendant collected its charge for carrying the goods, amounting to \$13.57, of Lawson's Express, and the Express collected that sum and its own charge of \$1.95 in addition, of the Seaboard Railroad Company, on delivery of the goods.

The goods arrived safely at Windsor, N. C., and were there delivered to Skirven by the last carrier in the line, without requiring him to produce the bill of lading.

On or about August 2, 1884, the plaintiffs indorsed the bill of lading in blank, and sent it, attached to the receipted bill for the goods, by the Adams Express Company, to Windsor, and directed the express company to present the bill to Skirven for payment, and, upon receiving payment thereof, to deliver to him the receipted bill and the bill of lading. Subsequently the Adams Express Company returned the receipted bill and the bill of lading to the plaintiffs, and informed them that they had presented the bill to Skirven, and he had refused to pay it.

The agent of the defendant testified, against the plaintiff's objection, that it was the general custom of the defendant line and of other steamship lines and railroad companies in Boston and New York, when they received merchandise for transportation marked for points beyond the ends of their lines, to forward the same from the end of their lines, by connecting lines, to its destination, in all cases where bills of lading or receipts were issued similar to the one in question.

The defendant requested the court to instruct the jury that the duty of the defendant was only to transport the goods to Norfolk as a common carrier, and to forward them from that point to Windsor, N.C.; that if the defendant delivered the goods to the connecting carrier at Norfolk in good order and condition, with proper instructions in regard to forwarding and delivering the same, it was not liable to the plaintiff in this action; and that upon all the evidence the plaintiffs were not entitled to recover; but the court refused so to instruct the jury, and instructed them that, upon the whole evidence, the plaintiffs were entitled to a verdict as a matter of law.

To these instructions and refusals to instruct, the defendant excepted.

Mr. Richard Stone, for defendant:

The law is well settled in this Commonwealth that a corporation established for the transportation of goods for hire between certain points, and receiving goods directed to a more distant place, is not responsible beyond the end of its own line, as a common carrier, but only as a forwarder, unless it makes a positive agreement extending its liability

Nutting v. Connecticut River R. Co. 1 Gray, 502; *Judson v. Western R. Co.* 4 Allen, 520; *Darling v. Boston & W. R. Co.* 11 Allen, 295; *Burroughs v. Norwich & W. R. Co.* 100 Mass. 26; *Washburn & M. Mfg. Co. v. Providence & W. R. Co.* 118 Mass. 490.

And the same rule is adopted in most of the States.

Myrick v. Michigan Cent. R. Co. 107 U. S. 102 (27 L. ed. § 325).

A delivery of goods to a carrier for transportation, marked and directed to a distant place, has been held to show that the goods were intended to be transported to that place.

Darling v. Boston & W. R. Co. 11 Allen, 295; and cases cited above.

"It may be assumed that this receipt was not intended to contain the whole of the contract between the parties, but that the general course of this department of the defendant's business, and the practices and arrangements which they had adopted in relation to it, were implied in and made a part of the contract under which the goods were received.

Washburn & M. Mfg. Co. v. Providence & W. R. Co. 118 Mass. 490.

The case of *Simkins v. Norwich & N. L. S. B. Co.* 11 Cush. 102, was similar to the present case. There, goods destined for the plaintiff at Eastville, Va., were delivered to the agent of an association, consisting of two railroad companies and a steamboat company, the three companies together forming one continuous line of transportation from Boston to New York. A receipt was given for the goods, in which the articles were described as "one case of merchandise * * * to be forwarded by steamboat and railroad," and by which the company promised "to forward by its railroad, and deliver to — or order, at its depot in —." The goods were carried to New York, and there put on board a sailing vessel bound for Norfolk. It was held that the defendant was liable as carrier only to New York, and from there as a forwarder to the place of destination.

Mr. W. H. H. Emmons, for plaintiff:

The place of delivery expressly stated in the contract is the defendant's wharf at Norfolk, Va., and nowhere else.

The marks on the goods and in the margin of the bill of lading are not part of the contract, and cannot control its express terms. Those marks are for the purpose of identifying the goods to be carried, and to indicate their ultimate destination when the terms of the contract have been complied with.

Rome R. Co. v. Sullivan, 25 Ga. 228; *Libby v. Ingalls*, 124 Mass. 508-505.

The usage claimed by the defendants (even if it existed) could not control the defendant's express contract.

Clark v. Baker, 11 Met. 186-190; *Dickinson v. Gay*, 7 Allen, 84; *Brown v. Foster*, 118 Mass. 186-189.

The plaintiffs were not bound to claim the goods until a reasonable time after their arrival in Norfolk, Va. As the defendant forwarded them immediately upon their arrival at Norfolk, Va., the plaintiffs had no opportunity to claim them at all.

If defendant exceeded its contract, and delivered the plaintiffs' goods in a way or for a purpose not authorized by the contract, the

plaintiffs are entitled to recover, although the defendant had no wrongful intent.

Hall v. Boston & W. R. Co. 14 Allen, 443; *Laverty v. Snethen*, 68 N. Y. 522.

A misdelivery of the goods is a conversion.

Hall v. Boston & W. R. Co. 14 Allen, 439; *Forbes v. Boston & L. R. Co.* 133 Mass. 154; *Claflin v. Boston & L. R. Co.* 7 Allen, 345; *Alderman v. Eastern R. Co.* 115 Mass. 235.

A bill of lading is to be construed most strongly against the carrier.

Hooper v. Wells, 27 Cal. 11.

The burden is upon defendant to show a compliance with the contract.

Alden v. Pearson, 8 Gray, 342-348.

If the contract does not in express terms authorize the forwarding of the goods beyond Norfolk, Va., the burden is on the defendant to show authority from the plaintiffs to so forward them.

The evidence expressly negatives such authority.

Even if defendant had authority to forward the goods beyond Norfolk, Va., it was also bound to correctly forward the plaintiffs' instructions.

Hutchings v. Ladd, 16 Mich. 493-501; *Jokanson v. N. Y. Cent. R. Co.* 88 N. Y. 610.

The plaintiffs' instructions in the bill of lading are to deliver "to the order of Charles H. North & Co., or his assigns." The instructions forwarded were "for order notify M. E. Skirven, Windsor, N. C."

This change of instructions probably caused the last carrier in the line to deliver the goods to Skirven without requiring him to produce the bill of lading properly indorsed by the plaintiffs.

In either event,—of a misdelivery at Norfolk, Va., by the defendant, or a misdelivery at Windsor, N. C., occasioned by the defendant's wrongful transmission of instructions,—the ruling of the presiding justice in favor of the plaintiffs was correct.

Field, J., delivered the opinion of the court:

The contract of the defendant was to transport the goods by steamship from Boston to its wharf at Norfolk, Va., and there deliver them to the order of the plaintiffs, if they were called for by them, and if they paid the freight and charges thereon. The marks on the margin of the bill of lading, of "Windsor, N. C., care agent Portsmouth, Va.," as well as the directions written across the bill, to "notify M. E. Skirven, Windsor, N. C.," indicated the intention of the plaintiffs that the goods were to be sent from Norfolk to Windsor; but they did not indicate that the goods were to be delivered at Windsor to any person who did not have an order from the plaintiffs to receive them. The defendant made no contract to forward the goods beyond Norfolk, unless such a contract is to be implied from these marks and directions. As the contract is express that the goods shall be delivered at Norfolk to the order of the plaintiffs, a contract on the part of the defendant to forward the goods beyond Norfolk cannot be implied from marks and directions which indicate that Windsor was intended by the plaintiffs to be the ultimate destination of the goods. But if these marks

and directions could be held to give authority to the defendant to send the goods forward by the usual route to Windsor, and if the defendant undertook to do this, it should have forwarded them with proper instructions. Although Skirven was to be notified of the arrival of the goods, yet it is plain, from the contract of the defendant, that the goods were ultimately to be delivered to the plaintiffs or their order; and the neglect of the defendant to give this instruction to the carrier, to whom it delivered the goods at Norfolk for transportation to Windsor, was a breach of the duty which it assumed when it forwarded the goods. The plaintiffs have lost the value of the goods by the breach of the contract or of this duty by the defendant. We infer, from the exceptions, that the facts therein recited were undisputed; if so, the instructions were correct. *Libby v. Ingalls*, 124 Mass. 503; *Darling v. Boston & W. R. Co.* 11 Allen, 295; *Hall v. Boston & W. R. Co.* 14 Allen, 439; *Forbes v. Boston & L. R. Co.* 133 Mass. 154; *Claffin v. Boston & L. R. Co.* 7 Allen, 345; *Northern R. Co. v. Fitchburg R. Co.* 6 Allen, 254; *Little Miami R. Co. v. Washburn*, 22 Ohio St. 324; *Johnson v. N. Y. Cent. R. Co.* 33 N. Y. 610.

Exceptions overruled.

George W. COLLINS

v.

Mayor and Aldermen of HOLYOKE.

1. In a proceeding to obtain a writ of **certiorari**, the burden is upon the petitioner to establish all the material allegations of his petition.
2. When a proceeding for a **certiorari** to the mayor and aldermen of a city is reserved by a single justice of the supreme judicial court for the consideration of the full court, upon petition and answer, the statements in the answer are to be taken as true, not only in those parts which set out the record and the acts of the board of mayor and aldermen within its jurisdiction, but also in those which allege extraneous facts, which might have been traversed and perhaps controlled by evidence.
3. An affidavit appended to such petition, which could not have been received in evidence at a final hearing upon the facts, can not affect the rights of the parties upon such reservation.
4. In such a proceeding, the members of the board of mayor and aldermen at the time such answer is required are the proper persons to make it, although they might not have been members of the board at the time the action sought to be reviewed was taken; and such answering members may state facts which they know officially, even though they do not know them personally.
5. Although a board of mayor and aldermen may not delegate the authority given them by statute to lay and make common sewers, they may employ agents to supervise the work.

6. A landowner is not entitled to notice of the intention of city authorities to lay out and construct a common sewer, or to make an assessment upon him.

7. The validity of an assessment for a common sewer, made by the proper city authorities, is not affected by the fact that they called in another person to assist them in making the assessment.

8. A provision of a city ordinance, requiring the superintendent of sewers to keep and submit to the board of mayor and aldermen an account of the cost of constructing sewers, and to report a list of the persons benefited,—*Held*, to be directory merely, and that failure to comply therewith did not invalidate an assessment for a sewer.

9. *Held*, also, that, as a method of equitably adjusting assessments, it was not improper for the assessing board to divide the assessments into three classes: "direct benefit," "remote benefit," and "more remote benefit."

(Hampden—Filed March 3, 1888.)

PETITION for certiorari. Heard on petition and answers, and reserved for the opinion of the full court. *Dismissed*.

The writ was sought to review a certain assessment for alleged benefits.

The petition was addressed to the justices of the supreme judicial court, and set forth that on March 24, 1885, the mayor and aldermen of Holyoke ordered a main drain or trunk sewer to be constructed in said city, in Canal and Lyman streets; that petitioner was the owner in fee simple of a certain lot of land on Ely Street, which did not abut on Lyman Street or on the line of the sewer; that no notice was ever given to petitioner of the intention to construct said sewer; that, at a meeting of the board of aldermen, assessments were attempted to be levied only upon the abutters; that said sewer was constructed; that it was a common or trunk sewer; that a warrant had been issued, signed by the mayor and aldermen, directed to the treasurer of said city, instructing him to collect from the parties therein named the sums set opposite their respective names, being the amounts alleged to be owing by said parties, as their respective portions of the expense of constructing said sewer; that petitioner's premises had been advertised for sale for the nonpayment of said sewer assessment; that there was no record of the board of aldermen that the superintendent of sewers ever kept and submitted to said board an account of the cost of constructing said sewer and all other expenses in relation thereto, as was his duty under the ordinances of said city,—all of which allegations were admitted by the answer.

The petition further alleged that the superintendent of sewers did not report to the board of aldermen a list of the persons and estates deriving benefit from said sewer, and there was no record of any such report; that there was no record that said board of aldermen ever assessed petitioner any sum as his portion of the expense of said sewer; that petitioner was credibly informed, and believed, that a person,

not a member of the board of aldermen, and other than the superintendent of sewers, and not a member of the city council of Holyoke, made a list of persons who he claimed ought to be assessed, and the amounts for which he claimed they should be assessed set opposite their respective names, on which list was the name of petitioner; that said list and amounts set opposite the respective names thereon were the only basis for the warrant, demand, and notice of sale; that said sewer was built under the supervision and direction of a joint committee, composed of four members of the common council and three aldermen; that various other persons owning land situated with respect to said sewer similarly to petitioner's land, and deriving as much benefit therefrom, were not assessed or in any manner required to pay for any portion of the expense of the construction of said sewer; that persons owning land abutting on Lyman Street and the line of the sewer were not assessed or required in any manner to pay for any portion of the expense of the construction of the sewer.

The petition prayed that a writ of certiorari might issue, commanding the mayor and board of aldermen of Holyoke to return to court a perfect record of its proceedings relative to said sewer and assessment, or alleged assessment, and a perfect record of its proceedings relative to the enforcement thereof, to the end that said proceedings might be quashed and dealt with as law and justice might require; and further that a writ of injunction might issue to enjoin the sale of petitioner's property.

The petition was sworn to.

The answer alleged that the assessment was made to abutters, but that the using of the word "abutters" was an error made by the clerk, and the said clerk had amended his records in that respect. It denied that there was no record of the board of aldermen that the petitioner was assessed, and alleged that there was such record.

The respondents neither admitted nor denied, as a matter not within their knowledge, the allegation that the sewer was built under the supervision and direction of a joint committee. They denied that various persons owning land situated with respect to said sewer similarly to the land of the petitioner, and deriving as much benefit therefrom, were not assessed; that persons owning land on Lyman Street and on the line of said sewer were not assessed.

The jurat was as follows:

Hampden, ss. August 24, 1887.

Personally appeared before me, the above named [mayor and aldermen], who do depose, make oath, and say that they are the respondents named in the foregoing answers and the amendments thereto subscribed by them, and they know the contents thereof; that those allegations in said answers and amendments which relate to the matters of the records of the board of mayor and aldermen and to said warrant or order, they know of their own knowledge to be true; that any of them were not members of the board of mayor and aldermen of the year 1885, who made the assessment in question, and they do not know of their own knowledge that the other matters and things stated in said answers and amendments are true, but upon

information and belief they believe them to be true.

Before me, T. B. O'Donnell,

Justice of the Peace.

The amended answer contained the following, *inter alia*:

"And the respondents say that an order or warrant for the collection of two thirds of the cost of said sewer, as provided by the ordinances of said city, was signed by the mayor and aldermen, and, in a list annexed to the same by the said mayor and aldermen, an apportionment of the cost of said sewer was made by the mayor and aldermen to the parties benefited thereby, and the said two thirds assessed to said parties, in which list the petitioner was charged and assessed for said sum of \$51.84, and said warrant and list were given by the said mayor and aldermen, to the treasurer of said city, for the collection of said sums, as provided by the ordinances of said city relating to sewers. And the said treasurer duly demanded said sum from the petitioner, and he neglected and refused to pay the same.

"And the respondents say that in said list the assessments were divided into three classes, which were called 'direct benefit,' 'remote benefit,' and 'more remote benefit;' and that the petitioner was assessed in the third class.

"And the respondents admit that the mayor and aldermen employed one J. F. Sullivan, chairman of the board of assessors of said city, and not any of the officers mentioned in the petition, on account of his large experience in assessing, to aid and assist them in making said assessments, by furnishing them with a list of the names of the persons who he thought ought to be assessed, and the amount for which he thought they ought to be assessed. They deny that said list and amounts so made were the only basis of said warrant, demand, and notice. And they say that the superintendent of sewers furnished them with the cost of said sewers, by which they were enabled to make said assessments."

The case was reserved upon the petition and answers, by W. Allen, J., for the consideration of the whole court.

Mr. W. H. Brooks, for the petitioner:

In their affidavit, respondents admit that they have no knowledge of the matters and things stated in their answers and amendments thereto, outside the records of the board of mayor and aldermen. These answers and the various amendments, therefore, do not constitute such statements of fact, denial, or return as the law contemplates.

Teukobury v. Middlesex County, 117 Mass. 563; *Worcester & N. R. Co. v. Railroad Comrs.* 118 Mass. 561.

The petition being sworn to, its averments, unless denied, are to be considered true.

Conformity to the ordinances by the superintendent was necessary for the guidance of the board in making an assessment, and for the purpose of preventing fraud and error. It was evidently contemplated by the ordinance that the account and list should be in writing, and in detail. The answer does not show that any such account and list was reported or submitted to the board of aldermen.

Thurston v. Little, 8 Mass. 429; *Blossom v.* 8 Mass.

Cannon, 14 Mass. 177; *Thayer v. Stearns*, 1 Pick. 482.

There was no such ascertainment, assessment, and certification by the mayor and aldermen as the statute requires. The board could not delegate that authority or power. It should be the result of their united judgment and knowledge.

1 Dill. Mun. Corp. § 96; *Day v. Green*, 4 Cush. 483; *Coffin v. Nantucket*, 5 Cush. 269.

The respondents do not deny the allegation that the sewer was built under the supervision and direction of a joint committee composed of four members of the common council and four aldermen. If it was so built, it was in contravention of Pub. Stat. chap. 50, § 1. The board had no right to delegate their power in this respect.

1 Dill. Mun. Corp. *supra*; *Day v. Green*, and *Coffin v. Nantucket*, *supra*.

Burdens and taxes laid on the people for the public good shall be equal.

Goddard, Petitioner, 16 Pick. 508, 509.

And if an assessment is erroneous in this respect it may be revised on *certiorari*.

Butler v. Worcester, 112 Mass. 541; *Whiting v. Boston*, 106 Mass. 89.

The statute makes it obligatory that a written demand for payment of the assessment be made. The ordinances of the city prescribe that that demand shall be made by the treasurer. The petitioner claims that the statute and ordinance are mandatory.

Reed v. Crapo, 127 Mass. 39.

It is also necessary, under the statute, that notice of the assessment should be given before petitioner could be charged.

Allen v. Charlestown, 111 Mass. 128; *Butler v. Worcester*, *supra*.

The amended answer alleges that "the assessments were divided into three classes,—'direct benefit,' 'remote benefit,' and 'more remote benefit,'—and that the petitioner was assessed in the third class." If this were so, of which there is no proof or sufficient affidavit, then the alleged assessment would be illegal and void, because there is no provision of law for the division of assessments into three classes.

A person assessed is entitled to know upon account of what benefit an assessment is made; and a failure to specify for which of the benefits mentioned in Pub. Stat. chap. 50, § 4, the assessment was made, would seem to invalidate any assessment.

Mr. T. B. O'Donnell, for respondents:

Notice to the petitioner of the intention to construct the sewer was not necessary.

Allen v. Charlestown, 111 Mass. 128; *Holt v. Somerville*, 127 Mass. 408; *Butler v. Worcester*, 112 Mass. 555.

The petition does not disclose that the superintendent of sewers was bound or required to keep or submit to the board of aldermen an account of the cost of construction of the sewer, or that said board was bound to keep a record thereof, or that the superintendent of sewers was bound to report to the board of aldermen a list of the persons and estates benefited by said sewer, or that said board was bound to keep a record of such report. These matters are not required by the statutes to be done; and, even if required by the ordinances, they are merely
8 Mass.

directory, and do not affect the validity of the assessment. They are, at most, simply aids to the aldermen in making the assessments; and the failure to furnish these aids to them is no damage to the petitioner. The city ordinances had no relation to the assessment.

Kelso v. Boston, 120 Mass. 297; *Lowell v. Hadley*, 8 Met. 195.

It is immaterial that the mayor and aldermen called in another party to aid them in making the assessment. No matter how many were called in to assist them, the assessment when finally made was their act. Besides, evidence cannot be introduced to control the record.

Taber v. New Bedford, 135 Mass. 162; *Charlestown v. Middlesex County*, 109 Mass. 270; *Mendon v. Worcester County*, 5 Allen, 18; *Farmington River W. P. Co. v. County Comrs.* 112 Mass. 214.

It makes no difference under whose direction or supervision the sewer was built.

Taber v. New Bedford, 135 Mass. 162.

If the claim that there were other persons owning land situated like the petitioners in respect to the sewer, and that persons owning land abutting on Lyman Street on the line of the sewer were not assessed, were admissible, the names of such persons should be stated in the petition. The allegation is too indefinite. Even if the petitioner was entitled to an abatement in the amount of his assessment on that account, he ought not to escape all liability, but should in some way be charged for what he should pay.

Pub. Stat. chap. 186, § 9; *Butler v. Worcester*, 112 Mass. 556.

The using of the word "abutters" was a harmless error to the petitioner even if the record had not been amended. Writs of *certiorari* will not be issued to correct technical errors.

Farmington River W. P. Co. v. County Comrs. 12 Mass. 212, and cases cited.

The clerk had a right to amend his record.

Conn. v. McGarry, 135 Mass. 558; *Halleck v. Boylston*, 117 Mass. 469.

The amended record cannot be contradicted.

Halleck v. Boylston, *supra*.

Notice in any form is sufficient.

Stone v. Boston, 2 Met. 228; *Pickford v. Lynn*, 98 Mass. 496.

The answer is conclusive as to the allegations of fact stated therein (*Mendon v. Worcester County*, 5 Allen, 18; *Worcester & N. R. Co. v. Railroad Comrs.* 118 Mass. 561), even if the facts alleged are upon information and belief (*Clinton Nat. Bank v. Bright*, 126 Mass. 535, and cases cited).

The respondents were able to make oath to the matters of record of the board of mayor and aldermen as being within their knowledge, but could not know the other matters stated therein; and their oath upon information and belief in support thereof is the most positive they could make, as none of them were members of the board which ordered the sewer laid or made the assessment. Even if a portion of the answer or oath in support thereof is irregular, the petition should be dismissed if the answer discloses sufficient grounds for dismissing it.

Fairbanks v. Fitchburg, 182 Mass. 42.

Knowlton, J., delivered the opinion of the court:

In proceedings to obtain a writ of certiorari, the burden is upon the petitioner to establish all the material allegations of his petition. In this case, which was reserved upon petition and answer, we must hold, in accordance with the decision in *Dickinson v. Worcester*, 188 Mass. 555, that the statements in the defendant's official answer are to be taken as true, not only in those parts which set out the record and the acts of the board within its jurisdiction, which do not appear in the record, but also in those which allege extraneous facts which might have been traversed and perhaps controlled by evidence. The affidavit appended to the petition could not have been received as evidence at a final hearing upon the facts, and cannot affect the rights of the parties upon this reservation.

The membership of the defendant board is not the same as when the assessment in question was made. But while its members change from time to time, the board itself as a tribunal is continuously the same. In *Fairbanks v. Fitchburg*, 182 Mass. 42, the board of mayor and aldermen that made the answer had not the same members as when it passed the order which was alleged to be illegal; but it was held that its right to answer was not thereby affected. In that case it appeared that the members who answered had executed the order which was called in question, and it was assumed that, in the performance of that duty, they must have known the facts connected with the adoption of the order. But the right of such a tribunal to answer as to its previous doings does not depend upon former action of the members who make the answer, in the matter to which the answer relates. It will often happen that the doings of a board acting judicially will be first called in question after they have been completed, and after the membership of the board has entirely changed. In such a case, it is important that the proceedings should be officially set forth. And this can be done only by those who are members when the question arises. Their answer as a board is made over their own signatures, and under the sanction of their official oaths. As public officers they may be expected to act impartially. It may be presumed that, before making such an answer, they will acquire what may be called official knowledge of the acts of their predecessors. As members of the same board, they may, in a variety of ways, be expected to have opportunities of knowing what the board has done and how it has done it. Without personal knowledge they may have official knowledge, which is something better than mere hearsay; and, in presenting an answer upon which the conduct of the board is to be passed upon by a higher tribunal, they should be permitted to state facts which they know officially, even though they do not know them personally. The statements in relation to the records of the board and its doings within its jurisdiction, which appear in the original and amended answers in this case, seem to be of this kind. The others are mere allegations in the nature of pleading, which may always be controverted by a petitioner. The form of jurat annexed to the first answer does not indicate that those

who answered had not official knowledge of the acts of the board in regard to which such an answer is ordinarily conclusive. It merely disclaims personal knowledge.

But it is unnecessary to decide in this case whether any part of the answer except the record would have been conclusive if traversed by the petitioner; for, in accordance with the decision to which we have referred, all its allegations must be deemed to be true.

Although the proceedings which we are considering were very irregular, the legal questions which arise in the case as presented are comparatively simple. It is true, as contended by the petitioner, that the mayor and aldermen could not delegate the authority given them by Pub. Stat. chap. 50, § 1, to lay and make common sewers. But no question is made that this sewer was legally laid; and it is only objected that it was "built under the supervision and direction of a committee, composed of four members of the common council and three aldermen." But this was done by order of the mayor and aldermen. The statute which gave them authority to make the sewer did not preclude them from employing agents to supervise and direct the work. If there was any irregularity in their conduct in this respect, we cannot say that the sewer was not "made" by the defendants, or that it was illegally constructed.

The petitioner was not entitled to notice of the defendants' intention to lay out and construct the sewer, or to make an assessment upon him. *Allen v. Charlestown*, 111 Mass. 123; *Holt v. Somerville*, 127 Mass. 408.

The validity of the assessment made by the mayor and aldermen is not affected by the fact that they called in another person to assist them in making it. *Taber v. New Bedford*, 135 Mass. 162.

The provisions of the ordinances requiring the superintendent of sewers to keep and submit to the board an account of the cost of constructing the sewer, and to report a list of the persons deriving benefit from it, were merely directory; and his failure to comply with them did not invalidate the assessment. *Dickinson v. Worcester*, 188 Mass. 555.

As a convenient method of equitably adjusting the assessments, the members of the board might, if they saw fit, divide them "into three classes,—direct benefit, remote benefit, and more remote benefit."

After the assessments were made, the petitioner appears to have had notice of the assessment upon him in accordance with the provisions of Pub. Stat. chap. 50, § 4.

The allegations of the answer and the amendments to it cover all the other matters referred to in the petition, and we find that justice does not require that a writ of certiorari should issue.

Petition dismissed.

Josiah G. BRIDGE, Ext.,

v.

Philenda BRIDGE, *Appt. from Probate.*

1. Where a will gives to the wife of the testator a certain yearly sum during life, if the income of the estate, not therein bequeathed to her or to the

payment of debts and funeral expenses, shall amount to that sum, together with the use of his house for life, it is proper for the executor to deduct from the gross income applicable to the payment of the annuity the amount paid out for repairs, taxes, water rates, insurance, and interest on a mortgage on the house.

2. The general expenses of administration should fall upon the corpus of the estate.
3. The allowance of commission to an executor for collecting his own debt is improper.
4. The mode of use, in the testator's lifetime, of a stable in the rear of his house, does not necessarily establish that the stable is included in a devise, to the wife, of the use of the "house in which we now live."

(Middlesex—Filed March 3, 1886.)

ON appeal from the decree of a single justice entered in accordance with the report of a master confirming a decree of the Probate Court settling an executor's accounts. *Affirmed in part and reversed in part.*

The appellant's exceptions to the master's report were as follows:

1. At the hearing before the master, the appellant claimed that, by a proper construction of the said will, the said annuity to the appellant, of \$400 a year, is chargeable to the gross income of the estate, and asked the master to so report; but the master declined, as more fully appears by said report, and the appellant objected and took exception thereto.

2. The executor in his accounts, among his personal charges, claimed an aggregate of \$65.04 as commissions on sums, and interest, collected from himself, although the said sums were all the time since the death of the testator in the executor's hands, and said interest accrued from himself. The appellant claimed that, according to said will, the executor could not charge said commissions; but the master declined, against the objection of appellant, so to report, and the appellant took exception.

3. The executor, in his second account, after sundry specific charges for services, charged "for time and services not included in above, \$50." The appellant claimed that this was an improper charge, and could not be allowed without the items and particulars, and objected to its allowance; but the master reported allowing it, and the appellant excepted.

4. In his fifth account the executor charges \$30 for himself attending court three times, and \$30 more for counsel fees; said attendance and counsel fees being to resist the widow's claim for her allowance. The appellant objected to these charges, but the master reported allowing them; to which the appellant excepted.

5. The executor collected and held, as though it were a part of the income of the estate, the rents and profits of the said stable, to the amount of \$211.50; said stable being situated within the curtilage of the house named in the will as for the use and oc-

cupancy of the widow. The appellant claimed said stable and its use, rents, and profits, and asked the master to so find and report, but the master found and reported that the will did not give her the stable, and declined to report as requested; and the appellant objected and took exception.

6. The appellant claimed, and asked to be allowed, interest upon the arrears of her annuity for the average time they had been due and payable; also upon the said unpaid legacy of \$85 since it fell due; also for the average time upon the said rents and profits of the stable; but the master disallowed each of these claims and refused to allow any interest at all up to the date of his report.

To each of these rulings and refusals the appellant objected and excepted.

The executor's (plaintiff's) exceptions to the master's report were as follows:

1. At the time of the hearing before the master in the above-entitled action, the plaintiff claimed that the legal construction of the will (the annuity provided for the appellant of \$400 a year, during the remainder of her natural life, if the income of the testator's estate not bequeathed to her in his will or to the payment of his debts and funeral expenses should amount to that sum) should be that she would not be entitled to the sum of \$400 a year for that time, if the income each year, after deducting expenses upon his whole estate, did not amount to that sum; but the master declined so to hold or to find, and did find and report that she was entitled to the sum of \$400 a year absolutely, by rejecting items or charges in the several accounts as not chargeable to the income of the estate, as more fully appears in said master's report; and the said plaintiff objected and took exception thereto.

2. The plaintiff, at the time of the hearing before the master, claimed and requested the said master to allow the items of charge set forth in Schedule A and Schedule B in his said report to be deducted from the gross income of the testator's estate, to arrive at the portion the appellant would be entitled to out of the same, which the master returns in his report to be \$543.58 and \$267.60 in both schedules, both amounting to \$811.18; which the said master declined to allow, or to rule as requested, and did rule and find, and has in his report reported, that all of the charges and items in said Schedules A and B in his said report should be eliminated out of the accounts relating to income, and not taken out of the gross income of the estate, but charged to the body of the estate, thereby depleting the body of the estate for the purpose of paying the widow, the appellant, the full sum of \$400 absolutely, and against the exact provision of the will relating to the same, and against other legatees or parties in interest in said will; to all of which the said plaintiff, the executor of said will, objected, and hereby the said executor excepts to the same and takes exception thereto.

Mr. Curtis Abbott, for appellant:

The will reiterates that it may be necessary to deplete the estate and abate the residuary clauses, to carry out the provisions for the widow. In consideration of these provisions

she waives her right to dower and distributive share.

Where the words of the testator leave his intention doubtful, the law imposes an abatement of residuary legacies for the sake of an annuity.

Wms. Exrs. [1860]; *Wright v. Callender*, 2 De G. M. & G. 652, and cases cited; *Croly v. Weld*, 3 De G. M. & G. 998-996.

The most consistent interpretation of the various clauses then would impose upon the executor and trustee his duties, after disposing of debts, lodge money, and furniture, in the following order: (1) provide house; (2) pay annuity; (3) clear off mortgage; (4) invest surplus.

See *Warren v. Gregg*, 116 Mass. 304; *Smith v. Fellows*, 131 Mass. 20; *Towle v. Swasey*, 106 Mass. 100-105; *Clayton v. Aikin*, 38 Ga. 320; Wms. Exrs. [1860], and cases cited; 2 Redf. Wills. 140 *et seq.*; *Boyd v. Buckle*, 10 Sim. 595.

But if the estate may not suffer depletion to keep up the widow's annuity, it may to pay the expenses and for the repairs of the house to be furnished her; this being the only alternative for a possible abatement of the residuary which decedent seems to have contemplated in every residuary clause of the will.

This devise, being accepted in purchase of her rights in the estate, would doubtless be a charge upon all the residuary, whether in the form of real or personal estate.

By the words, "estate not herein bequeathed to her" and "legacies and provisions," reference to this, at least, is intended; and the residuary clauses, all providing for a possible abatement, confirm this position.

And as the house in Waltham or elsewhere is given out of the estate as a home, the estate, not the income, must keep it up to the standard of a home.

2 Redf. Wills. 127, pl. 23; *Whiting v. Whiting*, 15 Gray, 508.

By the use of a thing is meant the entire use of it, and the words of the will imply such use. *Brown v. Kelsey*, 2 Cush. 249.

The stable is comprised within the curtilage of the house, or is given by the words of the will. Giving it as a house would not lessen or change its quality as a tenement. The legatee would have the power to let the whole or any part of it to others.

2 Redf. Wills. 381, pl. 11.

Her power to use all within the curtilage would be the same as that exercised by the testator and her in his lifetime.

Melcher v. Chase, 105 Mass. 125.

It was the house erected by testator, with the improved space between it and the barn, occupied by him and appellant; it was the house as lived in by them,—which the will devised.

With this house, consisting of dwelling, stable, and improved ground between them and the two streets, the said tenement has no connection, no door in common to, or right in, the barn. Thus they were erected, lived in, and given.

Rogers v. Smith, 4 Pa. 101; *Cro. Eliz.* 89; 8 Leon. 214; 1 Plowd. 171; 2 Wms. Saund. 401, note 2; *Tracy v. Talbot*, 6 Mod. 214; *Wood, Land. & T.* 178.

If executor has thus occupied the estate in 202

his representative capacity, he must account for the rents and profits.

Palmer v. Palmer, 13 Gray, 328.

Commissions on the money collected from himself are not lawful.

2 Redf. Wills. 410, note 53.

The \$50 lump charge is not allowable.

41 Ala. 267.

The \$30 for the executor, and \$30 for his attorney for services in resisting claim to widow's allowance, are not lawful.

Wright v. Wright, 13 Allen, 209.

Establishment of a legacy fixes interest as an incident from the time said legacy became due (Wms. Exrs. [1424]); also on arrears of the annuity (*Newman v. Auling*, 3 Atk. 579; 2 Redf. Wills. 478, 474, note 38.)

Mr. Edwin A. Alger, for plaintiff:

The plaintiff, as executor, in law could not be defended or justified to pay the appellant under said will the sum of \$400 per year during her natural life, when the net income did not amount to that sum.

The entire items of expense in the five accounts of the executor were properly deducted from the gross income, in accordance with the will of the testator, in order to establish the net income as found by the court. None of these items were for the improvement of the estates by additions thereto, but for keeping them in good repair. They could not be paid or taken out of the body of the estate of the testator in order to increase the net income thereof, without impairment of the legacies provided in said will for other parties. Therefore the decision of the probate court was right and should be affirmed.

Watts v. Howard, 7 Met. 478; *Parsons v. Winslow*, 16 Mass. 361; *Dexter v. Appleton*, 137 Mass. 323.

Holmes, J., delivered the opinion of the court:

This is an appeal by the widow of Abel E. Bridge from a decree of the probate court, allowing the accounts of her husband's executor.

1. The first question arises under the following clause of the will: "I give and bequeath to my wife, Philenda, \$400 a year during her natural life, if the income of my estate not herein bequeathed to her or to the payment of said debts and funeral expenses shall amount to that sum." The testator also gives her the use of his house for life, or, if she should desire to live elsewhere, requests his executor to furnish her a suitable house. She has continued to live in his house, and the executor deducts from the gross income applicable to payment of the \$400 the amount paid out for repairs, taxes, water rates, insurance, and interest on a mortgage on the house. This is plainly right. The gift is of \$400 a year if the net income amounts to that sum. The charges mentioned all fall on income, not on capital, unless the will directs otherwise. *Watts v. Howard*, 7 Met. 478, 482; *Parsons v. Winslow*, 16 Mass. 361; 363; *Sohier v. Eldredge*, 103 Mass. 345, 354; *Plympton v. Boston Dispensary*, 106 Mass. 544, 547.

We see nothing in this will to indicate that the usual rule is not to be applied. The case is not like *Smith v. Fellows*, 131 Mass. 20, where a gift of "\$1,000 per year during her

lifetime, the same to be paid from the income of my property," was held to be an absolute gift of the sum named, payable out of principal if necessary, and therefore payable out of gross income. The gift here is payable only from income, and the income available must be ascertained in the ordinary way.

2. The general expenses of administration should fall upon the corpus of the estate, as they are incurred for the benefit of the whole estate. See *Sawyer v. Baldwin*, 20 Pick 878, 388; *Brown v. Kelsey*, 2 Cush. 243, 249.

The decree of the probate court, erred in charging them to income.

3. There is no doubt that, when an executor's final account comes to this court by appeal, the compensation allowed him is subject to revision, as well as the other items. *Blake v. Pegram*, 109 Mass. 541; Pub. Stat. chap. 144, § 7; Id. chap. 156, §§ 5, 6, 17. The master having declined to revise this matter, the report must be recommitted, if the appellant desires, upon this single point. If it be true, which does not appear, that a commission is allowed the executor for collecting his own debt, the allowance is improper. But possibly, if such an allowance was made, it was considered in determining the other compensation allowed; and it may be thought proper to increase that by a corresponding amount, leaving the total compensation the same. There is nothing in the facts now appearing to indicate that the allowance for attending court and for counsel fees was improper. Pub. Stat. chap. 144, § 7; *Edwards v. Ela*, 5 Allen, 87; *Forward v. Forward*, 6 Allen, 494; *Blake v. Pegram*, *supra*; *Turnbull v. Pomeroy*, 140 Mass. 117, 118.

4. There is a stable in the rear of the house occupied by the testator, which was used by the testator in connection with the house. The executor has let it, and the appellant claims the rent. The mode of use in the testator's lifetime does not necessarily establish that the stable is included in the words "house in which we now live." 2 Wms. Saund. 401, note 2. The connection between the house and stable is not set forth very clearly; nor does it appear very clearly whether the master excluded the allowance of the rent for the stable on the ground that, as matter of construction, the words could not include a stable, or on a finding that the stable was not so connected with the house as to pass with it. On the facts appearing, we cannot say that the master and judge of probate were wrong. It is unnecessary to consider whether, in any case, the widow would have had any other right than personally to occupy the stable if so minded.

Decree accordingly.

George ALLENDORFF

v.

I. M. GAUGENGIGL.

Where a mortgage given to secure the debt of a married man included land owned by his wife; but the wife was not mentioned in the instrument until towards its end, where it was stated that she thereby relinquished all her right, title, and interest in the mort-

gaged premises to the grantee, and released to the grantee, his heirs and assigns, all right of dower and homestead in the premises; and the mortgage was signed by both the husband and wife,—*Held*, that as the relinquishment of the wife's general title was merely to the grantee, and not to his heirs and assigns, the mortgage only included a life estate in the wife's land, and not the fee.

(Suffolk—Filed April 6, 1888.)

ON plaintiff's appeal. Judgment affirmed.

The action was brought to recover damages for the breach of a contract to purchase certain lands. It was heard in the Superior Court upon an agreed statement of facts, which, in substance, set forth that plaintiff duly tendered to defendant a deed of the premises sufficient in form, but that defendant refused to receive it or pay the price, upon the ground that plaintiff had not a good title.

The title was admitted to have been in Mrs. Abby P. Young. Her husband, J. Albert Young, on December 26, 1876, made and signed a promissory note for \$1,000, to secure which he executed a mortgage, which included a certain lot belonging to the husband, and the property in question, belonging to his wife. This mortgage contained the following clause: "And for the consideration aforesaid, I, Abby P., wife of said J. Albert Young, do hereby relinquish all my right, title, and interest in either of the afore-described premises, to said grantee, and do hereby release unto the said grantee and his heirs and assigns all right of or to both dower and homestead in the granted premises," and was signed by both Mr. and Mrs. Young. In 1880 a foreclosure sale was made of both parcels, and they were conveyed to Charles W. Sumner, who conveyed by quitclaim deed to plaintiff, who entered into possession, which continued, peaceable and uninterrupted, down to the time of the commencement of this suit. If plaintiff could give a good and clear title to the premises, judgment was to be entered for plaintiff; otherwise for defendant. Judgment having been entered for defendant, plaintiff appealed.

Mr. Hollis R. Bailey, for plaintiff:

By the words of reference used in the clause of the deed wherein Mrs. Young relinquished her right, the preceding parts of the deed—where the consideration is stated, the land described, and the grantee set forth—are incorporated into and made a part of it.

The word "relinquish" is equivalent to the word "release."

Webster, Dict.; *Stearns v. Swift*, 8 Pick. 584, 586.

The word "grantee" means, not simply "Geo. Allendorff," but "Geo. Allendorff, his heirs and assigns," that being the description of the grantee in the granting part of the deed, and in the habendum.

The words "heirs and assigns," used in the latter part of the clause above recited, must be taken as referring to and limiting the preceding word "grantee" in both the places in which it is found.

See *Bent v. Rogers*, 187 Mass. 192.

The fact that the wife received no part of the consideration is not important.

Crocker, Common Forms, p. 210; *Thatcher v. Churchill*, 118 Mass. 108, 109; *Bartlett v. Bartlett*, 4 Allen, 440.

The word "heirs" is not necessary in the granting clause of the deed, but only in the habendum.

Pratt v. Sanger, 4 Gray, 86.

The habendum defines the estate granted.

1 Jones, Mort. 3d ed. § 67.

The deed contains a power to sell and convey absolutely and in fee simple.

If a power to convey in fee is given, it is not a matter of consequence what estate is given to the person who is to exercise the power. In some cases no estate at all is given. If general language is used, or language that is ambiguous, and a power to convey in fee is given, it will be held that a fee was conveyed to the person appointed to execute the power.

Cayron v. Attleborough Bank, 11 Gray, 492; *Varnum v. Meserve*, 8 Allen, 158; *Sedgwick v. Lustin*, 10 Allen, 430; *Tiedeman, Real Prop.* §§ 863, 864; *Devlin, Deeds*, ed. 1887, § 889.

The fact that Mrs. Young is not mentioned except in those clauses of the deed which follow the clause creating the power, is not important. If she is a party to the clause which allows redemption, then equally she must be held a party to the clause which provides for a foreclosure.

A wife who joins simply to release dower is entitled to the benefit of the redemption clause, and is bound by the foreclosure clause.

Brown v. Lapham, 8 Cush. 558; *McCabe v. Bellows*, 7 Gray, 148; *Davis v. Wetherell*, 18 Allen, 62; *Messiter v. Wright*, 16 Pick. 152.

Mr. William R. Richards, for defendant:

This case is not to be distinguished from the cases of—

Bruce v. Wood, 1 Met. 542; *Raymond v. Holden*, 2 Cush. 264; *Wales v. Coffin*, 18 Allen, 218; *Pierce v. Chace*, 108 Mass. 254.

In these cases it was held that a wife con-

veyed no title by signing and sealing a deed in which there was a declaration, in the conclusion of the deed, that the wife joined in token of her relinquishment of all her right in the bargain premises.

See also the cases given below, where it was held that a wife by simply signing and sealing a deed did not bar her dower or convey any title:

Lufkin v. Curtis, 18 Mass. 223; *Leavitt v. Lamprey*, 18 Pick. 382; *Melvin v. Locks & Canals*, 16 Pick. 187; *Greenough v. Turner*, 11 Gray, 382.

C. Allen, J., delivered the opinion of the court:

The original title was in Mrs. Young, and the plaintiff's title depends on the question whether her title was conveyed by the mortgage of December 26, 1876. She was not a party to the earlier part of the mortgage, and her participation in it as a grantor, was limited to the clause near the end, wherein she relinquished her right in the premises to the grantee, and released to the grantee and his heirs and assigns all right of dower and homestead. Her relinquishment of her general title was merely to the grantee, and not to his heirs and assigns. The suggestions of the plaintiff's counsel that the word "grantee" included the grantee and his heirs and assigns, and that the words "heirs and assigns" used later may be taken as referring back so that the relinquishment to the grantee included his heirs and assigns,—are quite inadmissible. So also the suggestion that she was a party to the power of sale in the mortgage, and that her title was concluded by the exercise of that power. The mortgage, therefore, only included a life estate to the lot now in question; and the title offered by the plaintiff is not good. *Bruce v. Wood*, 1 Met. 542; *Raymond v. Holden*, 2 Cush. 264.

Judgment affirmed.

CONNECTICUT.

SUPREME COURT OF ERRORS.

WARREN MFG. CO.

v.

NORWICH BLEACHING, DYEING, & PRINTING CO. *et al.*

A manufacturer of cotton cloths entered into a contract with C for the sale to C of a certain number of pieces of cotton cloths in the brown, to be delivered in certain specified quantities; and which contract provided that C should not at any one time owe for more than a certain specified number of pieces (about one third of the whole amount bargained for); and that the goods sent to be finished should be sent for account of the manufacturer, C to give instructions, and pay the bills, for the finishing, but not to remove at any one time more than the number of pieces to which his indebtedness at any one time was limited. *Held*, that under this contract, construed in connection with the situation and acts of the parties, the title to that portion of the goods sent by the manufacturer to the finisher, which C was not to owe for or remove, continued in the manufacturer; and that therefore such goods were not liable, while in the possession of the finisher, to attachment as the property of C.

(New London—Filed March —, 1888.)

APPEAL by plaintiffs from a judgment of the Superior Court of New London County in favor of defendants in an action to recover damages for the alleged conversion of certain property. *Reversed*.

The substituted complaint in this case alleged that on July 29, 1884, plaintiffs were the owners of 81 cases of cotton goods which were in possession of defendant, the Norwich Bleaching, Dyeing, & Printing Company; that plaintiffs were entitled to the immediate possession of the goods, and demanded the same of defendant, which was refused upon the ground that said defendant was garnishee in two processes of foreign attachment levied upon said goods,—in one of which the Attawaugan Company is plaintiff, and F. M. R. Casey is defendant; and in the other said Casey is defendant, and Charles G. Taylor and Godfrey Kissel, partners under the firm name and style of Taylor & Kissel, are plaintiffs; that said defendant also refused to deliver said goods to the plaintiffs on the ground that it had a lien upon the same to the full value thereof, for finishing the said goods and other goods for said F. M. R. Casey.

The complaint prayed a delivery of the goods to plaintiffs; damages; that the Bleaching, Dyeing, & Printing Company, the Attawaugan Company, and Taylor & Kissel be required to interplead; and for further relief.

It appeared that plaintiffs and Casey had entered into a contract of which the following is a copy:

1 CONN.

New York, January 22, 1884.

Sold to F. M. R. Casey, for $\frac{1}{4}$ Warren Mfg. Co., 7,500 ps. Warren Co's 40-inch 60x68 browns, to weigh about 5 yards per lb., same as last, and in double cuts, at 5 $\frac{1}{4}$ ¢ peryd., 4 mos. credit. To be delivered as follows:

February, 1,000 ps., in two deliveries.

March, 1,500 ps. do

April, 1,500 ps. do

May, 1,500 ps. do

June, 1,000 ps. do

July, 1,000 ps. do

Warren Co. to have option until May 1, of accepting or rejecting 1,000 ps. for August.

Strikes, lockouts, and other unavoidable casualties excepted.

It is hereby agreed that F. M. R. Casey shall not at any time owe for more than 2,500 ps., say about \$7,500, and that all goods sent to be finished shall be sent for account of the Warren Mfg. Co.

Mr. Casey to give finishing instructions, and pay finishing bills, but not to remove goods to an amount exceeding the above 2,500 ps. at any one time.

Shipping directions to follow.

D. O. Tatum.

Accepted by F. M. R. Casey.

Further facts appear in the opinion.

Messrs. C. E. Perkins and J. M. Thayer, for plaintiffs:

The question of the title to the goods must be determined by a construction of the contract.

Griswold v. Cook, 46 Conn. 198; *Fowler v. Mallory*, 1 New Eng. Rep. 649, 53 Conn. 420; *Dresser Mfg. Co. v. Waterston*, 3 Met. 9.

In construing a contract, the first point is to ascertain what the parties themselves meant and understood by it. This intention is to be ascertained from the instrument itself. The general intention of the parties controls particular words, and to such intention even technical words must give way.

2 Pars. Cont. 494, 499, 501, 517; *Brown v. Slater*, 16 Conn. 192; *Buell v. Cook*, 4 Conn. 242; *Todd v. Hall*, 10 Conn. 544; *Cooke v. Barr*, 39 Conn. 296; *Fowler v. Mallory*, 1 New Eng. Rep. 649, 53 Conn. 437; *Waterbury First Soc. v. Platt*, 12 Conn. 181; *Griswold v. Cook*, 46 Conn. 198; *Tomlinson v. Ousatonic Water Co.* 44 Conn. 99; *Bean v. Atwater*, 4 Conn. 8.

A man's bargain ought to be performed as he intended it. There is no reason why a man should be forced to trust when he never meant it.

Forbes v. Marsh, 15 Conn. 384; *Hughes v. Kelly*, 40 Conn. 148; *Lewis v. McCabe*, 49 Conn. 141.

To show an intention to trust Casey, the defendants rely upon the acts of the plaintiffs at the time it shipped the goods to the bleaching company. But whenever the vendor has reserved to himself the *jus disponendi*, no title passes, even where there is an actual delivery to the vendee. But the rules adopted for the purpose of ascertaining whether the vendor has reserved such right or not, where his intention is to be determined by his acts and conduct, do not apply to cases like the present where there is a written contract to which we look to gather the intention.

Benj. Sales, § 381; *Merchants Nat. Bank v.*

615

Bangs, 102 Mass. 291; *Cairo Nat. Bank v. Crocker*, 111 Mass. 168.

As the goods were not in existence, but were to be manufactured, the contract was executory, and no present title passed by the agreement. Under the contract no title passed to Casey in the goods manufactured until they were removed, pursuant to the contract, from the bleaching company. As he removed the goods, the title *pro tanto* passed to him.

Moody v. Brown, 56 Am. Dec. 643, note; *Sutton v. Campbell*, 2 Thomp. & C. 595; *Hunt v. Thurman*, 15 Vt. 386; *Mason v. Thompson*, 18 Pick. 305.

As to the force to be given to the stipulations in the contract, see—

The Elgee Cotton Cases, 89 U. S. 22 Wall. 180 (22 L. ed. 863); *Martineau v. Kitching*, L. R. 7 Q. B. 486.

By the contract, Casey was authorized to remove, and the plaintiffs by their instructions to the bleaching company placed it in his power, as they were bound to do, to remove, 2,500 pieces in excess of what he had at any time paid for. To goods removed by him in violation of the contract, he would acquire no title.

Jennings v. Gage, 13 Ill. 610; *S. C.* 56 Am. Dec. 476.

Whether a delivery passes title depends on the intent with which it is made.

Ilidreth v. Fitts, 53 Vt. 684; *Merchants Nat. Bank v. Bangs*, 102 Mass. 291; *Benj. Sales*, p. 318, § 381; pp. 324, 325, § 394; *Wigton v. Bowley*, 180 Mass. 254; *Turley v. Bates*, 2 Hurlst. & C. 200; *Cairo Nat. Bank v. Crocker*, 111 Mass. 166; *Parker v. Baxter*, 86 N. Y. 593.

Taking the view that the property and right of possession in these goods passed to Casey when plaintiffs appropriated them to the contract, the goods never came into his actual possession, and the plaintiffs have a lien, as vendors, upon the goods. The bleaching company was the bailee of the plaintiffs until the goods were removed under the contract.

Benj. Sales, §§ 766-769, 771; *Milliken v. Warren*, 57 Me. 46; *Townley v. Crump*, 4 Ad. & El. 58; *Doddsley v. Varley*, 12 Ad. & El. 632; *Parks v. Hall*, 2 Pick. 211; *Barrett v. Pritchard*, Id. 515; *Arnold v. Delano*, 4 Cush. 33.

Even though credit be given, which is generally conclusive as to the waiver of the lien, yet, if the goods are thus held until the credit has expired, the vendor can enforce his lien though the buyer may not be insolvent.

Benj. Sales, § 825; *Valpy v. Oakeley*, 16 Q. B. 641; *Bunney v. Poyntz*, 4 Barn. & A. 568; *Dixon v. Yates*, 5 Barn. & A. 313.

Messrs. J. Halsey and S. Lucas, for defendant, the Attawaugan Company:

It was immaterial how the parties understood the contract, its terms and conditions. The contract, being in writing, speaks for itself; and the meaning of the language employed cannot be varied by explanation and the intention of the parties not expressed in the instrument itself.

Hotchkiss v. Higgins, 52 Conn. 213; *Pierpont v. Longden*, 46 Conn. 499; *Mead v. Strouse*, 41 Conn. 567; *Galpin v. Atwater*, 29 Conn. 97; *Glendale Woolen Mfg. Co. v. Protection Ins. Co.* 21 Conn. 37; *Brown v. Slater*, 16 Conn. 196;

Avery v. Chappel, 6 Conn. 275; *Dean v. Mason*, 4 Conn. 432; 1 Swift, Dig. 187; 3 Taylor, Ev. 8th ed. §§ 1202, 1236.

The contract, being in the language of the plaintiffs, will be construed most strongly against them, if susceptible of a double meaning in any part.

Elting v. Sturtevant, 41 Conn. 176; *Barney v. Newcomb*, 9 Cush. 46.

The plaintiffs made an appropriation of and delivered the goods free on board the cars at Warren. They sent Casey an invoice of such goods, as sold to him, and a bill of lading. They charged said goods to him on their books as goods sold, and the 4 months' credit which Casey was to have by the contract commenced from the date of such deliveries. Casey, from the time said goods were shipped, and the invoices and bills of lading sent to him by the plaintiffs, assumed the full and absolute control of the goods, paid freight on them, had them finished, sold portions of them; and all this with the full knowledge of the plaintiffs. By the terms of the contract, and deliveries under it, and the conduct of the parties, the title to the goods was in Casey when attached.

Benj. Sales, 4th ed. § 331, and note; §§ 315, 317, 399; 1 Pars. Cont. 519-526; 2 Kent, Com. 10th ed. 685-687; *Higgins v. Murray*, 73 N. Y. 252; *Odell v. Boston & M. R. Co.* 109 Mass. 50; *Merchants Nat. Bank v. Bangs*, 102 Mass. 295; *Krulder v. Ellison*, 47 N. Y. 36; *Bailey v. Hudson River R. Co.* 49 N. Y. 70.

The plaintiffs had no lien on the goods. They had sold and delivered them without any agreement that they should remain its property, or that it was to have a lien on them. The vendee had taken possession of the goods and placed them in the hands of a third party, who had expended labor upon them and entirely changed their character. The contract and conduct of the plaintiffs were wholly inconsistent with such lien.

Pinney v. Wells, 10 Conn. 118; 1 Swift, Dig. p. 547; *Parks v. Hall*, 2 Pick. 212; *Chapman v. Searle*, 3 Pick. 83; *Benj. Sales*, §§ 797, 827; 1 Pars. Cont. § 526; 2 Kent, Com. 10th ed. 836; *King v. Indian Orchard Canal Co.* 11 Cush. 231; *Stickney v. Allen*, 10 Gray, 352.

Beardsley, J., delivered the opinion of the court:

The superior court found that the title to the goods in question in this case, which were attached, as the property of Casey, by the Attawaugan Company, was in him at the time of the attachment, and rendered judgment for the defendants. The question is whether such finding is justified by the facts found.

It is found that the contract between the plaintiffs and Casey, though importing on its face a present sale of existing property, was in reality a contract for the future sale of goods to be manufactured by the plaintiff. This is immaterial, however, as the goods were afterwards made, and the contract then applied to them as it would have done if they had been made before it was entered into.

The first question is as to the intention of the parties as expressed by the contract.

That this intention is to be derived from a reasonable construction of all its language.

looking to its subject-matter, the situation of the parties, and their object in making it, is elementary law.

The plaintiffs were manufacturers of cotton cloths. Casey was engaged in the business of buying such goods and reselling them after having them finished at a bleachery.

Let us suppose that Casey proposes to the plaintiffs to buy of them their goods to the amount of \$16,500 on four months' credit. The plaintiffs are not willing to give him the credit, but are willing to sell him goods to the amount of \$7,500 on four months' credit. Under such circumstances it is not improbable that the parties might come together upon an arrangement that the entire quantity of goods which Casey wished to buy should be delivered to a bleachery, to be finished as Casey desired and under his direction; but he at no time to have the title to, or the right to remove from the bleachery, more than a certain number of pieces of the goods,—the price of which was \$7,500,—until he paid for those so removed; the goods to be sent to the bleachery by installments as they were manufactured, and the four months' credit to commence running when they were sent.

In this way Casey might have all the goods ready for market with as little delay as if he owned them, and the plaintiffs might have all the advantage of a present sale, if Casey performed his contract, and, if he did not, would have the goods in excess of those sold to Casey, increased in value by the labor bestowed upon them at the bleachery. Such was evidently the situation of the parties, and the object to be accomplished; and such, in substance at least, is the contract we are considering.

The goods were to be delivered to the bleachery, and Casey was to have the direction of the finishing and the right to take them away, subject to the provision that he should not remove more than 2,500 pieces which he had not paid for.

The authority given to him to direct as to the finishing of the goods would be senseless if he was the owner of them; and the expressions, shall not "owe for" "or remove" are equivalent to an affirmation by the parties that the title to the goods which Casey was not to owe for or remove should continue in the plaintiffs.

If Casey had the title to the goods, he would owe for them, and would have the right to remove them.

The defense claims that, by the contract, a delivery of the goods at the bleachery was to be a delivery of them to Casey. If this was so, we do not see how the plaintiffs would be prevented by it from enforcing their reserved right of property.

The well-settled law of this State is, that the delivery of the possession of personal property to one, under a contract that he shall not become the owner of it until he has paid for it, does not vest the title in him. *Levis v. McCabe*, 49 Conn. 141, and cases there cited.

But the language of the contract is wholly inconsistent with the claim of the defendants in this respect.

The goods were to be sent to the bleachery, on account of the plaintiffs; and Casey's right
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of possession, as we have seen, is expressly limited.

If the rights of the parties, therefore, are to be governed by the contract, it seems clear that the title to the 81 pieces of goods was in the plaintiffs, when they were attached by the Attawaugan Company, it appearing that Casey then owed for at least 2,500 pieces, which he had removed.

The parties, by their dealings under the contract, gave it a practical construction fully in accord with that which we have given it. Seven thousand of the 7,500 pieces contracted for had been delivered in various shipments before the 14th of July, when Casey became insolvent and disappeared. A letter from the plaintiffs to the bleaching company, sent in connection with each shipment, informed it that the goods were sent, and were to be finished on account of the plaintiffs, but that Casey was to give the instructions as to the finishing and pay the bills for finishing, and requested information as to the shipment of any of the goods by Casey.

A letter sent by the plaintiffs, in connection with the first shipment, informed the bleaching company that Casey was to give all instructions regarding them and the goods to be thereafter sent, until further orders from them. In the month of June, Casey, in violation of the contract, removed from the bleachery more than 2,500 pieces, without making the required payment. The plaintiffs at once, upon being informed of it by the bleaching company, requested Casey to return the goods so taken, and he complied, so far as he could, with the request.

The court has not found, and it cannot be inferred from the finding, that the plaintiffs have waived any of their rights under the contract. The authority which it is found that Casey, by the permission of the plaintiffs, exercised over the goods, was only such as was given to him by the contract. The charging of the goods on the plaintiffs' books, as if sold on the day they were sent to the bleachery, and sending an invoice to Casey as of goods sold, is probably accounted for by the fact that, upon the performance by Casey of his contract, the sale was too late from the time of the delivery of the goods at the bleachery, in respect to the credit to be given; but, however this may be, these facts are not of controlling significance.

There is error.

In this opinion the other Judges concurred.

WINDHAM COUNTY SAVINGS BANK v.

John L. HIMES.

1. The provision of the Act of 1833 (Rev. 1875, p. 358, § 2), to the effect that the foreclosure of a mortgage shall not preclude the mortgage creditor from recovering so much of the mortgage debt as the mortgaged property, estimated by the court at the expiration of the time limited for redemption, shall be insufficient to satisfy, is not (except in cases where there is an appraisal under the Act of 1878) repealed.

- by the provision of the **Laws of 1878, chap. 129**, to the effect that, upon motion of any party to a foreclosure, the value of the mortgaged property shall be **appraised by appraisers**, and that the mortgage creditor shall, in any further suit upon the mortgage debt, recover only the difference between the value of the mortgaged property as fixed by such appraisal and the amount of his claim.
2. These **statutory provisions are not inconsistent, but alternative**. If there is an appraisal under the Act of 1878, it fixes conclusively the value of the premises; if there is no such appraisal, the court ascertains the value upon any proper evidence.
 3. The Legislature did not intend, by the Act of 1878, to bar suits for a recovery of a deficiency in the mortgage debt, in cases where there has been no appraisal.
 4. The provision of the Act of 1878, that no suit for such deficiency shall be brought against any person who was not a party to the foreclosure suit, repeals so much of the Act of 1833 as allowed such a suit against a person who was not a party to the foreclosure suit.

(Windham—Filed December 5, 1887.)

ACTION to recover the balance of a mortgage debt after a foreclosure of the mortgage, brought in the Superior Court of Windham County and there reserved for the consideration and advice of this court. *Judgment for plaintiff advised.*

Argued before Park, *Ch. J.*, Carpenter, Pardee, Loomis, and Beardsly, *JJ.*

The facts are sufficiently stated in the opinion of the court.

Messrs. John L. Penrose, Jeremiah Halsey, and Arthur G. Bill, for plaintiff:

It is now settled law in this State that "the foreclosure of the mortgage shall not preclude the mortgage creditor from recovering so much of the claim to secure which the mortgage was given as the property mortgaged, estimated at the expiration of the time limited for redemption, shall be insufficient in value to satisfy."

Rev. Stat. p. 358, § 2.

Prior to 1833 it was held, by repeated decisions, that the foreclosure was in the nature of a satisfaction of a debt secured by mortgage. It was deemed an appropriation of the thing pledged in payment of the demand for which it was security.

Derby Bank v. Landon, 3 Conn. 62; *Swift v. Edson*, 5 Conn. 581; 2 *Swift, Syst.* 440; 2 *Swift, Dig.* 219.

By the statute above cited, "the court before which the action upon the claim is pending shall ascertain the value of the mortgaged property at the expiration of the time limited, and render judgment for the difference between such value and the amount of the claim."

This statute is not repealed by Pub. Acts 1878, chap. 129, p. 341.

There is no repealing clause in this Act; consequently if it repeals the former Act it must be by implication. Repeals by implication are

not favored by courts. The two statutes must directly conflict or there must be negative words.

Kallahan v. Osborn, 37 Conn. 490; *Haynes v. Jenks*, 2 Pick. 176.

Messrs. T. E. Graves and M. A. Shumway, for defendant.

Carpenter, J., delivered the opinion of the court:

This is an action to recover the balance of a mortgage debt after a foreclosure of the mortgage. The defendant was a party to the foreclosure suit. No application was made to the court to appoint appraisers to ascertain the value of the mortgaged premises at the time of the foreclosure; as there was no appraisal the defendant insists that the suit cannot be maintained. The case is reserved for the advice of this court.

Prior to 1833 the foreclosure of a mortgage operated to extinguish the mortgage debt. In that year a statute was passed which appears in the Revision of 1875, p. 358, § 2, as follows: "The foreclosure of a mortgage shall not preclude the mortgage creditor from recovering so much of the claim to secure which the mortgage was given as the property mortgaged, estimated at the expiration of the time limited for redemption, shall be insufficient in value to satisfy."

In 1878 a statute was passed as follows:

"§ 1. The foreclosure of a mortgage shall be a bar to any further suit or action upon the mortgage debt, note, or obligation, unless the person or persons who are liable for the payment thereof are made parties to such foreclosure. § 2. Upon the motion of any party to a foreclosure, the court shall appoint three disinterested appraisers, who shall, under oath appraise the mortgaged property within ten days after the time limited for redemption shall have expired, and shall make written report of their appraisal to the clerk of the court where said foreclosure was had, which report shall be a part of the files of said foreclosure suit; and such appraisal shall be final and conclusive as to the value of said mortgaged property; and the mortgage creditor in any further suit or action upon the mortgage debt, note, or obligation shall recover only the difference between the value of the mortgaged property as fixed by such appraisal and the amount of his claim." Sess. Laws 1878, chap. 129.

The case turns upon the construction of these two statutes. Is the former repealed by the latter? If it is, the action cannot be maintained. If not, the plaintiff is entitled to a judgment.

There is no repeal except by implication. To be a defense the former statute must be wholly repealed. As repeals by implication are not favored, the new will repeal the old only so far as the two are incompatible. It will not be presumed that the Legislature intended to repeal any portion of an old statute which may well stand with the new; the two taken together being intelligible and reasonable.

The statute of 1878 provides that no suit shall be brought against any person who was not made a party to the foreclosure suit. The former statute allowed such a suit, and of course to that extent is repealed. The statute

of 1878 provides that, when an appraisal is had under its provisions, such appraisal shall be conclusive as to the value of the mortgaged premises. The old statute required the court to ascertain the value, which, being inconsistent with the new, is also repealed in all cases where there is an appraisal under the new statute. The defendant was a party to the foreclosure suit; hence the statute does not bar this suit. But there was no appraisal; hence that portion of the statute relating to the appraisal and its effect have no application. The defendant insists that that provision of the statute is exclusive, and that, notwithstanding the fact that there was no appraisal, the value of the property cannot be ascertained in any other way. We think that such a construction gives an effect to the Act which the Legislature did not intend.

The first statute contains this provision: "But the value of the property mortgaged, at the expiration of said time, shall be ascertained by the court before which the action is pending; and he shall recover only the difference between such value and the amount of his claim." This clause is not expressly repealed, and is not repealed by implication except in cases where there is an appraisal under the statute of 1878. The circumstances of two cases which may be brought under that statute may be very different. In one there may be an appraisal. If there is, that fixes conclusively the value of the premises. In the other there is no appraisal; in which case the court ascertains the value upon any proper evidence.

The Legislature did not intend to bar suits in cases where there was no appraisal, because it has not said so. It has said that one omission (to make the debtor a party to the foreclosure) shall constitute a bar, and said it expressly; the court cannot extend it to an omission to have an appraisal. But it did intend that the mortgage debtor as well as the creditor should have an opportunity to have an appraisal. It is optional, not compulsory. The statute proceeds upon the theory that the debtor has an interest in having an appraisal; therefore he may move for the appointment of appraisers. But if the defendant is right in his construction of the statute, it is for the debtor's interest to have no appraisal, for then no suit can be maintained against him.

If the Legislature had intended to bar a suit unless there was an appraisal, it would have said so expressly, or would have used language that would admit of no other construction. But the language used will admit of another construction, and, when considered with reference to the subject-matter and object of the statute, seems to require it.

We advise judgment for the plaintiff.

In this opinion the other Judges concurred, except *Park, Ch. J.*, who dissented.

Richard WOOD *et al.*

v.

WILEY CONSTRUCTION CO.

NATIONAL TUBE WORKS CO. v.

SAME.

1. In the case of a joint-stock corporation organized under the laws of Con-

necticut, whenever and wherever all of its stockholders are assembled and in fact engaged in considering and determining what the corporation shall do and by whom it shall act, there is the corporation; and what they do, it does. The appointment by such stockholders of an agent to speak or act for or represent the corporation is an appointment by the corporation, and it is bound by such agent's action.

2. It is not necessary to the above result of the stockholders' action that there should have been any previous notice, or that there should be any written resolution or any record of their action; their consenting speech and act is legally equivalent to all these.
3. After a joint-stock corporation is organized, its directors and agents, acting as such, cannot transact business of the corporation, and within its scope, in its name, and escape the legal result of binding the corporation.
4. If the stockholders of a joint-stock corporation (the organization certificate of which has been filed with the secretary of state, as required by the Connecticut statutes,—a copy of which is made by the statute *prima facie* evidence of the due formation, existence, and capacity of the corporation) proceed to transact business and hold themselves out to the world as a corporation, the burden of showing any defect in the organization of the corporation is upon them, when they desire to avail themselves of such defect, in an action against the corporation for a breach of contract made by them in its name.

(Hartford—Filed March, 1888.)

APPEAL by defendant from judgments of the Superior Court of Hartford County in favor of plaintiffs in actions upon promissory notes. *Affirmed.*

The defendant was alleged to be a corporation organized under the laws of Connecticut for the construction and repair of waterworks in different parts of the country. It purchased large quantities of materials from the respective plaintiffs, for a part of which it issued its promissory notes. To recover the amount alleged to be due upon these notes, as well as for goods sold and delivered, these actions were brought. The court below rendered judgment for \$68,691.82 in favor of Richard Wood *et al.*, and for \$52,041.51 in favor of the National Tube Works Company, and defendant appealed.

Further facts appear in the opinion.

Messrs. Charles E. Perkins and Case, Maltbie, & Bryant, for defendant, appellant:

The Wiley Construction Company was not legally competent to do any business or make any contracts.

The court finds that there was no evidence that the articles of association were ever published as required by Rev. Stat. 1875, pp. 810, 811, §§ 1, 5.

Until this was done, this corporation had no

power to, and in the eye of the law did not, make the notes or contracts upon which judgment was rendered in these cases.

Where the doing certain acts is by statute made a prerequisite to the existence of a corporation, until those acts are done no corporation exists at all.

1 Morawetz, Priv. Corp. 2d ed. p. 28, § 27, and cases cited.

If a grant of a special power, only to exist when a certain thing is done, does not exist until that thing is done, a grant of a general power to do any business, only to exist when certain things are done, is governed by the same rule.

Medill v. Collier, 16 Ohio St. 599; *Heinig v. Adams & W. Mfg. Co.* 81 Ky. 300; *Hurt v. Salisbury*, 55 Mo. 310; *Garnett v. Richardson*, 35 Ark. 144.

The rule that the existence of a corporation may be proved by producing its charter and proving acts of user under it only applies to corporations organized under special charters, and not to those organized under general laws.

Mokelumne H. C. & Min. Co. v. Woodbury, 14 Cal. 265; *Narragansett Bank v. Atlantic Silk Co.* 3 Met. 288.

Nor is the corporation estopped from showing that it was not competent to make a contract by the fact that it has received a consideration or benefit from it.

Ang. & A. Corp. § 256, and cases cited.

A corporation cannot be estopped from showing that a contract was *ultra vires*.

Hood v. New York & N. H. R. Co. 22 Conn. 508.

The representations, declarations, and admissions of the agent of a corporation stand upon the same footing with those of the agent of an individual. To bind the principal, they must be within the scope of the authority confided to the agent, and must accompany the act or contract which he is authorized to do or make.

Ang. & A. Corp. § 309. See 2 Morawetz, Priv. Corp. § 540 a, p. 509; *Peek v. Detroit Novelty Works*, 29 Mich. 313; *Corbin v. Adams*, 6 Cush. 98; *Tripp v. New Metallic Pack Co.* 187 Mass. 499.

Messrs. Arthur F. Eggleston and Edward D. Robbins, for plaintiffs, appellees:

If illegality of organization of a corporation is to be relied on, it must be specially pleaded.

West Winsted Sav. Bank & Build. Asso. v. Ford, 27 Conn. 282; *Savage Mfg. Co. v. Armstrong*, 17 Me. 34; *Heaston v. Cincinnati & Ft. W. R. Co.* 16 Ind. 275; *Conard v. Atlantic Ins. Co.* 26 U. S. 1 Pet. 386 (7 L. ed. 189); *Soc. Prop. Gosp. v. Pawlet*, 29 U. S. 4 Pet. 480 (7 L. ed. 927); *Union Cement Co. v. Noble*, 15 Fed. Rep. 502.

The statute provides that the officers of a corporation, "who shall intentionally fail to perform any of the duties by law required of them, shall be jointly and severally liable for all its debts contracted during the period of such failure."

Rev. Stat. p. 314, § 3.

Where a defect in the organization of a corporation has been specially pleaded and fully proved, the courts have, notwithstanding, refused to permit the fact to be used in favor of a defendant corporation, against an innocent party whom it has induced to contract with it.

See *Bigelow, Est.* p. 463; *Stone v. Burkshire Cong. Soc.* 14 Vt. 86; *Reynolds v. Myers*, 51 Vt. 444; *Callender v. Painesville & H. R. R. Co.* 11 Ohio St. 518; *Aller v. Cameron*, 3 Dill. 198; *Blackburn v. Selma, M. & M. R. Co.* 2 Flipp. 525; *Empire Mfg. Co. v. Stuart*, 46 Mich. 482; *Camp v. Byrne*, 41 Mo. 525.

When, in suits on a contract, the existence of the corporation is put in issue, it is only necessary to prove that the corporation is *de facto* existent.

Morawetz, Priv. Corp. § 770; *Society Perun v. Cleveland*, 1 West. Rep. 506, 43 Ohio St. 481; *Stout v. Zulick*, 5 Cent. Rep. 333, 48 N. J. L. 599; *Smith v. Sheeley*, 79 U. S. 12 Wall. 358 (20 L. ed. 430); *Swartwout v. Michigan A. L. R. Co.* 24 Mich. 389; *Pape v. Topeka Capitol Bank*, 20 Kan. 440; *Toledo Bank v. International Bank*, 21 N. Y. 542; *Douglas County v. Bolles*, 94 U. S. 104 (24 L. ed. 46); *Cochran v. Arnold*, 58 Pa. 399; *M. E. Union Church v. Pickett*, 19 N. Y. 432; *Eaton v. Aspinwall*, 19 N. Y. 119; *Thompson v. Candor*, 60 Ill. 244.

The corporation cannot set up an insufficient publication of its certificate of incorporation as a defect in its organization, to defeat a recovery against it.

Dooley v. Cheshire Glass Co. 15 Gray, 494; *Whitney v. Wyman*, 101 U. S. 392 (25 L. ed. 1050); *Merrick v. Reynolds, E. & G. Co.* 101 Mass. 381; *Hawes v. Anglo-Saxon Petroleum Co.* Id. 397; *West Winsted Sav. Bank & Build. Asso. v. Ford*, 27 Conn. 282.

A formal vote is not necessary to the appointment of an agent by a corporation.

Melledge v. Boston Iron Co. 5 Cush. 158; *Goodwin v. Union Screw Co.* 34 N. H. 378.

Acquiescence by the managing directors of a corporation in the customary exercise of assumed authority by a given person is equivalent to a formal grant of such authority, so far as the rights of innocent third parties are concerned. This is true even when such acquiescence is simply the result of neglect or inattention.

Story, Ag. § 56. See *Sherman v. Fitch*, 96 Mass. 64; *Lyndeborough Glass Co. v. Massachusetts Glass Co.* 111 Mass. 315; *Martin v. Webb*, 110 U. S. 14 (28 L. ed. 50); *Mahoney Min. Co. v. Anglo-Californian Bank*, 104 U. S. 192 (26 L. ed. 707); *Dougherty v. Hunter*, 54 Pa. 330; *Allen v. Citizens Steam Nav. Co.* 22 Cal. 28; *First Nat. Bank v. Kimberlands*, 16 W. Va. 555; *Smith v. Hull Glass Co.* 11 C. B. 897; *Kelsey v. Crawford County Nat. Bank*, 69 Pa. 426; *Sturgis Nat. Bank v. Reed*, 36 Mich. 263; *Chicago & N. W. R. Co. v. James*, 24 Wis. 888; *Beers v. Phoenix Glass Co.* 14 Barb. 358; *Chicago Build. Soc. v. Cronell*, 65 Ill. 453; *New Hope & D. B. Co. v. Phoenix Bank*, 3 N. Y. 156; *Mitchell v. Deeds*, 49 Ill. 417; *Smith v. Smith*, 62 Ill. 493; *Phillips v. Campbell*, 48 N. Y. 271; *Forster v. Ohio-Colorado Reduction & M. Co.* 5 McCrary, 330; *Lee v. Pittsburgh Coal & M. Co.* 56 How. Pr. 873; *Gordon v. Preston*, 1 Watts, 385; *Springfield Nat. Bank v. Fricke*, 75 Mo. 178; *Perry v. Simpson Waterproof Mfg. Co.* 37 Conn. 520; *Toll Bridge Co. v. Betworth*, 30 Conn. 391; *Morawetz, Priv. Corp.* § 538; Ang. & A. Corp. § 284; *Field, Corp. Wood's ed.* §§ 171, 172; *Dill. Mun. Corp.* 132, 383, 750.

After a corporation has invested an agent with apparent authority to represent it, persons

dealing with such agent may rely upon this apparent authority until they have received notice, in some way, that the authority has expired or has been revoked.

Morawetz, Priv. Corp. § 637.

Pardee, J., delivered the opinion of the court:

These are two cases against the Wiley Construction Company, upon the same state of facts. They were argued together by agreement, and will be treated as one case.

The defendant corporation was organized early in February, 1880, under the joint-stock laws of this State, and located in Hartford. A certificate of organization was filed in the office of the secretary of state, February 9, 1880.

The capital stock was fixed at \$500,000, divided into 5,000 shares. Solon L. Wiley subscribed for 2,500 shares, George Ballou for 2,499 shares, and George E. Beatty for 1 share.

Wiley lived at Greenfield, in the State of Massachusetts; Ballou at New York city or Boston; and Beatty at Boston. Wiley was, and for many years had been, a civil engineer, and engaged in various engineering enterprises, and particularly in obtaining rights or franchises from cities, towns, villages, etc., in different parts of the United States, to construct systems of waterworks for supplying such municipalities and the inhabitants thereof with water; and, having obtained such rights or franchises, had been engaged in constructing the waterworks, either personally or through a local company organized to construct them.

Ballou was engaged in the banking and brokerage business in New York and Boston; and, at or about the time when the defendant corporation was organized, was interested and engaged in promoting and floating various railroad, mining, and other enterprises, and in providing the capital to build and work the same, and in providing for the issue and marketing of the stock and bonds incident to these schemes. Ballou's principal place of business was in New York city, and the greater part of his time and attention was applied to his business at New York, though occasionally he was in Boston.

Beatty was employed by Ballou as cashier in his Boston office. Ballou and Wiley had known each other from childhood, and knew of the line of business each was so engaged in.

There was no evidence that the articles of association were advertised, as required by law.

No formal meetings of the stockholders or directors were held after the meetings at which the defendant was organized, except, possibly, a meeting to place Walter Burnham in the place occupied, before his death, by Mr. Beatty.

The business and affairs of the company were managed by Ballou and Wiley in an informal manner, and as if it was their joint personal affair; they using the name of the defendant for that purpose.

No formal resolution or vote was had empowering any person to act for the defendant in any way; but the authority to act for and bind the defendant was agreed by Ballou, Wiley, and Beatty to be exercised by Wiley in the manner that he did in fact act.

The corporation was organized as the result of the agreement of Ballou and Wiley. Beatty

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had no real interest in it, and subscribed for his single share so as to make the three persons associating, required by the statute. Beatty's single share was held for the benefit of Ballou.

The corporators were made directors. Wiley was made president, and Beatty secretary and treasurer.

Nothing has ever been paid in on account of any of the subscriptions to the capital stock.

The condition of affairs, and the reasons which induced Ballou and Wiley to organize the corporation, were as follows:

From and after 1877 or 1878, and down to the organization of the corporation, waterworks had been commenced or constructed in whole or in part in several places,—those at Ottumwa and Tiffin completed so far as the original construction was concerned, and those at Niles, Owego, and Towanda were in process of construction. Those completed were receiving repairs and extensions from time to time.

The corporation was suggested and organized for the purpose of doing all that had theretofore been done by Ballou and Wiley in obtaining the right to build, and in constructing and extending waterworks and pipe-lines, and in keeping the same in repair.

Contracts, rights, or franchises to construct were to be obtained by Wiley in the defendant's name, and the construction, extension, and repair was thereafter to be done by the defendant or by Wiley in its name, and the material and supplies used in the construction were to be purchased by Wiley in its name or in his own name as he saw fit.

As president and general manager of the Wiley Construction Company, and with the knowledge and consent of Ballou, Wiley, beginning in the spring of 1880, took, in behalf of the company, new contracts to build works at Gardner, in Massachusetts; Las Vegas, in New Mexico; Clifton, in Arizona; and Appleton, in Wisconsin. He also contracted to build and did build a pipe-line for the San Pedro & Cañon Del Agua Mining Company. But, as Ballou was the president and promoter, and his house the financial agent, of the mining company, it was thought best by Ballou and Wiley that Wiley should take this contract in his individual name. But in fact it was for the benefit of Ballou and Wiley, in the same manner and to the same extent as all the others, and purchases were made by Wiley therefor in the name and upon the credit of the Wiley Construction Company. Shipments were made on account of this contract, both to Wiley and to Captain Ruger, an employee engaged in the construction of the pipe-line.

All the affairs, financial and otherwise, of the Wiley Construction Company, from and after its organization down to the year 1882, were managed by Wiley, with the advice and direction of Ballou.

Beatty died in July, 1881, and his place as director and officer of the corporation seems not to have been filled until the fall of 1881, when one Walter Burnham, an attorney at law by profession, but then employed by Ballou in some of his many schemes, acted, to some extent, in place of Beatty, as an officer of the company.

No books of the defendant seem to have been kept, and no formal record of the doings of its

officers or stockholders. No reports, as required by law, were made. But Ballou and Wiley continued to prosecute their schemes after the formation of the corporation substantially as they did before, using the name of the corporation when it suited their purposes, and omitting it when they chose.

The manager at the plaintiff's works, and the treasurer and financial manager of the plaintiff, called upon or saw Ballou, and he told each of them that the defendant was responsible, and that Wiley had power to purchase on behalf of the defendant; and the goods were sold and delivered to Wiley upon the credit of the defendant, and the debt in question incurred in reliance upon such statements of Ballou, and upon the representations of Wiley and the credit of the defendant. The goods were used at Tiffin, Towanda, Las Vegas, Clifton, Ottumwa, Owego, and Appleton.

The defendant filed reasons of appeal, as follows:

1. That the court erred in not holding that, there being no evidence that the articles of association were published as required by law, the Wiley Construction Company was never authorized to transact business, and could not legally transact any.

2. The court erred in holding that, upon the facts found, the contracts of purchase made by said Wiley of the plaintiffs in the name of the Wiley Construction Company were binding upon that corporation.

3. The court erred in holding, upon the facts found, that said Wiley had legal authority to make contracts binding upon the Wiley Construction Company.

4. The court erred in holding that the statements of said Ballou in relation to the authority of said Wiley to make contracts in the name of the Wiley Construction Company were binding upon said corporation, as an estoppel or otherwise.

5. The court erred in holding that, there never having been any legal meeting of the directors after the organization, authority could be legally given to said Wiley to make contracts for the corporation by separate agreements of the directors.

6. That it does not appear, from the finding of facts, that said Wiley had any legal authority to make the purchases of the plaintiffs for the Wiley Construction Company, for which they have recovered judgment, nor that the same have ever been ratified or affirmed by the corporation, nor that the corporation had ever received any benefit from the same.

7. That it does not appear from the finding that said Wiley had any authority to make any of the contracts for waterworks in the name of the Wiley Construction Company, which are mentioned in the finding, and especially the contracts at Appleton and elsewhere for which the goods of the plaintiffs in this case were furnished.

The finding is that "no formal resolution or vote was had, empowering any person to act for the defendant in any way; but the authority to act for and bind the defendant was agreed by Ballou, Wiley, and Beatty to be exercised by Wiley in the manner he did in fact act."

In the case of a joint stock corporation organ-

ized under the laws of this State, whenever and wherever all of its stockholders are assembled and in fact engaged in considering and determining what the corporation shall do and by whom it shall act, there is the corporation; what they do, it does. The appointment of an agent to speak or act for it, or represent it in any one matter or in all matters, with unlimited authority, is an appointment by it; and it is bound by his action. It is not necessary to this result that there should have been any previous notice of such meeting, or that there should be any written resolution, or that there should be any record of what was done; their consenting speech and act is legally equivalent to all these.

Upon the record, every stockholder was a director and was present, was considering what the corporation should do, and joined in appointing Wiley as its agent, and in sending him into the world with full authority to do everything which was subsequently done by him, and to bind the corporation by every purchase and promise which he has made for it and in its name.

Of course the individuals drew over themselves the corporate shield, as protection, against the hazards of their projected enterprises, to their individual fortunes. Of necessity, then, they intended that all purchases and promises should be by the corporation, and that Wiley should be appointed and authorized by it to make for it, and in its name and behalf, these purchases and promises. To do this particular business was the only reason for the existence of the corporation; no one of its stockholders had any other purpose in view when organizing it; but every one of them did intend that it should so far act and make contracts in its corporate capacity, through the instrumentality of Wiley, its agent, as to relieve themselves from all burden of personal responsibility. They all so said to Wiley when all were assembled as a corporation. It is found that when thus assembled they agreed that contracts, rights, or franchises to construct were to be obtained by Wiley in the defendant's name, and the work of construction, extension, and repair should thereafter be done by it, or by Wiley in its name, and the materials and supplies were to be purchased by Wiley in its name or in his own name, as he saw fit. This business was within corporate scope. The agent exercised the power conferred, and used the corporate name. The acts and contracts by this agent are the acts and contracts of the corporation.

The degree of informality which attended the management of its affairs by all of the shareholders assembled and uniting is of no legal significance; none, even if they were mistaken as to the legal effect of their use of the corporate name; none, even if they supposed as a matter of law, although using the corporate name, that the business might remain that of a partnership. The corporation was organized; its directors and agents, acting as such, could not transact its business in its name and control the legal result.

Our statute declares that, before a joint-stock corporation shall commence business, the president and directors shall publish at full length its articles of organization in a newspaper published in the county in which it is located.

Upon the trial there was no evidence as to such publication. The statute (Rev. Stat 1875, p. 439, § 28) provides that "a copy, certified by the secretary of this State under its seal, of the original certificate of organization of any joint stock corporation, shall be *prima facie* evidence of the due formation, existence, and capacity of such corporation;" that is, shall be *prima facie* evidence, not merely that the corporation is a legal entity, but that there is no legal bar to the transaction of business as such. For such a statute there is good reason. If the stockholders have omitted to meet any one of the formal statutory prerequisites, and, notwithstanding, proceed to transact business and hold themselves out to the world as a corporation, buy and use property and promise to pay for it; and if, when sued for breach of contract, they desire to take advantage of a defect in their armor, known to themselves, concealed from creditors,—it is proper that the burden of showing the defect should be placed upon themselves.

There is no error in the judgment complained of.

In this opinion the other Judges concurred.

EMMA C. GIESSE

v.

WILLIAM FRANKLIN.

1. Where one enters into a valid agreement to conduct a business for the benefit of another as her representative, "without accountability for the manner of conducting the same, or for any errors of judgment in the conduct thereof," he is liable for losses in the business resulting from his neglect.
2. Where an agent charges himself with an unauthorized discount allowed on a sale of his principal's goods, and subsequently compromises his own claim against the principal, with other creditors, at a certain per cent, he is not entitled to have the discount deducted from his claim before the computation of the per cent thereon.
3. When one, compromising with his debtor for the discharge of his claim at a certain per cent thereof, provided the same is paid on or before a certain date, has in his hands at the time fixed for payment sufficient moneys of the debtor which he may apply to the compromise, he is deemed to have received the same in discharge of his debt.

(New Haven—Filed February —, 1888.)

APPEAL by defendant from a judgment of the Superior Court of New Haven County, Stoddard, J., in an action for account with claim for damages for negligence. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. Henry E. Pardee and Simeon E. Baldwin*, for defendant, appellant:

The action being an equitable one, it is necessary that the facts specially found should be such as to support the decree.

Gen. Stat. p. 444, § 10; *Goodrich v. Stanley*, 28 Conn. 79.

1 CONN.

Where the nature of the transaction necessarily constitutes an account, consisting of receipts and payments, debts and credits, the balance only is considered as the debt, at law, as well as in equity.

Wat. Set-off, p. 20, § 16.

The composition was to be void unless the 60 per cent was paid to each by August 15, 1885.

To make the composition binding as respects any part of defendant's demands, it must be shown that he waived this proviso as to payment of such part by August 15.

Doughty v. Savage, 28 Conn. 158.

No judgment, holding a man for negligence, can stand on a finding which does not show facts on which his legal duty arises.

Schoonmaker v. Albertson, 51 Conn. 887, 898.

Messrs. W. L. Bennett and S. W. Kellogg, for plaintiff, appellee:

An agent or bailee paid to carry on a business may be held liable for negligence in discharging his duties.

The composition agreement was in all respects valid and binding. The defendant signed it, representing his claims to be \$8,898, and thereby induced others to sign, by representing "that he would take 60 per cent of his debt in full."

See *Hartford & N. Y. Transp. Co. v. First Nat. Bank*, 46 Conn. 569.

There was no error in deducting the 40 per cent, or crediting 60 per cent upon the several items of the defendant's claim, aside from the notes. The result is precisely the same as if they had all been brought into one item, and the 40 per cent deducted, or the whole 60 per cent allowed. The defendant had already executed the compromise agreement as to the notes, and by his own act had separated the items of his claim. He is bound by that compromise agreement, and by his own action in relation thereto.

Forsythe, Comp. chap. 2, pp. 8-11; Warren v. Skinner, 20 Conn. 562.

Even if the defendant had not signed the paper, his parol agreement would have been sufficient to bind him.

Argall v. Cook, 48 Conn. 160; *Mellen v. Goldsmith*, 47 Wis. 573; *S. C. 82 Am. Rep. 781*.

Beardsley, J., delivered the opinion of the court:

This is an action to recover a balance claimed by the plaintiff upon a settlement of accounts between herself and the defendant, and also damages for his alleged negligence in his management of her business.

The following facts are extracted from the somewhat voluminous finding and exhibits in the case. In August, 1877, the plaintiff entered into copartnership with one Plumb in the stove business in New Haven, which continued until some time in 1883. The capital of the firm consisted of the stock of a bankrupt firm which the defendant, in whom the plaintiff reposed great confidence, had purchased for her, at her request, but in his own name. The defendant was credited on the books of the company with this stock at a valuation of \$8,000.

In November, 1877, the plaintiff owed the defendant \$— balance of purchase money paid by him for the stock of goods.

Plumb contributed nothing to the capital of the copartnership, and had not, so far as appears, any valuable interest in it at its termination. The defendant, who was engaged in other business in New Haven, had also to a large extent the charge and management of the plaintiff's interest in the stove business from its commencement, and received a salary for his services.

During the latter part of the time he had succeeded in impressing the plaintiff with full confidence in his business qualifications and character, so that she gave little or no personal attention to the business, but surrendered the entire charge of her interests in the copartnership to the defendant, he sending her from time to time statements of the condition of the business. On the 17th day of October, 1882, the plaintiff assigned to the defendant her interests in the copartnership, as security for an advance of \$200 and such other advances, not exceeding \$1,000, as might be thereafter made by him.

On the 9th day of March, 1883, said Plumb assigned to the defendant, as trustee for the plaintiff, his interest in the copartnership; and on the 17th day of March, 1883, the defendant made the following written declaration, assented to by the plaintiff, as follows:

Whereas I, William Franklin, of New Haven, Connecticut, am now conducting a certain business in said New Haven, under the name of the Franklin Stove Company, formerly conducted under the name of Brownson & Plumb, and latterly under the name of I. H. Plumb & Co.; and whereas I have, as agent for Mrs. Emma C. Giesse, formerly Emma C. Brownson, purchased the interest of said S. H. Plumb in said business, and am to account to him therefor, as appears by his assignment to me, dated March 9, 1883, and my agreement with him of even date therewith; and whereas I have an interest in said business by assignment from said Emma C. Giesse, as appears by her assignment dated October 17, 1882, and have engaged in said business to secure and protect the interest of said Emma C. Giesse therein and her indebtedness to me, and it is agreed that I shall receive from said business the sum of \$12.50 per week for my services in conducting the same, and as much more as such services may be reasonably worth, as we may agree,—now therefore I hereby declare that I am conducting said business for the benefit and as the representative of said Emma C. Giesse, without accountability for the manner of conducting the same, or for any errors of judgment in the conduct thereof; and that, whenever all accounts between us are settled, and all indebtedness to me on the part of said Emma C. Giesse is fully paid and satisfied, and I am fully discharged from all liability arising from, growing out of, or in any way connected with, said business, whether under the name of Brownson & Plumb, S. H. Plumb & Co., the Franklin Stove Company, or any other name or designation,—then I will transfer the interest in said business assigned to me by said Emma C. Giesse, to her or to such person or persons as she may name, whenever by her requested so to do, and until so requested will hold the same in trust for her use and benefit.

William Franklin.

Dated at New Haven, this 17th day of March, 1883.

The foregoing is a correct and satisfactory statement of the position of said William Franklin, and of our agreement and understanding in relation to said business.

March 17, 1883.

Emma C. Giesse.

From this time the defendant, as the plaintiff's agent, calling himself the trustee, had the entire management of the plaintiff's business, sending her the written statements, from time to time, prepared from the books.

A statement made about the 1st day of February, 1884, shows a loss upon the prior year's business of about \$600, but showed the plaintiff's capital above liabilities to be \$8,000. The plaintiff was alarmed at the loss, and requested the defendant to sell out the business. He was unwilling to do this; and the plaintiff allowed him to continue the business, and entered into the following contract with him, under which the business was conducted until its close:

Articles of agreement made by and between Mrs. E. C. Giesse, of the city of Boston and State of Massachusetts, of the first part, and William Franklin, of the town and county of New Haven, State of Connecticut, of the second part, witnesseth:

Whereas the said Giesse is the owner of \$6,000 worth of stock in the Franklin Stove Company, situated in said town of New Haven, at No. 313 Chapel Street, and the said parties are willing that said company shall continue the prosecution of the same business for the term of one year from date,—

The said Giesse hereby agrees with the said Franklin that he may continue said business in said place for the term of one year from this date, and that her capital stock may remain in said business under the management and sole control of said Franklin, and that he may at any time sell out all the said Giesse's interest in said business and stock, to her best advantage, as his judgment may direct, and shall pay over to her her share of the avails of the same.

And the said Franklin, in consideration aforesaid, agrees to assume the sole management of said stove business, and sell out the entire capital stock and the entire interest of said business when in his judgment the same can be done for the best interests of said Giesse.

And the said Franklin hereby agrees with the said Giesse that, in consideration of his having received the sole management of said business during the year, if he should die at any time within the year, and the proceeds of all said business and stock shall be sold, and the share of said Giesse in the avails of the sales shall not amount to the sum of \$6,000, then there shall be paid, by the said Franklin's executor's or administrators, out of the estate, a sum sufficient to make up to said Giesse a sum of money equal to the deficiency; but said sum so to be paid out of his estate shall in no wise exceed the sum of \$2,000.

In witness whereof the parties have hereunto set their hand and seals this 1st day of March, A. D. 1884.

Wm. Franklin, [L. s.]
Emma C. Giesse, [L. s.]

The business for the year 1884 to February 5, 1885, showed a further loss of \$1,500. At that date the value of the plaintiff's interest

in the business was \$4,500. From February 1, 1885, to July 1, 1885, there was, as shown by the books, a loss in the business of over \$6,000, and the liabilities were more than \$1,500 in excess of the assets.

The court finds that this loss was largely due to the neglect, by the defendant, of the plaintiff's interests entrusted to him, and assessed the damages for such neglect at \$1,500.

On the 9th of July, 1885, the defendant, describing himself as trustee and agent of the plaintiff, entered into a contract with one Crane for the purchase, by the defendant and Crane, of all the plaintiff's property in charge of defendant, upon the basis of a deduction of 25 per cent from an inventory to be taken by them, and for the formation by them of a copartnership or joint-stock company. This agreement was concealed from the plaintiff, and she refused to assent to it on the 30th day of July, 1885, when the defendant requested her to do so; being ignorant of its terms, and having consulted counsel.

An inventory of the property referred to was taken on the 1st day of August, 1885.

Its value was found to be, and was in fact, \$7,089.72.

On the 4th day of August, 1885, the defendant, as trustee, made a bill of sale of the goods to Crane, to hold for them jointly, and, as such trustee, received from himself and Crane \$5,817.24 in money and notes. He entered the amount of the 25 per cent discount upon the books as his personal loss, and the court finds that he intended that the amount \$1,772.43 should be a charge against himself in accounting with the plaintiff. In stating the account between the parties, the court charged defendant with the value of the property—\$7,089.72.

On the 17th of July, 1885, the liabilities of said business amounted to about \$11,000; of this amount about \$3,000 was due to the defendant, as follows:

For amount as advanced, as hereinbefore found	\$ 309.61
" cash advanced January, 1885	1,406.00
" balance of book account	205.13
" liability as maker and indorser of certain notes which he afterwards took up and became owner of, with interest due on the same	5,875.00

On said 17th of July, the defendant prepared the following compromise agreement:

We, the undersigned, creditors of the Franklin Stove Company of New Haven, Connecticut, to the amount set opposite our respective names, so far as the same can be ascertained at the signing hereof, for good and valuable considerations, hereby promise and agree with each other, and with said debtor, that we will accept and receive in full satisfaction and discharge of our said claims respectively 60 per cent of the same, provided that payment of said per cent be made on or before August 15, 1885, by cash, certified check, or equivalent.

Dated New Haven, July 17, 1885.

—and signed it himself, carrying out his credit as \$——, and thereby agreed to accept 60 per cent of said indebtedness, and afterwards, by personal solicitation and by representations that he was the largest creditor, induced a number of other creditors to sign it.

The defendant, after collecting the proceeds of the sale and other amounts from the business,

employed an attorney, who paid to the creditors signing the agreement, other than the defendant, 60 per cent of their respective claims. On the 30th day of September, 1885, the defendant held said notes of the concern, given for money advanced, to the amount of \$6,028.44, having as indorser taken them up. On that day the attorney employed by him paid him 60 per cent of that amount, with interest, and the defendant caused the accounts, on which said notes appeared upon the books, to be balanced by entering such payment of 60 per cent and making an entry of 40 per cent discount.

The defendant had in his possession before the 15th day of August, 1885, a sufficient amount of money belonging to the plaintiff—the proceeds of said business—to pay 60 per cent of all the debts upon said compromise agreement, including all the debts due to him. On the 25th day of November, 1885, the defendant paid to himself \$240 in cash, and on the 30th day of January, 1886, made a further payment to himself of \$200, and applied said payment upon the said debt of \$1,410.

Other than as above stated the defendant had not appropriated any sum to himself in payment of the other items of indebtedness due to him, as hereinbefore set forth, at the time the present suit was brought. The court disallowed the defendant's claim for salary after February 1, 1885, because of his negligence, as hereinbefore stated.

All the creditors of the concern whose names do not appear upon said compromise agreement have been paid in full. A few accounts due to the concern remain uncollected.

The court stated the account between the parties as follows:

William Franklin,	
In account with Mrs. Emma C. Giesse, Dr.	
To 25 per cent of amount of inventory of August 1, 1885	\$1,772 43
" interest to April 4, 1887	179 24
" amount of discount	9 00
" balance of cash	86 82
" amount paid Morse & Pardee	138 00
" cash paid November 25, 1875	210 00
" " January 30, 1886	200 00
Cr.	\$2,586 59
By 60 per cent of	\$309 61
with interest to August 1, 1885	12 57
	322 18
" 60 per cent of	\$710 00
with interest to August 1, 1885	28 43
	\$738 43
" 60 per cent of	\$700 00
with interest to August 1, 1885	21 21
	\$721 21
" 60 per cent of balance of William Franklin	\$206 13
	128 07
	1,188 14
	\$1,406 45
	1,500 00
	\$2,906 45

The court rendered judgment for said sum of \$2,905.45.

The defendant assigns the following errors:

1. The court erred in ruling that the defendant was liable to the plaintiff for any error in the conduct of said business.

2. The court erred in ruling that the defendant was liable to the plaintiff for any loss in said business from February 1, 1885, to August 1, 1885.

3. The court erred in deducting 40 per cent from the defendant's claim due July 17, 1885.

4. The court erred in deducting 40 per cent from claims of the defendant due at the signing of the compromise papers, in July, 1885, by items, and not from the net balance of account as due with reference to that time.

5. The court erred in deducting 40 per cent from the notes instead of from the amount paid on them by defendant out of his own funds.

6. The court erred in holding that the defendant was liable for any losses or shrinkage in the net assets of said business.

7. The court erred in holding, in effect, that the defendant was liable, in law or in fact, to the plaintiff until the plaintiff had been made good for all charges, liabilities, and interest in the premises.

8. The court erred in holding that the defendant had funds in his hands, and was therefore satisfied as to the amount due him on compromise paper, before the general creditors were satisfied, although the total amount as finally received paid all the claims except those of the defendant, and left nothing or only a trifle for him.

9. The court erred in adopting any rule or line of figures, except to strike a balance between the defendant and plaintiff, as of the date of said compromise paper, if said paper is to be held binding on defendant, it not being pretended that after that he received more than he paid out.

10. The court erred in holding that the defendant was liable for said discount of \$1,772.43 to Crane.

11. That the court erred in holding said compromise paper at all binding on defendant, in favor of the plaintiff.

The defendant's claim that he is shielded from liability for losses caused by his neglect of the plaintiff's interests is not well founded. In support of this claim, he relies upon the expression in the paper made by him, and assented to by the plaintiff, on the 17th of March, 1885: "I hereby declare that I am conducting said business for the benefit of, and as the representative of, said Emma C. Giesse, without accountability for the manner of conducting the same, or for any errors of judgment in the conduct thereof."

The general language "without accountability," etc., if it stood alone, would not justify the defendant's claim. The mode of conducting the business does not mean neglect of it, either partial or entire; but this general language, by a familiar principle of construction, is restrained by the specification "errors of judgment," and limited to losses so occasioned. The defendant might as properly claim immunity from losses if occasioned by his bad faith and dishonesty.

But this is unimportant, because, as we understand it, at the time when the loss occurred for which the defendant was held liable, between the 1st of February and July, 1885, the parties

were not living under the contract of March 17, 1883, but under another and different one. On the 1st day of March, 1884, the plaintiff became alarmed at the condition of her business, and proposed to the defendant to close it. The defendant, to induce her to continue him in the management of it, entered into the new contract in full as to the rights and liabilities of the parties under it; and we see no ground for an implication that the claim in question became part of it.

The remaining question is whether the court properly stated the account between the parties.

The composition agreement signed by the defendant and other creditors bears date the 17th of July, 1885. There is no question that it was a valid and binding agreement, and included all the indebtedness of the plaintiff to the defendant. On the 4th of August, 1885, the defendant, as trustee, sold the plaintiff's goods to himself and Crane for 75 per cent of their value, and assumed the obligation to pay the plaintiff the other 25 per cent, amounting to \$1,772.43. It is not material to the case that the sale was kept secret from the plaintiff, or that she might have disaffirmed it as being made by her trustee to himself. She affirms it, and calls upon the defendant for payment of the sum which he agreed to pay.

The defendant claims that it should be deducted from the amount due from the plaintiff to him when the composition agreement was executed, and that he should be required to receive 60 per cent only on the balance.

The effect of this would be that a part of his claim for which he agreed to name 60 per cent in payment would be paid in full, and thereby his contract with the other creditors who signed the composition agreement, as well as with the plaintiff, be violated.

The defendant claims that he is not bound by the compromise agreement, because the 60 per cent of his claim was not paid on or before the 16th of August, 1885, the time within which it was required to be paid, to operate as a discharge. It is to be borne in mind that, before the 15th day of August he had in his pocket enough of the plaintiff's money to pay himself and the other creditors.

The defendant suggests that this money, or a part of it, might have been necessarily used for other purposes. If so it was for him to show it.

The rational construction of the finding, as it stands, is that he had this money, which he might have applied to the payment of the 60 per cent due to him.

This being so, the case stands as if he had received the 60 per cent within the time fixed for its payment.

But, aside from this, it is found that, on the 30th day of September, 1885, he accepted the 60 per cent in discharge of the notes held by him, amounting to about \$6,000. That was more than was due him after deducting \$1,772.43 from 60 per cent of his entire claims. We believe that these considerations meet such of the assignments of error as rest upon any facts contained in the finding. There seems to be no injustice done to the defendant by the result to which the court came in stating the account.

There is no error.

In this opinion the other Judges concurred.

INDEX.

The points decided are denoted by the name of the case appended or "*Id.*," other points, indexed as "*cited in*," and "*S. P. cited in*," are such as are found in the decisions, either as *dicta* or argument, references to statutes, or in dissenting opinions.

Indexes to Notes and Briefs, found in early volumes in a supplement, have been found so generally approved as to entitle them henceforth to be incorporated into this general alphabetical arrangement under proper subheads.

ABATEMENT. See DEVISE AND LEGACY, VII.

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ACCORD AND SATISFACTION.

1. Refusal to accept a sum, smaller than that claimed, in full satisfaction, but which is accepted and credited on account, does not preclude an action for the unpaid balance. *Tompkins v. Hill* (Mass.) 290.

2. A payment of a part for the whole of a liquidated debt is not a sufficient consideration to support a promise to accept it as a satisfaction. Cited in *Tyler v. Odd Fellows Mut. R. Asso.* (Mass.) 196.

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1. A demand, substantially correct, is not vitiated by a slight mistake in the amount demanded. *Bigelow v. Copen* (Mass.) 257.

2. A separate collateral agreement to deliver, on demand, certain property as security, requires a demand within the continuance of the legal liability upon the debt. *Shaw v. Sillway* (Mass.) 466.

3. All parties interested in the object of a suit should be made parties thereto. Cited in *First Nat. Bank v. Crafts* (Mass.) 441.

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4. Where parties are numerous, it is sufficient if such be joined as will represent the interest of all. *Dowey v. St. Albans Trust Co.* (Vt.) 652.

5. When, in a probate appeal, an issue of (fact is framed, the court may order a change of venue for the trial of the same. *Backus v. Cheeney* (Me.) 795.

6. If the issue framed is decisive of the whole case, the whole cause should be transferred to the other county. *Id.*

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1. A contract for the sale of "milk of one dairy" means that the milk shall be such as can be lawfully sold, under Stat. 1886, chap. 818, § 2. *Com. v. Holt* (Mass.) 538.

2. In prosecutions for selling impure milk where the milk analyzed has not been taken under provisions of statute, the testimony of the person analyzing the milk is admissible. *Id.*

3. Where defendant was driving a milk wagon on which was painted a license and the name "R & L;" and which contained cans of milk not marked "skim milk," from which adulterated milk was taken; and where complaint charged defendant and L, as co-partners, with having in their possession adulterated milk to sell,—the government need not prove they were partners. *Com. v. Rowell* (Mass.) 590.

4. That defendant was upon the wagon was competent evidence for the jury upon the issue whether he was in possession of the milk with intent to sell it. *Id.*

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1. To let loose a fox for purpose of being hunted by dogs is cruelty to animals, under Pub. Stat. chap. 207, § 8. *Com. v. Turner* (Mass.) 265.

2. The word "animal," in Pub. Stat. chap. 207, § 53, includes all irrational beings; the statute applies only to foxes when they are in the custody of men. *Id.*

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APPEAL AND ERROR.

I. WHEN LIES; TIME AND MANNER OF.

II. RECORD, ETC.

III. WHAT IS OPEN AND CONSIDERED.

IV. BOND; COSTS.

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See ACTION OR SUIT, 5-7; CASES CERTIFIED; CERTIORARI; COSTS, 2, 3; CRIMINAL LAW, IV.; EXCEPTIONS; EXECUTORS AND ADMINISTRATORS, 16; INSOLVENCY, 17-19; REPLEVIN, 5.

I. WHEN LIES; TIME AND MANNER OF.

1. A final order settles the rights of parties under the issues. *Nelson v. Brown* (Vt.) 108.

2. Interlocutory orders, such as one allowing amendment of return of service, are not appealable. *Id.*

3. Appeal and exceptions upon interlocutory matters cannot be heard in the supreme judicial court until the proceedings at nisi prius appear to be ended. Cited in *McCallum v. Lambie* (Mass.) 276.

4. A probate appeal must be taken within one year after the decree complained of. *Briggs v. Barker* (Mass.) 267.

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5. The court can not relieve a party failing to appeal within such period. *Id.*

6. A nonresident widow, who did not know that administration had been taken, may appeal from the allowance of a claim, on the ground of a mistake, under Rev. Laws, § 1426. *Conndon v. Conndon* (Vt.) 107.

7. If the defendant, without fault, failed to perfect his appeal, his remedy is by proceedings in review. *Handy v. Tibbets* (Mass.) 481.

8. Error does not lie for an interpolation in the record. Cited in *Bean v. Conway Sav. Bank* (N. H.) 85.

II. RECORD, ETC.

9. Where the record of the trial judge does not show any deposit with him, or any offer to make deposit, the defendant can not show compliance with the statute by parol evidence of offer and tender of deposit to the trial justice. *Handy v. Tibbets* (Mass.) 481.

10. The statement of a judge, certifying reasons for admitting evidence, is of the highest weight. *South Danvers Nat. Bank v. Jackson* (Mass.) 444.

III. WHAT IS OPEN AND CONSIDERED.

11. Assignment of error, in an action for fraud in the exchange of horses, that plaintiff testified, under objection, that he had paid his lawyer \$25; that his own horse was worth \$30; and that he paid defendant \$20 difference,—is not good, where it does not appear that the defendant was harmed thereby. *Bennett v. Gibbons* (Conn.) 620.

12. No question for review is presented by an assignment of error, that the trial court should not have found certain propositions of fact as it did. *Nat. Shoe & Leather Bank's Appeal* (Conn.) 604.

13. An exception to the entire charge upon one branch of the cause is too general; the error should be specified at the close of the charge. *Rosell v. Fuller* (Vt.) 217.

14. An objection to evidence not made below will be deemed waived. *Bennett v. Gibbons* (Conn.) 620; *Stevens v. Pullington* (Vt.) 218.

15. An objection to testimony not referred to in the argument, is deemed waived. *Com. v. Ewig* (Mass.) 177.

16. When an executor's final account comes up on appeal, compensation allowed him is subject to revision. Cited in *Bridge v. Bridge* (Mass.) 915.

17. A conclusion by the trial court, from the facts, is reviewable. *Hayden v. Allen & Blanchard Co.* (Conn.) 87.

18. The verdict of the jury in equity, confirmed by the presiding justice, will not be reversed unless clearly erroneous. *Webb v. Fuller* (Me.) 790.

19. The appellant has the burden of showing error. *Id.*

20. A master's report will not be set aside without clear proof of error. *Paul v. Frye* (Me.) 691.

21. The decision of a single justice up-

on facts in equity will not be reversed unless clearly erroneous. *Id.*; *Duren v. Hall* (Me.) 791.

22. A judgment is not reversed when justice requires the same judgment to be renewed. Cited in *Bean v. Conway Sav. Bank* (N. H.) 84.

IV. BOND; COSTS.

23. An appeal being frivolous, the judgment was affirmed, with double costs from the time of appeal, under Stat. 1883, chap. 228, § 15. *Hinds v. Cottle* (Mass.) 181.

24. An appeal bond in an action to recover the possession of real property, conditioned that the appellant will satisfy any judgment against him, and all rent due or to become due, and costs and damages, within thirty days after judgment, is a binding contract at common law. *Pray v. Wadell* (Mass.) 898.

25. In an action on such bond, the plaintiff may recover rent up to the time when he obtained possession under his execution, including rent during the second lease as well as the first. *Id.*

26. An appeal bond dated August 18, 1884, reciting proceedings in court as having occurred August 16, 1884, and which was filed and proved September 1 following, is not misleading. *Id.*

27. Where an appeal is prosecuted to final judgment, the principal in the bond and his sureties can not dispute the validity of the judgment on the ground of variance between the language of the bond and that prescribed by the statute. *Id.*

BRIEFS AND NOTES.

Only lies for some error apparent upon record. 182.

Time of. 900.

Record cannot be altered or contradicted by parol evidence. 482, 911.

Clerk may amend. 911.

Matters of discretion are not reviewed. 796, 833.

Questions of discretion not specially reserved are not revisable. 72.

Objections not of record are not considered. 40.

When decision on demurrer is not appealed from, question is not open. 848.

Instructions misleading jury are ground for reversal. 416.

Decree is not reversed solely upon question of costs. 645.

Findings of fact; not reviewable. 39.

Conclusive where evidence conflicting. 236.

By master, are conclusive. 516, 692.

Presumption is that judge referred to matters in evidence. 629.

That rulings of court below on law are correct. 381.

Frivolous appeal will be dismissed and damages given. 182.

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Form of appeal bond in actions to recover possession of land. 901.

Date of bond cannot render it void. 900.

ARBITRATION AND REFERENCE.

See ATTACHMENT, 7.

1. A reference under a rule of court can not embrace the claim of a party not before the court, against the defendant; such an agreement falls short of a novation, and cannot be carried into effect according to the rules of law. *McCarthy v. Mack* (Mass.) 459.

2. Where submission does not empower a less number of the arbitrators than the whole to decide, the award must be made by all of them. *Hubbard v. Great Falls Mfg. Co.* (Me.) 794.

BRIEFS AND NOTES.

Submission under rule of court cannot include strangers to record. 461.

Referee cannot determine extent of own authority. 460.

Award should be bar to litigation upon matter submitted. 461, 795.

ARMY AND NAVY. See CIVIL SERVICE.

A seaman in the United States naval service during the rebellion was not entitled to extra State pay, though he first enlisted in the military service. *Brown v. Dubois* (Vt.) 106.

BRIEFS AND NOTES.

Federal seaman's right to extra State pay for services during rebellion. 106.

ARREST. See FALSE IMPRISONMENT; TAXES, 7.

1. A notice of a proceeding to obtain a certificate for the arrest of a judgment debtor is returnable on the day fixed for his appearance. *Wehrle v. Gurney* (Mass.) 831.

2. If a return of *non est inventus* is made upon the notice, a suit may be immediately brought upon the bail-bond. *Id.*

3. The return upon such notice by the officer is competent and sufficient evidence. *Id.*

BRIEFS AND NOTES.

Officer may arrest and detain one upon probability of having committed felony. 292.

Officer making arrest and taking goods because he believes them connected with crime, holds them subject to order of court. 360.

ASSAULT AND BATTERY.

1. In trespass to the person, the allegation of place is immaterial. *Lillisbridge v. Barber* (Conn.) 599.

2. Where defendant is corroborated only by persons who were not eyewitnesses, it is not error for the court to speak of his testimony as substantially uncorroborated. *Id.*

BRIEFS AND NOTES.

Allegation of place is unnecessary for trespass to person. 600.

ASSIGNMENT. See FRAUD AND FRAUDULENT CONVEYANCE, 8; MORTGAGE, III.

1. Where the plaintiff, assigning his claim against the defendant, continues the prosecution of the action, oral evidence of fraud by the defendant in obtaining an agreement from plaintiff to pay the costs of the action is immaterial. *Hagan v. Sartwell* (Mass.) 539.

2. The assignment of a claim is no defense to an action on the contract for services. *Coulter v. Haynes* (Mass.) 894.

3. In such case the assignee need not indorse the writ. *Id.*

BRIEFS AND NOTES.

Wages to be earned are assignable. 898.

Assignee of written contract may sue for specific performance. 522.

ASSIGNMENT FOR BENEFIT OF CREDITORS. See CORPORATIONS, 7-9.

1. In an assignment of all of the assignor's property, the words "except so much as is by law exempt from attachment" mean only property exempt by statute. *Rhode Island Nat. Bank v. Chase* (R. I.) 758.

2. Under such assignment, equitable interests or assignable contingent interests pass to the assignee. *Id.*

3. A creditor not formally assenting to an assignment within the time limited is presumed not to have assented. *Waterman v. Sprague Mfg. Co.* (Conn.) 632.

4. He is not estopped from enforcing his claim to the property assigned by refraining, upon promise of debtor that his claim should be paid, from accepting time notes under the assignment. *Id.*

5. Omission to enforce claim in a State where the transfer was valid does not bar suit in a State where it is void against nonassenting creditors. *Id.*

6. An assignment providing for the payment of a note, but reserving all remedies thereon against the indorser, does not extinguish the debt. *Taunton Nat. Bank v. Stetson* (Mass.) 260.

7. It is fraudulent for assignee, at an auction sale held by him, to employ a puffer or bidder to enhance the price, even if his intention is to secure the best price for the creditors; and the creditors can compel him to account for the amount of his puffer's bid. *Hartwell v. Gurney* (R. I.) 882.

BRIEFS AND NOTES.

Assent of creditor essential. 632.

ASSOCIATIONS. See BENEFIT SOCIETIES.

ASSUMPSIT. See HUSBAND AND WIFE, 5.

1. Assumpsit on quantum meruit lies N. E. R., V. V.

to recover the value of services, where the parties' minds have never met. *Tucker v. Preston* (Vt.) 361.

2. Where the services extended through several years, interest is allowable on the balance due at the end of each year. *Id.*

BRIEFS AND NOTES.

Lies for breach of simple contracts. 414.

Will not lie except upon previous request, expressed or implied. 603.

ATTACHMENT. See DEVIRE AND LEGACY, 36-38; EVIDENCE, 12-14, 17; INSURANCE, 14; REPLEVIN, 2, 8; SALE, 7.

1. A State officer cannot attach property in a United States bonded warehouse, or in the possession of a customs officer. *Peabody v. Maguire* (Me.) 604.

2. The party placing property in the warehouse may be charged as trustee of the real owner. *Id.*

3. The service of a writ against a partner upon a firm creditor, as trustee, is invalid. *Id.*

4. Such attachment becomes valid where all the partners are made parties before any change of the property, and before the intervention of rights of third parties. *Id.*

5. The plaintiff, prevailing against claimant in holding the property, is entitled to costs. *Id.*

6. One indebted to the defendant for labor for a sum less than \$20 is not chargeable under trustee process, where the claim is not for necessities. *Abbott v. Smith* (N. H.) 224.

7. An award by arbitrators against obligor in a bond for future support, for non-performance, is subject to trustee process. *Dickinson v. Dickinson* (Vt.) 183.

8. A general attachment binds any real estate in the county, of which the record title is in the debtor. *Taunton Nat. Bank v. Stetson* (Mass.) 260.

9. The allegations of the principal defendant in trustee process must be filed before the adjudication upon the disclosure. *Dill v. Wilbur* (Me.) 767.

10. Filing of such allegation at a later time is in the discretion of the court. *Id.*

11. A chattel mortgagee may demand of the attaching officer the payment of his claim. The demand should state the amount and nature of the debt due. *Wilson v. Crocker* (Mass.) 446.

12. A demand by the assignee of a mortgage, stating neither the names of the parties to the mortgage, the time of making, the date of payment, nor the interest, is insufficient. *Id.*

13. Innocent inaccuracies or errors in the account, resulting from accident or mistake, and which do not mislead the attaching creditor, do not invalidate the demand. Cited in *Id.* 448.

BRIEFS AND NOTES.

Equitable interests are not liable to. 738.

Property in possession of customs house officer is not attachable. 695.

Award against obligor for future support, for nonperformance, is not exempt. 183.

Of mortgaged chattels. 264.

Officer's return is evidence of valid attachment of property. 858.

To constitute valid attachment of real estate, it need not be specifically described in officer's return. 260.

Not defeated by clerk's failure to make proper entries. 358.

ATTORNEY AND CLIENT. See EVIDENCE, 25.

AUCTION AND AUCTIONEER. See ASSIGNMENT FOR BENEFIT OF CREDITORS, 7.

Where an auctioneer bids off the property for the buyer, the seller may disavow the sale. *Randall v. Lautenberger* (R. I.) 779.

BAIL AND RECOGNIZANCE. See ARREST, 2; POOR DEBTOR, 6, 7; PRINCIPAL AND SURETY, 1.

1. Such reasonable bail will be required of the defendant, confined on *mesne process*, by the court, as should be required by the jailer, under Gen. Laws, chap. 225, § 14. *Widbur's Petition* (N. H.) 224.

2. A special bail may at any time or place, without a bail-piece, apprehend the debtor. *Warthen v. Prescott* (Vt.) 865.

BRIEFS AND NOTES.

Recognizance is void where arrest was illegal. 494.

BANKRUPTCY.

1. Where a decree authorized the assignee to sell land to the bankrupt, who requested the deed to be made to his wife, the deed so made is valid, and may be made to the bankrupt as the wife's agent. *Wilson v. Winslow* (Mass.) 298.

2. A bankrupt can not maintain trespass against defendants, subsequent devisees of the wife. *Id.*

BRIEFS AND NOTES.

Assignees do not take whole legal title in bankrupt's property. 298.

BANKS AND BANKING. See GIFT, 1, 2.

BAWDY AND DISORDERLY HOUSES. See HUSBAND AND WIFE, 8, 9.

1. A complaint that the defendants at a certain time and place kept a house of ill-fame, and used the same for the illegal sale of liquors, etc., is sufficient, under Pub. Stat. chap. 101, § 6. *Com. v. Clark* (Mass.) 878.

2. Testimony as to the reputation for chastity of women found in the house is competent. *Id.*

3. The defendant, testifying that he had

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never had any interest in the sale of liquors on the premises, may be cross-examined as to his relations to the house prior to the time charged to the complaint. *Id.*

BRIEFS AND NOTES.

Indictment must state name of lessee, or that it is unknown. 851.

Proof of reputation of women frequenting house is pertinent to establish its character. 880.

BENEFIT SOCIETIES.

1. A promise by a benefit association to pay the creditor of a member the money payable on his death, is void. *Skillings v. Massachusetts Ben. Asso.* (Mass.) 718.

2. The designation of a friend or creditor as beneficiary is invalid. *Rice v. New Eng. Mut. Aid Soc.* (Mass.) 816.

3. Invalid designation of beneficiary does not make the certificate void. *Id.*

4. If member survives all the beneficiaries, his membership shall be for the benefit of his heirs. *Id.*

5. An action brought for the benefit of the beneficiary, not permitted to take under the statute, will not defeat an action by the administrator of the member. *Id.*

6. The receipt of money by the administrator discharges the company. *Id.*

7. An unconditional acceptance of an assessment waives all known grounds of forfeiture, including the failure of prompt payment. *Id.* 818.

8. Where the company received such payment on condition, the condition does not apply to later payments upon subsequent assessments. *Id.* 818, 816.

9. A wife, designated as the beneficiary, loses her rights as such by the subsequent procurement of a divorce. *Tyler v. Odd Fellows Mut. R. Asso.* (Mass.) 191.

10. The designation of a sister, not dependent upon the member, is invalid. *Id.*

11. The son and heir at law of the member, designated as the beneficiary of a portion of the fund, is entitled to the entire fund, notwithstanding the designation of said sister. *Id.*

12. A receipt by a guardian of the minor for a portion of the fund, in full of all demands, does not bar a claim to the whole fund. *Id.*

BRIEFS AND NOTES.

Creditor cannot be designated as beneficiary. 718.

Acceptance of assessment after forfeiture waives it. 815.

BILLS AND NOTES. See GUARANTY; LIMITATION OF ACTIONS, 2, 3.

1. A promise in writing to pay money upon condition that "this note is to be given up" if the sum is paid to a third person within a time specified, is not a promissory note, and is barred by the Statute of Limita-

tions in six years. *Chapman v. Wight* (Me.) 787.

2. To constitute a promissory note, the instrument must be **certain as to payment**, and not dependent on a contingency. Cited in *Id.* 787.

3. Where a note was given for interest upon another note, an indorsement upon latter of interest, paid only by second note, was no discharge of claim for interest, and second note was **without consideration**. *Taylor v. Slater* (R. I.) 755.

4. A note made and delivered is *prima facie* evidence of consideration. *Whitney v. Clary* (Mass.) 152.

5. The surrender of the note given by the defendant's son, although not enforceable at law, is a sufficient consideration for a new note by the defendant. *Id.*

6. The surrender of an overdue note, enforceable as against one of indorsers, is a valuable consideration for a new note between the same parties, with an additional indorser. *Bromley v. Hawley* (Vt.) 680.

7. The rights of an indorser are not such that a purchaser need inquire as to the validity of the note as between parties to it. *Id.*

8. The presumption is that a note is paid where a new note is given to take it up. *Snow v. Foster* (Me.) 353.

9. An action on the new note in the name of one to whom it was indorsed is barred by a discharge in insolvency, under a law enacted prior to its date, though subsequent to the date of the old note. *Id.*

10. A new note is the creation of a new liability. Cited in *Abbott v. North Andover* (Mass.) 601.

11. Part payment of a note by guarantors, upon an agreement with the holders that the note be kept alive for their benefit, does not discharge the makers *pro tanto*. *Granite Nat. Bank v. Fitch* (Mass.) 482.

12. A note given by the makers of a former note for the balance unpaid thereon is not a payment, unless accepted in discharge of the original note. *Id.*

13. Taking a note for a pre-existing debt is not payment. Cited in *Taylor v. Slater* (R. I.) 758.

14. The holder of a mortgage note, void for want of consideration, can not show that the maker subsequently sold the land for more than he gave for the note and mortgage. *Brigham v. Holden* (Mass.) 753.

15. All that is required to entitle the plaintiff to recover upon a lost note is proof that the defendant can pay the note without the hazard of being required to pay a second time. *Adams v. Baker* (R. I.) 823.

16. The testimony of one requested to witness a note in the defendant's presence, and who read it, is sufficient to prove the making of it. *Whitney v. Clary* (Mass.) 152.

17. In an action on a receipt to return or collect a note, the defendant has the burden of showing a return of the note on demand. *Rowell v. Fuller* (Vt.) 217.

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BRIEFS AND NOTES.

Must be certain as to payment, and not depend upon contingency. 787.

Note payable on demand is payable at once. 543, 568.

In such case, no other demand need be made except by bringing suit thereon. 802.

Taking of note is payment only when security of creditor is unimpaired. 354.

Action at law lies by owner of note lost after maturity. 323.

Courts will not presume that note was negotiated. 323.

Plaintiff must prove that defendant signed note in presence of attesting witnesses. 153.

BONDS. See APPEAL AND ERROR, IV.; BAIL AND RECOGNIZANCE; COVENANT, 9; INTOXICATING LIQUORS, II.

1. An actual or implied acceptance of a bond is essential to constitute a delivery. Cited in *Bell v. Pierce* (Mass.) 547.

2. Coupons are, in legal effect, equivalent to separate bonds for the different installments of interest. Cited in *Sanborn v. Clough* (N. H.) 224.

3. Under a bond for future support, providing that obligee, if dissatisfied, may reside in some other family, it is optional with him whether he resides with the obligor or at some other place. *Dickinson v. Dickinson* (Vt.) 183.

BRIEFS AND NOTES.

Liability of obligors in bonds delivered by obligor directly to obligee. 547.

Liability of obligors in bonds given to public officers. 547.

Bonds for future support; place of; change. 183.

BOUNDARIES.

1. Fence-viewers can not establish a disputed boundary. *Camp v. Camp* (Vt.) 140.

2. A parol agreement in regard to division line of adjoining owners of real estate, unless followed by acquiescence of fifteen years, is not conclusive between the parties. Cited in *Id.* 140.

BRIEFS AND NOTES.

Fence-viewers cannot establish. 140.

BREACH OF THE PEACE.

1. The oath to the complaint of a private prosecutor may be taken by a notary public. *State v. Freeman* (Vt.) 132.

2. Where there is no certificate of oath appended to the complaint, an amendment is allowable. *Id.*

BRIEFS AND NOTES.

Oath to complaint of private prosecutor may be administered by different officer than examining magistrate. 132.

BRIDGES.

1. Under an Act authorizing the construc-

tion of a bridge over a river in such place and manner as commissioners might determine, they could erect the bridge high above the river, and extending beyond its bank to an avenue, there establishing an abutment. *Sullivan v. Webster* (R. I.) 881.

2. Under a statute limiting the weight which a team may haul across a bridge, the weight of the driver is included. *Deater v. Canton Tollbridge Co.* (Me.) 704.

3. The owners of the bridge are not liable for injuries from breaking through it, where the load exceeds such limit. *Id.*

BRIEFS AND NOTES.

Bridge owner is not liable for injury by breaking through it of load in excess of statute. 705.

BURGLARY.

Where both breaking and entering with intent to steal, and larceny, are properly charged in one count, the prosecuting officer may nol. pros. either of the charges. Cited in *Com. v. Dunster* (Mass.) 116.

BURIAL GROUNDS. See CEMETERIES.

CARRIERS.

I. OF GOODS.

II. OF PASSENGERS.

BRIEFS AND NOTES.

See PRINCIPAL AND AGENT, 3.

I. OF GOODS.

1. Where a bill of lading provides that the goods are to be delivered at a certain wharf on payment of freight, a contract of the carriers to forward the goods to some other place is not implied from marks on the bill, indicating that the shipper intended some other ultimate destination. *North v. Merchants & Miners Transp. Co.* (Mass.) 907.

2. The carrier, undertaking to forward the goods to the destination indicated by the marks, is liable for a loss where it delivers the goods to a connecting line without instructions contained in the bill. *Id.*

3. Under a contract for carriage, a common carrier is an insurer until the transit is ended, and then liable only as warehouseman during such reasonable time as the goods are in its custody awaiting the call of the consignee. *Bassett v. Connecticut River R. Co.* (Mass.) 908; *Blaisdell v. Connecticut River R. Co.* (Mass.) 907.

4. Under Pub. Stat. chap. 112, § 214, a railroad company is not liable for goods destroyed by fire while in its possession under a contract of carriage. *Id.*

5. Where the goods are in its possession not under a contract, it is liable for their destruction by fire communicated by locomotives. *Id.*

6. The consignee of goods sent c. o. d. cannot maintain replevin against the carrier for their nondelivery. *Lane v. Chadwick* (Mass.) 563.

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II. OF PASSENGERS.

7. Conditions in a coupon ticket book, that the coupons are to be detached in conductor's presence, and to be accepted for passage only when accompanied by the ticket, are not waived by sometimes allowing passengers to pay their fares with coupons without showing their books. *Boston & M. R. Co. v. Chipman* (Mass.) 572.

8. An attempt to evade the payment of fare need not be fraudulent to warrant ejecting or removing a passenger. *Marshall v. Boston & A. R. Co.* (Mass.) 172.

9. Evidence that the plaintiff had seen conductors accept detached coupons, similar to those offered by him, is incompetent to show his belief that they were a proper tender of fare. *Id.*

10. Such evidence is admissible to prove a custom. *Id.*

11. A passenger alighting from a train and taking a position upon the sidewalk of a highway ceases to be a passenger; and, when injured while crossing the railroad track, without looking for approaching trains, cannot recover. *Allerton v. Boston & M. R. Co.* (Mass.) 835.

12. A carrier is liable for the loss of the luggage of a passenger whose fare was paid by another. Cited in *Nugent v. Boston, U. & M. R. Co.* (Me.) 869.

13. A carrier is not liable for its failure to transport merchandise checked by the owner as baggage. *Blumenthal v. Maine C. R. Co.* (Me.) 855.

BRIEFS AND NOTES.

Of goods. Bills of lading are capable of being explained by parol. 580.

Consignee does not acquire title from mere fact of being named in bill of lading. 581.

Misdelivery of goods is conversion. 908.

Liable for destruction of goods by fire. 204, 205, 207, 208.

Is not liable beyond own line, unless it makes positive agreement extending its liability. 907.

One is passenger from time of entry into station until departure therefrom. 828.

Must provide safe passage to and from trains. 826.

Rule providing that coupons shall be invalid unless detached by conductor is reasonable. 573.

Passenger refusing to pay fare may be ejected without arrest. 173.

Liability for failure to transport merchandise checked as baggage. 355, 356.

CASE. See MALICIOUS PROSECUTION, 5; NUISANCE, 3; PLEADING, 4; WATERS AND WATERCOURSES, 7.

CASES CERTIFIED.

On certificate of constitutional questions, constitutionality of some Act of General Assembly only will be considered. *Es Fitzpatrick* (R. I.) 675.

CEMETERIES.

1. A cemetery association selling its lots and using its receipts in caring for its grounds, and to a large extent furnishing free burial for the poor, is not a public charity, and is liable for negligence in burying in the plaintiff's lot a person not entitled to be buried there. *Donnelly v. Boston Catholic Cem. Assn.* (Mass.) 741.

2. Such association, not being the agent of a municipality in the performance of a municipal duty, is not exempt from liability on that ground. *Id.*

BRIEFS AND NOTES.

Where cemetery is public charity, it is not liable for negligence. 742.

CERTIORARI.

1. A petitioner for certiorari must establish all the material allegations of his petition. *Collins v. Holyoke* (Mass.) 909.

2. When a proceeding for certiorari to the mayor and alderman of a city is reserved by a single justice for consideration of the full court, upon petition and answer, the answer is taken as true. *Id.*

3. An affidavit appended to the petition, which could not have been received in evidence at the final hearing, can not affect the rights of the parties upon said reservation. *Id.*

4. The members of the board of mayor and aldermen at the time such answer is required are the proper persons to make it, although not members of the board at the time the action sought to be reviewed was taken. *Id.*

BRIEFS AND NOTES.

Answer is conclusive as to facts stated therein. 911.

CHARITIES. See CEMETERIES 1; DEVISE AND LEGACY, V.

CHATTEL MORTGAGE. See ATTACHMENT, 11-18; HUSBAND AND WIFE, 1; MORTGAGE, V.

CHURCHES. See RELIGIOUS SOCIETIES.

CIVIL SERVICE.

Under Laws 1897, chap. 487, honorably discharged soldiers and sailors cannot be preferred for appointment to office without having made application. *Devens, J.*, dissent. *Re Civil Service Rules* (Mass.) 113.

CLOUD ON TITLE.

1. Where there is a joint or mixed possession, the petition against a person making adverse claim, to show cause why he should not bring an action to try his alleged title, can not be maintained. *Orthodox Congregational Society v. Greenwich* (Mass.) 209.

2. If the petition prevails, the title must be tried in an action at law. *Id.*

3. Where a meeting-house was built by a town upon a common belonging to it, and had N. E. R., V. V.

been used as a town house and place for public worship until a new town house was built, and then for religious services and lectures, by permission of the town, which kept up the custom of ringing the bell at noon, and of tolling it for deaths, the religious society which occupies the audience room by such permission has not such exclusive possession as entitles it to maintain such petition. *Id.*

4. A bill by one not in possession, to remove a cloud from his title to land, held by the tenant by virtue of a judgment alleged to be fraudulent, will be dismissed without prejudice, if the complainant fails to prove fraud. *Garage v. Harris* (Me.) 812.

BRIEFS AND NOTES.

Bill is not maintainable by one not in possession. 818.

Petition against person holding adverse possession. 209.

CLUBS. See INTOXICATING LIQUORS, 12, 13.

COLLATERAL SECURITY. See PLEDGE AND COLLATERAL SECURITY.

COLLEGES AND ACADEMIES. See TAXES, 3.

COMMERCE.

Pub. Stat. chap. 634, § 1, prohibiting keeping of liquors for sale, is not obnoxious to provision of Federal Constitution conferring upon Congress exclusive power to regulate commerce. *State v. Fitzpatrick* (R. I.) 673.

COMMON CARRIER. See CARRIERS.

COMMON DRUNKARDS. See DRUNKARDS.

COMPOSITION WITH CREDITORS. See INSOLVENCY, 1, 2; PRINCIPAL AND AGENT, 7.

CONDEMNATION PROCEEDINGS. See EMINENT DOMAIN; MUNICIPAL CORPORATIONS, III.; RAILROAD COMPANIES, 2-8; ROADS AND HIGHWAYS, II.; WATER COMPANIES, 1-4.

CONDONATION. See HUSBAND AND WIFE, 14, 15.

CONFLICT OF LAWS.

1. The law of a place where a contract is made governs its interpretation, although performance is demanded in a foreign jurisdiction. *Peabody v. Maguire* (Me.) 694.

2. Where no foreign law is provided, the court will assume the law of the place of the contract is the same as that where the remedy is sought. *Id.*

3. Where a New York corporation mortgaged its real estate in Connecticut and New York to secure its bonds, a foreclosure in New York is nugatory as to the estate in Connecticut. *Farmers L. & T. Co. v. Postal Tel. Co.* (Conn.) 848.

4. The Statute of Limitations of one State does not bar suit in another. *Waterman v. Sprague Mfg. Co.* (Conn.) 682.

BRIEFS AND NOTES.

Contract is governed by law of place where made. 606.

Contracts concerning alienation of land are governed by *lex rei sitae*. 483.

Lex fori. 696.

Jurisdiction of courts over land is local. 347.

CONSTABLES. See OFFICE AND OFFICER, 2.

CONSTITUTIONAL LAW. See COMMERCE; INTOXICATING LIQUORS, 88, 89.

1. The party assailing the constitutionality of an Act has the burden of proof. *Northampton v. Hampshire County Co. (Mass.)* 175.

2. An interpretation rendering a statute constitutional should be adopted. *State v. Intoxicating Liquors (Me.)* 862.

3. The Legislature cannot enact a law impairing the right of trial by jury. *Id.*

4. A statute requiring one convicted in a justice's court, by a jury of six men, to procure copies of appeal at his own expense, if he appeals to a court where he may have a jury of twelve, does not infringe the constitutional right to trial by jury. *Re Marron (Vt.)* 785.

5. The governor, in performing his duty of taking care that the laws "be faithfully executed," has no arbitrary power, but must proceed according to law. Cited in *Re State Prison Commission (R. I.)* 100.

6. The first ten Amendments to United States Constitution apply only to the United States. *Re Fitzpatrick (R. I.)* 675.

7. Fifth Amendment to Federal Constitution imposes restrictions only on the general government, and does not apply to State government. Cited in *State v. Flynn (R. I.)* 830.

BRIEFS AND NOTES.

Validity of statute is favored. 505.

Legislature may enact retrospective laws affecting remedy only. 852.

Right to trial by jury cannot be impaired. 735.

No person can be tried twice for same offense. 880.

Fifth Amendment to Federal Constitution has no reference to State government. 880.

CONTEMPT.

A defendant can not except to an order committing a State witness for contempt. *State v. Hall (Me.)* 235.

CONTRACT. See ASSIGNMENT, 2; CONFLICT OF LAWS, 1, 2; EQUITY, 1, 2; EVIDENCE, II.; FRAUDS, STATUTE OF, 3, 4; HUSBAND AND WIFE, I.; INFANTS; MUNICIPAL CORPORATIONS, II.; ORDERS; PLEADING, 1-8; SALE; VENDOR AND PURCHASER.

1. A promise is sometimes implied from silence or presumed assent of the parties. Cited in *Roswell v. School Dist. No. 19 (Vt.)* 139.

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2. One accepting the benefit of services done for him without his request must pay a reasonable compensation therefor. *Id.*

3. The maker's assent to the compromise of his claim against a third person is sufficient consideration of a promise by the holder of notes to accept in full payment such percentage as was received in the settlement of such claim. *Hunt v. Brown (Mass.)* 810.

4. In an action upon the notes by the legal representatives of the payee and promissor, the maker was not bound to plead the agreement in defense. He may maintain an action for the breach of the agreement. *Id.*

5. An agreement, on part payment of a judgment, to pay the balance in a few days, upon an agreement of the other party to refrain from enforcing an execution, is founded upon a valuable consideration, and waives the right to treat the judgment as voidable. *Smith v. O'Brien (Mass.)* 842.

6. Where creditors agreed to divide whatever one should realize, after the deduction of costs and fees of suits and execution, the costs and fees in actions to avoid the judgments in said suits, and to recover the proceeds of sales on said executions in the hands of the officer, are within the agreement. *Steele v. Nash (Mass.)* 154.

7. Words having no relation to the subject to which the contract relates can not be regarded. *Manufacturers F. & M. Ins. Co. v. Western Assur. Co. (Mass.)* 501.

8. A contract to put gas-pipes in a building, destroyed before the work could be finished without the fault of either party, is dissolved thereby. *Gilbert & Barker Mfg. Co. v. Butler (Mass.)* 578.

9. The plaintiff may recover for work and materials furnished at the time of the dissolution of the contract, where he was prevented from full performance by the defendant's fault. *Id.*

10. The defendant, assuming another's contract, which he afterwards rescinded, cannot set it up as defense to an action for work and labor done. *Duggan v. McCarthy (R. I.)* 897.

BRIEFS AND NOTES.

Mutuality is requisite, 141, 272, 788.

Must be result of free assent of parties, to be binding. 161.

Consideration for promise need not exist at the time promise is made. 758.

Parol agreement to accept part of debt in full satisfaction for whole is not binding for want of consideration. 811.

Agreement to pay third party's debt in consideration of forbearance to sue. 155.

Party misled as to actual contents of instrument is not bound. 540.

Law supplies what is presumed to have been intended by parties in implied contract. 862.

Law will not raise implied promise against one incapable of making valid promise. 180.

Remains executory so long as anything remains to be done. 400.

Building; builder may charge for work upon change of plan. 765.

Construction is to be upon whole contract. 412.

Is governed by intention of parties. 412, 917.

And by their acts and conduct. 820.

Every word and clause is to be taken into consideration. 568.

Rescission; placing other party in statu quo. 84.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, I.

CORONER. See HOMICIDE.

CORPORATIONS.

I. IN GENERAL.

II. JOINT STOCK COMPANIES.

III. MANUFACTURING COMPANIES.

BRIEFS AND NOTES.

See BENEFIT SOCIETIES; DEED, 8; INSURANCE; RECEIVER; TAXES, 8, 4; WATER COMPANIES; WRIT AND PROCESS, 1.

I. IN GENERAL.

1. Acts incorporating and providing for consolidation of railroad companies are competent proof of the existence of a new company. *Com. v. Carroll* (Mass.) 430.

2. To charge a corporation as a trustee of the defendant, it must appear that it has his goods or credit in his hands. *Seward v. Arms* (Mass.) 202.

3. Corporations have the power to mortgage or sell their property, unless restricted by statute. *Fitch v. Lewiston Steam Mill Co.* (Me.) 862.

4. An officer of the corporation may be authorized to execute a mortgage for it, and that authority may be inferred from long acquiescence. *Id.*

5. An agent of a corporation may be appointed without the use of a seal. *Id.* 863.

6. Insolvency is not sufficient evidence of the surrender of corporate rights. *Dowey v. St. Albans Trust Co.* (Vt.) 652.

II. JOINT STOCK COMPANIES.

7. The majority of directors of joint-stock corporation may make an assignment for creditors under the statute. *Chase v. Tuttle* (Conn.) 624.

8. The action of the majority is not invalidated because absent directors, out of the State, failed to receive notice of the meeting. *Id.*

9. Where record of meeting recites that the proceedings were had at meeting called, it will be presumed that purpose of meeting was specified in notice thereof. *Id.*

10. Law 1876, p. 107, providing that any of the directors of a domestic corporation owning stock in any other corporation can be director of such other corporation, is not repealed by the Joint-Stock Act of 1880, providing that directors of a joint-stock corporation shall be stockholders therein. *Id.*

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11. A joint-stock corporation is bound by the acts of an agent appointed by the stockholders. *Wood v. Wiley Construction Co.* (Conn.) 921.

12. It is not necessary to the appointment of an agent by the stockholders that there should have been any previous notice of their action. *Id.*

13. Stockholders transacting business and holding themselves out as a corporation, having filed the organization certificate, have the burden of showing a defect in the organization of the corporation when they desire to avail themselves thereof in an action against the corporation for the breach of a contract made by them in its name. *Id.*

III. MANUFACTURING COMPANIES.

14. Where a manufacturing company executed a mortgage to secure advances not to exceed a certain sum; and the mortgagees made additional advances on verbal promises of the mortgagor's financial agent, that they should be secured by the mortgage and by consigned goods; and the avails of the consigned goods, being less than the mortgage, were applied by the mortgagees on the additional advances in the first instance; and the mortgagor has gone into insolvency,—*Held*, that the mortgage protected advances up to the amount secured thereby; that the mortgagees could, by said verbal agreement, repay himself for additional advances from the consigned goods, before making any application of the same upon the mortgage debt; and that the mortgagee was entitled to recover advances, less the proceeds of consigned goods. *Lewis v. Hartford Silk Mfg. Co.* (Conn.) 608.

15. It is not ultra vires for a manufacturing corporation to invest in materials in excess of immediate necessity, when the price thereof is low, with view to benefit by a rise in price. *National Shoes & Leather Bank's Appeal* (Conn.) 604.

16. Where a bank sought to enforce a claim against "B & Bros.," an insolvent manufacturing corporation, for money loaned upon notes indorsed "B, agent," evidence that an account for the financial branch of the corporation's business, managed by B, had stood in his name, as agent, in another bank for some years before it was transferred to plaintiff bank, was admissible to show knowledge of his doings on part of the directors. *Id.*

BRIEFS AND NOTES.

Existence of corporation may be proved by producing its charter, or by proving acts of user under it. 922.

Illegality of organization of corporation relied on must be specifically pleaded. 922.

Contracts ultra vires are often ratified by Legislature. 818.

Is not estopped from showing contract was ultra vires. 922.

Plea of ultra vires will not prevail where it will accomplish legal wrong. 819.

May mortgage property and authorize execution of mortgage by officers. 863.

Director may contract with corporation. 440.

Director's relation to bank is that of agent to principal. 440.

Agent; formal vote is not necessary to appointment of. 923.

How far bound by acts of. 609.

Bound where acts are within scope of authority. 445, 633.

Cannot set up against creditors invalidity of *de facto* agent's appointment. 624.

Majority of directors may make assignment for creditors. 624.

Insolvency is not evidence of surrender of corporate rights. 653.

Surrender of franchises must be accepted by Legislature. 654.

Equity cannot decree forfeiture of franchises. 654.

Not dissolved by insolvency. 654.

COSTS. See APPEAL AND ERROR, IV.; ASSIGNMENT, 1; ATTACHMENT, 5; MORTGAGE, 25; NEW TRIAL, 6; STATUTES, 8.

1. Under Rev. Stat. chap. 82, § 124, to entitle defendant to a stay of proceedings in a second suit until costs in the first, in which plaintiff was nonsuited, are paid, it is enough that the cause of action in the first suit may be relied upon in the second. *Smith v. Allen* (Me.) 702.

2. A probate appeal is a civil action, within R. I. Pub. Stat. chap. 217, § 1, relating to costs. Cited in *Aldrich v. Providence* (R. I.) 97.

3. Unless specially reserved, costs are not ordinarily reviewable at the law terms. *Nutter v. Varney* (N. H.) 85.

BRIEFS AND NOTES.

Follow the event of action. 87.

Stay of proceedings until costs of action paid. 701.

COUNTERCLAIM. See SET-OFF AND COUNTERCLAIM.

COUNTIES.

Where the superior court fixed the salary of the steward of the jail in Lawrence at \$900, and the commissioners fixed the salary of his successor, upon the incumbent's resignation, at \$800, after such salary had been paid as fixed, the successor had no claim against the county. *Vose v. Essex County* (Mass.) 428.

COURTS.

1. The chancery jurisdiction of the supreme court is not ousted by a statute affording a remedy in some other tribunal. *Moulton v. Smith* (R. I.) 761.

2. Mere consent does not confer jurisdiction of the person. *Com. v. Maloney* (Mass.) 168.

3. The rules of court are as binding upon the court as upon the parties. *Achorn v. Andrews* (Me.) 850.

BRIEFS AND NOTES.

Jurisdiction; amount in controversy. 47.

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COVENANT. See EVIDENCE, 5; SPECIFIC PERFORMANCE, 1; VENDOR AND PURCHASER, 2, 3.

1. Where the owner of two lots conveyed one to W, reserving "privilege of conveying water across the southwest corner of premises conveyed," a conveyance of the other lot to plaintiff by owner's heirs, including "same privilege of drawing water, and conveying same through land of W. as enjoyed by the original owner in his lifetime," necessarily excluded any right appurtenant to W's lot of drawing water from aqueduct running across it, which required no entry on the plaintiff's lot. *Johnson v. Knapp* (Mass.) 551.

2. No right could exist to maintain a pipe on plaintiff's land under a deed not recorded, and of which he had no notice. *Id.*

3. Where water had flowed to one of the lots in question, through pipes upon land conveyed to plaintiff, since 1837, and the maintenance of such pipes was necessary to the enjoyment of the estate, to this extent there was an incumbrance on plaintiff's land at the time of the deed to him. *Id.*

4. Power of attorney to convey the maker's realty, and to make deeds therefor, with or without covenants of warranty, authorized the making of covenant against incumbrances. *Id.*

5. Covenant will lie on the words, "to which payment well and truly to be made I bind myself," in a bond with a condition of defeasance. *Douglas v. Hennessy* (R. I.) 94.

6. No demand is necessary before action brought. *Id.*

7. The burden is on defendant to prove his plea of performance. *Id.*

8. When grantee has all the land described in his deed, but not all the grantor agreed to convey, his remedy is not an action on the covenant. *Church v. Stiles* (Vt.) 104.

9. Covenant will not lie on an official bond for misfeasance in office. Cited in *Douglas v. Hennessy* (R. I.) 95.

10. In actions of contract on covenant of warranty against incumbrances, defendant can not prove by parol that plaintiff agreed to pay incumbrances as part of the consideration. *Simanovich v. Wood* (Mass.) 190.

11. In actions on covenant against incumbrances, plaintiff will recover actual damages sustained. *Beecher v. Baldwin* (Conn.) 418.

12. If he is evicted, he will recover value of land at eviction, provided he has paid purchase money. *Id.*

13. If purchase money has been partially paid, he will recover amount paid, with interest. *Id.*

BRIEFS AND NOTES.

Easement to go upon land and take water therefrom is breach of covenant against incumbrances. 553.

Measure of damages for breach of covenant of warranty is value of land at eviction. 419.

Covenant will not lie for land not included in deed. 105.

CRIMINAL LAW.

I. INDICTMENTS; INFORMATIONS; COMPLAINTS.

II. PLEAS; FORMER CONVICTION.

III. TRIAL.

a. Evidence.

b. In General; Charge of Court.

IV. NEW TRIAL; APPEAL.

BRIEFS AND NOTES.

See ADULTERATION; ANIMALS; BAWDY AND DISORDERLY HOUSES; BREACH OF THE PEACE; BURGLARY; DRUNKARDS; EMBEZZLEMENT; FORGERY; GAMING; HOMICIDE; HUSBAND AND WIFE, 8-10; INCEST; INTOXICATING LIQUORS, IV.; JURY; LEWD AND LASCIVIOUS COHABITATION; LOTTERY; MALICIOUS MISCHIEF; SEARCH AND SEIZURE; SUNDAY, 2-4; VOTERS AND ELECTIONS; WITNESS, 9, 10.

I. INDICTMENTS; INFORMATIONS; COMPLAINTS.

1. A complaint may be made by any one competent to make oath to it. *Com. v. Carroll* (Mass.) 430.

2. An offense charged to have been committed in a locality within the jurisdiction of the court is well pleaded. *Id.*

3. Objection to the form of a complaint cannot be raised in the superior court for the first time. *Id.*

4. Whether an indictment in the words of a statute is sufficient depends upon whether every necessary fact is charged or implied from the language used. *State v. Miller* (Vt.) 787.

5. In an indictment for threatening to accuse of crime, the name of the person threatened must be proved as set forth. *Com. v. Buckley* (Mass.) 147.

6. A variance in regard to the middle name or initial is fatal. *Id.*

7. A and E as middle initials, are not the same, as a matter of law. *Id.*

8. An erroneous statement in the caption of an indictment of the year in which it was found is not ground for motion to quash; it may be cured by amendment. *State v. Jenkins* (N. H.) 57.

9. Mere surplusage will not vitiate a complaint or indictment, and need not be proved. *Com. v. Rowell* (Mass.) 590.

10. A complaint must allege the material elements constituting the offense, which must be proved. *Id.*

11. If the complaint unnecessarily allege anything descriptive of the identity of the offense, it must be proved as alleged. *Id.*

12. Where two offenses are improperly charged in one count, the prosecuting officer may not *pros.* one of them. Cited in *Com. v. Dunster* (Mass.) 116.

13. Where the offense is set out with aggravating circumstances, which enlarge the offense, the prosecuting officer may not *pros.* the ag-

gravation, and obtain a conviction for the lesser offense, which is well charged. Cited in *Id.*

14. Formal defects in a complaint must be objected to before judgment in the lower court. *Com. v. Turner* (Mass.) 265.

II. PLEAS; FORMER CONVICTION.

15. When the defendant pleads guilty in the police court, and appeals, he can not claim a trial by jury, unless the court gives him leave to plead anew. *Com. v. Ingersoll* (Mass.) 883.

16. A plea of *nolo contendere*, accepted by the court, is equivalent to a plea of guilty; the defendant cannot plead such plea without leave of court. *Id.*

17. In the absence of any defect to a plea of misnomer, a replication can raise the questions: (1) that defendant was as well known by the name in the complaint as by that in the plea; (2) that the names were pronounced alike. These questions are not presented by demurrer to the plea. *State v. Mahia* (Me.) 354.

18. In a complaint under the liquor law, an allegation that a former conviction was at a term of court which in fact ended before the date when the decision is alleged to have been received from the law court in that cause, is bad. *State v. Conwell* (Me.) 873.

19. An allegation of a former conviction, in an indictment for a single sale of liquor, that at a specified term of court the defendant was convicted "of selling a quantity of liquor," is sufficient. *State v. Wyman* (Me.) 859.

20. An allegation of a former conviction, in a complaint for search and seizure, averring that at a time specified the defendant was convicted "of unlawfully keeping in said county intoxicating liquors with intent to sell in violation of law," is sufficient. *State v. Devine* (Me.) 854.

21. A record of a former conviction for keeping a liquor nuisance is admissible only when the building in the record is the same as that in the indictment. *State v. Hall* (Me.) 285.

22. A record saying "indictment for being common seller of liquors" is admissible to show a former conviction. *State v. Laskus* (Me.) 287.

23. Whether the defendant is the same person named in the record is for the jury to say. *Id.*

24. Under a plea of guilty, continuing the cause to be again called up for sentence upon notice to the defendant amounted to a discharge. *Com. v. Maloney* (Mass.) 168.

III. TRIAL.

a. Evidence.

25. Evidence of independent similar offense on the same occasion is competent, when admitted only as it affects the offense charged on a disputed question of fact. *Com. v. Ewig* (Mass.) 177.

26. A person may be convicted on the uncorroborated testimony of an accomplice. *State v. Dana* (Vt.) 108.

27. The rule as to uncorroborated evidence of an accomplice merely requires such corroboration of the particulars of the story as convinces the jury of its truth. *Id.*

b. In General; Charge of Court.

28. It is within the discretion of the trial judge to allow counsel to read a statute to the jury. *Com. v. Hill (Mass.)* 277.

29. Defendant's counsel may remind the jury that, whenever they have a proper occasion to give a reason for acquitting the defendant, it will be sufficient to say that his guilt was not proved. *Com. v. Brownell (Mass.)* 271.

30. Where jury are properly instructed upon the true interpretation of the statutes and law of the case, a request to charge that they may consider the statutes and law in the case is properly refused. *Com. v. Tay (Mass.)* 712.

31. It is too late to request, during the closing argument of counsel, an instruction that testimony, admitted without objection, was incompetent. *Com. v. Clark (Mass.)* 378.

32. If a question of law arises for the first time during such argument, the defendant may ask a ruling upon it. *Id.*

33. Jury can not act by a majority, and each juror must act upon his own convictions. *Com. v. Ford (Mass.)* 595.

IV. NEW TRIAL; APPEAL.

34. A motion for a new trial, in a criminal case tried in the superior court, can be heard only by a justice of that court. *State v. Intoxicating Liquors (Me.)* 852.

35. On appeal from a sentence of a trial magistrate, such irregularities only as deprive him of jurisdiction can avail the defendant. *Com. v. Maloney (Mass.)* 163.

36. If a trial judge had jurisdiction of the person of the defendant, the appellate court has the same jurisdiction. Cited in *Id.* 165.

37. Attestation by trial justice of a copy of the record transmitted to the superior court is sufficient. *Com. v. McFarland (Mass.)* 252.

38. Where a magistrate's record does not state that the appellant entered into a recognizance, but he transmitted the recognizance to the superior court with a copy of his record, this sufficiently shows that the appeal was perfected. *Com. v. Bisch (Mass.)* 252.

39. A mere clerical error in the record is no ground for quashing a complaint. *Id.*

40. The withdrawal and limitation of part of the charge, upon a matter of fact, removes the ground of complaint. *Com. v. Clifford (Mass.)* 121.

41. The trial court may pass upon exceptions before filed or allowed. *Id.*

42. It will be presumed, on appeal, that offense proved in the superior court is same as that of which defendant was convicted in lower court, where the evidence corre-

sponds to the complaint in the lower court. *Com. v. Ferry (Mass.)* 789.

43. Where evidence admitted generally was admissible under counts in the indictment which were not held bad, and upon which the defendant was convicted, there can be no exception to refusal to strike it out. *Com. v. White (Mass.)* 450.

BRIEFS AND NOTES.

Indictment using statutory language is sufficient. 147, 890, 787.

When use of statutory language is not sufficient. 537.

Requisites of indictment for threatening to charge one with crime. 147.

Erroneous statement of year in which indictment found. 58.

Videlicet is to fix with certainty that which was before general. 511.

Essential facts must be stated with certainty. 351.

Matter of description is not surplusage. 235.

Variance in name is fatal. 274.

Offense must be proved as charged. 273, 851.

Courts will not order election until evidence is all in. 740.

Defendant cannot waive fatal defect in indictment. 452.

It is discretionary with court to receive plea of *nolo contendere*. 332.

Requisites of allegation of prior conviction. 115, 854, 859, 873.

Record of, is inadmissible. 235, 238.

Testimony taken at inquest is open to inspection of public. 630.

Right of trial judge to prohibit counsel from reading statute to jury. 277.

Right of defendant to be heard through counsel. 271.

Instructions upon matters of fact. 121.

Accomplices; credibility; corroboration. 100; Note, 108.

One procuring commission of crime with which defendant is charged is not accomplice. 188.

Evidence of similar distinct offense is inadmissible. 480, 789.

Court having jurisdiction of party and offense, sentence is not void. 164.

Objection cannot be first made upon appeal. 119.

Clerical error in record is immaterial. 252.

CUSTOM AND USAGE. See CARRIERS, 10; EVIDENCE, 3; MASTER AND SERVANT, 7.

DAMAGES. See COVENANT, 11, 13; EMINENT DOMAIN; ESCAPE; FALSE IMPRISONMENT, 3; INTOXICATING LIQUORS, I.; LOGS AND LOGGING; MUNICIPAL CORPORATIONS, III., IV.; NEGLIGENCE; NUISANCE; ROADS AND HIGHWAYS, 14; SALE, 12; SEDUCTION; VENDOR AND PURCHASER, 3; WATER COMPANIES, 5, 7, 8.

DEATH. See DEVISE AND LEGACY, 18; GUARANTY, 5; NEGLIGENCE, IV.

1. Death is **presumed from an absence of seven years** without being heard from. Cited in *Stockbridge v. Stockbridge* (Mass.) 519; *S. P.* in *Johnson v. Merrithew* (Me.) 855.

2. There is **no presumption** that death occurred at any particular time during that period. *Id.* 855.

3. Where several lives are lost in the same disaster, there is **no presumption** that either survived the other. *Id.*

4. That a vessel sailed from Scotland for Havana, and was **never heard from**, will authorize the inference of loss of all on board within six months after her departure. *Id.*

BRIEFS AND NOTES.

Is presumed from seven years' absence without being heard from. 855.

There is no presumption of survivorship. 856.

DEBTOR AND CREDITOR. See ACCORD AND SATISFACTION; ASSIGNMENT FOR BENEFIT OF CREDITORS; ATTACHMENT; BANKRUPTCY; FRAUD AND FRAUDULENT CONVEYANCE, II.; INSOLVENCY; LIMITATION OF ACTIONS, 4-7; POOR DEBTOR; RECEIVER.

DECEDENTS' ESTATES. See DESCENT AND DISTRIBUTION; DEVISE AND LEGACY; DOWER; EXECUTORS AND ADMINISTRATORS; WILL; WITNESS, 1-3.

DECLARATIONS. See EVIDENCE, III.

DEDICATION. See ROADS AND HIGHWAYS, I.

DEED. See COVENANT; MORTGAGE, II.

1. A deed **misread** to an illiterate man, without fraud, does not bind him. Cited in *O'Donnell v. Clinton* (Mass.) 436.

2. A deed **not acknowledged** is **valid** between the parties. *Gardiner v. Johnston* (R. I.) 759; *Fitch v. Lewiston Steam Mill Co.* (Me.) 862.

3. A certificate of **acknowledgment**, on the mortgage of a corporation, by its treasurer, that he acknowledged it to be "his free act and deed," does not vitiate it. *Id.* 862.

4. The **construction** which the parties by their practical acts put upon a deed containing a privilege of opening a ditch, whereby they have taken the entire flow of water for a long period, is held the **proper one**. *Brigham v. Ross* (Conn.) 406.

5. A **description**, "thence to a poplar tree on the bank of N. River, and thence up said river until it comes on the line to make a right angle with the east end of said cornbarn," makes the thread of the stream the **boundary** of the tract conveyed. *Taylor v. Blake* (N. H.) 51.

6. A grantee's right of **drainage through a private way**, acquired by prior adverse use, is **not affected by a clause** in a deed, that he should have **no right of frontage** on, N. E. R., V. V.

or access to, such private way, for any land **except the parcel conveyed** thereby. *Hicks v. Wetmore* (R. I.) 98.

7. An intention to convey to the centre line of a **highway** is not presumed when the grantor does not own the fee of the highway. *Church v. Stiles* (Vt.) 104.

8. Where one accepts a deed bounding him by another's land, the land referred to becomes a **monument** which controls distances. Cited in *Id.* 105.

9. **Courses and distances yield to monuments** in case of conflict. Cited in *Id.*

10. A **clause reserving a right of passageway** "as the same is now enjoyed," and a clause in a subsequent deed reserving such passageway "as specified in the first-mentioned deed," are **exceptions** and not reservations. *Wood v. Boyd* (Mass.) 188.

11. A **reservation** can not **vest** any right in a **stranger** to the deed. *Id.*

12. If the **reservation** does not contain words of inheritance it will give only an estate for the life of the grantor. *Id.*

13. The use of the word "**reserving**" is of little importance where the plain purpose is to except rights of way existing, by prior grants, in third persons. *Id.*

BRIEFS AND NOTES.

Grantor must be mentally **capable**. 855. Imbecility, not amounting to idiocy, is not alone sufficient to avoid deed. 871.

To constitute sufficient **delivery**, deed need not be in manual possession. 293.

Construed so as to effectuate intent of parties. 406.

Grant of principal thing carries with it what is necessary to its beneficial enjoyment. 553.

Description defines extent and limits of possession acquired by entry under deed. 836.

Parol evidence is admissible to remove doubt in description. 406.

Boundaries; streams. 51.

When a piece of land is described as bounded on lands of another, such lands are **monuments**. 105.

Reservation must be in grantor himself. 189.

Growing timber may be separated from realty by express reservation. 423.

Use of word "**reserving**" is not decisive. 189.

Presumption of intention to convey to centre of **highway**. 104.

Word "**heirs**" is only necessary in **habendum**. 916.

Habendum devises estate granted. 916.

DEFAULT. See JUDGMENT, 4.

DEFINITIONS. See ANIMALS, 2; INSOLVENCY, 8.

1. **Final orders** or decrees settle the rights of the parties under the issues made by the pleadings. *Nelson v. Brown* (Vt.) 103.

2. **Fornication**, at common law, is sexual intercourse of unmarried persons of different sexes. *State v. Dana* (Vt.) 112.

8. "**Illicit**" means that which is unlawful or forbidden by law. Cited in *State v. Miller* (Vt.) 738.

4. An **officer de facto** is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law. Cited in *Clark v. Easton* (Mass.) 559.

5. A **pool** is a combination of stakes, the money derived from which goes to the winner. *Com. v. Ferry* (Mass.) 740.

6. "**Representatives**," as having signification of "next of kin." *Davies v. Davies* (Conn.) 409.

7. A **waiver** is the voluntary relinquishment of some known right or advantage. Cited in *Peabody v. Maguire* (Me.) 699.

BRIEFS AND NOTES.

- Action. 796.
- Cause. 796.
- Civil actions. 797.
- Coercion. 817.
- Composition. 240.
- Consent. 858.
- Crime. 596.
- Dissolution. 653.
- Dwelling-house. 390.
- Expert. 686.
- Family. 82.
- Fiduciary relations, persons standing in, named. 872.
- Fines. 298.
- Gift. 877, 878.
- Heirs at law. 835.
- Highway does not include private way. 815.
- Illicit. 737.
- Increase. 413.
- Inhabitation and residence do not mean domicil. 810.
- Law. 858.
- "May" construed as "shall." 47.
- Missile. 511.
- Negligence. 416.
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- Qui tam* actions. 298.
- "Relinquish," where equivalent to "release." 915.
- Specific devises. 255.
- Tenants in common. 412.
- Tort. 169.
- Vessel. 465.
- Void. 889.
- Waiver. 286, 695, 798, 843.

DEMAND. See ACTION OR SUIT, 1, 2; COVENANT, 5; TROVER AND CONVERSION, 2.

DESCENT AND DISTRIBUTION.

1. A legal estate obtained from a trustee merely by virtue of the ownership of the equitable estate, by one who had received the equitable estate by devise from his parent, is not an **ancestral estate**, within Rhode N. E. R., v. v.

Island Statutes of Descent. *Shepard v. Taylor* (R. I.) 876.

2. When the **equitable estate merges in the legal**, obtained from a different source, **descent follows the legal estate.** *Id.*

3. The **heirs at law** are those who answer the description at the time of the testator's death. *Whall v. Converse* (Mass.) 838.

BRIEFS AND NOTES.

One's heirs at law are those entitled to take at time of death. 825.

Upon merger of legal and equitable estates, descent follows legal title. 878.

Doctrine of estates by purchase. 877.

Distribution is entrusted to court. 519.

Probate court must ascertain heirs and distributees of estate in order to obtain distribution. 602.

DEVISE AND LEGACY.

I. CONSTRUCTION; GENERAL RULES.

II. DESCRIPTION OF BENEFICIARY; DISTRIBUTION.

III. DESCRIPTION OF GIFT; IN GENERAL.

IV. SURVIVORSHIP; REMAINDERS; RESIDUARY CLAUSES.

V. TRUSTS; CHARITIES; POWERS; PERPETUITIES.

VI. WIDOW.

VII. ADVANCEMENTS; ABATEMENT.

VIII. CHARGE ON LAND; PAYMENT; DEBTS; INTEREST.

BRIEFS AND NOTES.

See WILL.

I. CONSTRUCTION; GENERAL RULES.

1. A **will speaks from testator's death**, unless a different intention is expressed. Cited in *Campbell v. Clark* (N. H.) 87.

2. The construction of a will is **governed by the intention** of the testator. *Re Boardman* (R. I.) 781.

3. When the language of a will is plain, no **intention of testator**, except that expressed, is **sought after**. *Greenough v. Cass* (N. H.) 53.

4. **Questions not yet arisen** in the course of administration will **not** ordinarily be **considered**. *Gaffney v. Kenison* (N. H.) 81.

5. A **will and a codicil** are construed together. Cited in *Webb v. Carpenter* (R. I.) 672.

6. They may operate as a **revocation** of a prior testamentary instrument. Cited in *Id.*

II. DESCRIPTION OF BENEFICIARY; DISTRIBUTION.

7. In a provision directing executors, upon the death of either of testator's sons, "to pay over to the widow, if living, \$3,000, providing he (the son) leaves no heirs," etc., the word "**heirs**" means "**children**." *Anthony v. Anthony* (Conn.) 41.

8. Where a legatee was to receive the income of property during life, and upon death the property was to be distributed to his "**per-**

sonal representatives who are entitled to his personal estate according to law," these words were intended to describe his next of kin. *Carpenter and Granger, JJ.*, dissent. *Davies v. Davies* (Conn.) 407.

9. A devise "in equal shares to all my nieces and nephews, and to the nieces and nephews of my former husband," is a gift to such of them as survive the testatrix; and they take per capita. *Campbell v. Clark* (N. H.) 66.

10. A niece or nephew of testatrix, and also of her former husband, does not take a greater share than the others. *Id.*

11. The daughter of a niece who dies in testatrix's lifetime does not take her mother's share. *Id.*

III. DESCRIPTION OF GIFT; IN GENERAL.

12. A gift to a class implies an intention to benefit those who constitute the class when the gift takes effect, and to exclude all others. Cited in *Id.* 67.

13. Where testator directed his executors to divide a portion of his estate equally among the children of A; and children of B, who was the son of A, and the nephew of testator, petitioned for payment to them of the amount payable to B, and showed he had departed from his home some ten years before the testator's death, and had not been heard of since,—the presumption of death from seven years' absence applies; and his issue who survive testator are entitled to take his share. That the gift to B was to him as one of a class did not prevent the operation of Pub. Stat. chap. 127, § 8; it is immaterial whether any of the class, the children of A, survive the testator. *Stockbridge v. Stockbridge* (Mass.) 518.

14. Where executors deposited money in bank under order of probate judge, reciting that it appeared that the residence of B was unknown, this was not intended to have any further effect than to provide for the proper keeping of the money until it should be ascertained who were entitled to it. *Id.*

15. After payments of debts, etc., a testator directed that the rest and residue of his money in banks, stocks, and bonds be paid to E for his own, but not until of age,—*Held*, that by the words "rest and residue of money in banks," etc., money deposited in banks and invested in stocks and bonds, after the payment of debts, etc., was meant; coupons detached from bonds are included in the legacy. The income of the legacy to E was payable during his minority to his guardian. *Sanborn v. Clough* (N. H.) 233.

16. In a bequest of "mill stock and bank stock," where the testator had no bank stock, the words "bank stock" are to be construed as describing his deposits in various savings banks, and the legacy is a specific one. *Tomlinson v. Bury* (Mass.) 254.

17. A specific legacy distinguishes the property bequeathed from the other property of the testator, so that it can be identified. *Id.*

18. A testator directing an investment, of which the income was to be sufficient to

keep his burial lot in good condition, the court may fix the amount. *Gafney v. Kenison* (N. H.) 81.

19. The mode of the use in the testator's life of a stable in the rear of a house does not necessarily establish that it is included in a devise of the "house in which we now live." *Bridge v. Bridge* (Mass.) 912.

IV. SURVIVORSHIP; REMAINDERS; RESIDUARY CLAUSES.

20. Where testator left six children, to one of whom, A, he gave certain land "to hold to him, his heirs and assigns, forever," and provided that if any of the children should die without issue, such child's share should go in equal shares to the surviving brothers and sisters; and A died without issue,—the land passed in equal shares to his brothers and sisters living at his death. *O'Brien v O'Leary* (N. H.) 61.

21. In a devise for life, with remainder over to the survivors of a class, the words of survivorship are referred to life tenant's death. Cited in *Id.*

22. On a devise of the residue of an estate to three children, providing that if any of them die without issue their portion to be shared equally by the survivors, the death of the devisee spoken of means death during the testator's lifetime, and the children surviving the testator take an absolute estate. *Phelps v. Phelps* (Conn.) 239.

23. Under a subsequent clause, providing that one of said children should keep her share in her separate right, or until her children should marry or become of age; and, should she die without issue, her portion to revert to the other two children or survivor,—where the daughter lived to go into possession of her share, she had an absolute fee as a separate estate. *Id.*

24. Where the will provided that, in case of a certain child's death before his youngest child became of age, the real estate upon which he resided, owned by the testator, was to be sold, and the proceeds invested for the support of his widow and children until the youngest became of age, and then the property to be divided among the children,—where said child survived the testator the trust failed. *Id.*

25. A vested remainder may be conveyed by mortgage. *Flanders v. Greeley* (N. H.) 77.

26. Where a will gave the residue of an estate to A and others, to be divided between them; and a codicil gave A all of the residue, after payment of expenses, without division,—it does not revoke the bequests, but gives A all of the residue after payment of bequests, instead of dividing it. *Webb v. Carpenter* (R. I.) 673.

27. Nothing is given by a residuary clause except upon the condition that something remains after the paramount claims are satisfied. Cited in *Tomlinson v. Bury* (Mass.) 256.

28. A devise to a son if he return or is found anywhere living within ten years after the death of the testatrix, goes to the resid-

uary legatee in case he does not return or is not heard from. *Leader v. O'Loughlin* (Me.) 792.

V. TRUSTS; CHARITIES; POWERS; PERPETUITIES.

29. A provision for the relief of the most destitute of testator's relatives is not void for uncertainty. *Gafney v. Kenison* (N. H.) 81.

30. Under a devise of three parts of an estate in trust for the testator's wife, son, and daughter, during their lives; and, upon the wife's death, the property given to her to be held for the son and daughter for their lives; and, upon the death of each, for the use of the children of each *per stirpes*,—the trust estate is to be held in one entire fund. *Bell v. Town-er* (Conn.) 347.

31. Where a will gave the residue of testator's estate to his four children, to be divided equally among them, and a codicil directed that the share given to one of such children should be invested by a trustee for her benefit, and at her death to be divided among her children, etc., testator's intent was to give the trustee the legal title to such child's share of the realty and personalty, with a power of sale. *Boston S. D. & T. Co. v. Mixer* (Mass.) 576.

32. The caption of the order of notice of a petition for leave to sell such child's share of the realty, using the words "heirs at law, next of kin, and all other persons interested in the real estate," is sufficient compliance with Pub. Stat. chap. 141, § 21. *Id.*

33. The right of a trustee to sell at private sale is not limited to one year after license. *Id.*

34. Where testator devised property to a trustee to use for the support of the *cestui que trust* as in his judgment he may deem necessary, a later provision, directing that the *cestui que trust* shall have no part of the fund so long as his health continues, is merely advisory. *Isley v. Isley* (Me.) 791.

35. Where the beneficial interest in a testator's estate has become vested in beneficiaries who are *sui juris*, the trust will not be continued merely for the purpose of continuing the compensation of the executor-trustee. *Stater v. Huribut* (Mass.) 889.

36. The income of a trust may, without express terms, be made inalienable by the beneficiary, and exempt from his debts. *Sears v. Choate* (Mass.) 902; *Baker v. Brown* (Mass.) 904.

37. Where the residue of an estate is devised to the children of the testatrix with a trust for the support of the father during life, the amount thereof resting wholly in their discretion, equity will not put a valuation upon the father's support and order the daughters to pay it over to his creditors, leaving him to be supported by charity. *Id.* 904.

38. Where a will left property in trust to pay an annuity from the income to the testator's sole heir at law; and contained no limitation over of the estate; and there is no provision that the income or estate should not be

alienable or attachable; and the beneficiary had the absolute equitable title to the income and property,—the trust should be terminated and the property conveyed to him. *Sears v. Choate* (Mass.) 902.

39. Where an article in a will makes a bequest to institutions similar to those mentioned in the next previous article, the institutions named in such previous article cannot become legatees under the subsequent article, as they cannot be said to be similar to themselves. *Rhode Island Hospital Trust Co. v. Olney* (R. I.) 884.

40. Under a bequest to charitable uses, the Rhode Island Homeopathic Hospital, being fully organized and in operation, and ready to make immediate use thereof, is capable of becoming a legatee thereunder. *Id.*

41. The Rhode Island Catholic Orphan Asylum, the Providence Association for the Benefit of Colored Children, and various other institutions are qualified to be recipients under said article in said will. *Id.*

42. The testator having provided for the ultimate disposal of a gift, the legatee has no power of appointment. *Davies v. Davies* (Conn.) 407.

43. A bequest of money to be divided equally among testator's widow's legal heirs after her death is inoperative, under the statute against perpetuities. *Anthony v. Anthony* (Conn.) 41.

VI. WIDOW.

44. A provision that the widow take about two thirds of the entire income of the personality, and the use of nearly half of the realty, is in lieu of dower. *Id.*

45. An income in cash of \$1,200 a year during life, to the widow, is payable annually. *Id.*

46. Where a will gave a widow the income for life of the residue of the estate, and so much of the principal as should be necessary for her support; and on her death, after certain legacies, gave the residue to one, with whose consent the widow received a sum from the principal with which she purchased a dwelling-house; and sixteen years thereafter the income proved insufficient,—she is entitled to an additional payment from the principal without first selling the house. *McKenzie v. Ashley* (Mass.) 489.

VII. ADVANCEMENTS; ABATEMENT.

47. A provision that the legatees' debts to the testator should be deducted and the balance paid to them, and if they exceeded the legacy the surplus to be discharged, makes such debts advancements. *Taylor's Appeal* (Mass.) 253.

48. Executors have no right to charge interest on these debts after the testator's death. *Id.*

49. If a legacy is specific, and is appropriated to the payment of debts, the legatee is entitled to contribution from the other specific legatees. Cited in *Tomlinson v. Bury* (Mass.) 256.

50. Where testator ordered his executor to sell his real estate and pay \$1,000 to S and

\$1,000 to a missionary society, and the land sold for less than \$2,000, \$ and the society take the fund in equal shares. *Sumner v. American Home Miss. Soc.* (N. H.) 49.

51. A clause that if the estate diminishes in value the legacies shall decrease in proportion, means all the legacies shall decrease proportionally. *Re Spencer* (R. I.) 826.

VIII. CHARGE ON LAND; PAYMENT; DEBTS; INTEREST.

52. A direction for legacies to be set off in real estate by disinterested persons will be upheld. *Gafney v. Kenison* (N. H.) 81.

53. General pecuniary legacies are not chargeable upon specific devises of land, although in the residuary clause. *Belcher v. Belcher* (R. I.) 677.

54. A devise of land in satisfaction of a debt due from testator is preferred to general pecuniary legacies. *Id.*

55. Where the residuum of an estate was charged with the payment of debts and administration expenses, the administrator was properly made a party to a bill by a creditor praying that his claim might be charged upon the lands devised to the residuary devisee. *Woonsocket Inst. for Sav. v. Ballou* (R. I.) 888.

56. The ordinary practice is to wait until the claims against an estate have been settled, and a clear fund ascertained, before enforcing the payment of legacies. Cited in *Re Spencer* (R. I.) 829.

57. Where a will directs that, after the payment of legacies, dividends from certain stock shall be divided and held in trust for two corporations until the aggregate sums reach a certain amount, the legacies are to be paid from the dividends before division. *Re Boardman* (R. I.) 781.

58. It being apparent that the testator relied almost exclusively on the stock to yield funds for his benefactions, as well as to make provision for his children, debts are properly paid out of the dividends instead of the corpus of the stock. *Id.*

59. Where a will, directing immediate payment of legacies, allows executors two years for payment, the legacies bear interest from the testator's death, in case of delay. *Id.*

60. Where a codicil confirms the appointment of executors, and allows them five years to settle the estate, legatees cannot enforce their legacies during such period. *Re Spencer* (R. I.) 826.

61. Where the will gives money to a legatee if he survives probate, a codicil, declaring that if he dies before payment the sum shall form part of the residuary estate, makes the right to the legacy contingent upon surviving until payment. *Id.*

62. Where legacies are not contingent, and no time for payment is specified, legatees are entitled to interest after one year from the testator's death. *Id.*

63. Where a widow was given a yearly

sum during life if the income of the estate should amount to that sum, together with the use of the house for life, the executors may deduct from the gross income the amount paid out for repairs, taxes, insurance, and mortgage interest on the house. *Bridge v. Bridge* (Mass.) 912.

64. General administration expenses fall upon the corpus of the estate. *Id.*

BRIEFS AND NOTES.

Construction; intention of testator controls. 44, 58, 238, 848, 893, 577, 678, 782, 840, 903.

Clearly-expressed intention in one part of will will not yield to doubtful portion in another. 791.

Unambiguous words must prevail. 53.

Distribution per capita or per stirpes. 44, 66.

Specific; defined. 255.

Gifts of stock; when held specific. 255.

Pecuniary; vests immediately upon testator's death. 328.

Are payable from property not specifically bequeathed. 228.

Fee may be conveyed without words of inheritance. 229.

Estate tail. 230.

Where testator gives income of money to one for life, and principal to another, executor should hold and invest fund. 492.

When vested and when contingent. 233, 280.

Remainder; in personal chattel, dependent upon life estate, may be created. 229.

Vested remainder may be conveyed by mortgage. 78.

Opening of remainder to let in after-born children. 45.

Limitations over chattels are good. 229.

All the estate not otherwise devised falls into the residuum. 824.

Trust arises by implication in order to carry out intention where there is no corpus given to trustee. 841.

Trust property is chargeable with payment of support. 905.

Although trustees have discretion as to amounts in which trust fund is to be applied for beneficiary, yet it cannot be taken for his debts. 905.

Power of court of equity to decree termination of trust when all interests under it are vested. 908.

Charities; uncertainty. 83.

Bequest to most destitute of testator's relatives upheld. 83.

Whenever a power is given, whoever takes estate takes from grantor by whom power is created. This power may be executed by married woman. 877.

Perpetuities. 83.

Provision in lieu of dower; what constitutes. 43.

Charge upon real estate. 677.

Order of payment of legacies. 50.

Personal estate is primarily liable for debts. 788.

Debts and legacies of gross sums are primarily payable from estate or corpus. 788.

Establishment of legacy fixes interest as an incident from time legacy became due. 914.

Advancements. 254.

Where intention is doubtful, law imposes abatement of residuary legacies for sake of annuity. 914.

Contribution of legatees. 256.

DISMISSAL. See EXCEPTIONS, 8.

DIVORCE. See HUSBAND AND WIFE, III.

DOWER. See DEVISE AND LEGACY, VI.

The probate court can not set off a portion of the real estate to the widow until after assignment of dower. *Mathewson v. Mathewson* (R. I.) 824.

BRIEFS AND NOTES.

Right of widow to dower cannot be taken in execution for debt. 861.

DRAINS AND SEWERS.

1. The board of mayor and aldermen may employ agents to supervise the construction of common sewers. *Collins v. Hotyoke* (Mass.) 909.

2. A landowner need not be notified of the intention of the city authorities to construct a common sewer or make an assessment for it. *Id.*

3. The validity of an assessment for a common sewer is not affected by the fact that the city authorities called in another person to assist them in making the assessment. *Id.*

4. A failure to comply with an ordinance requiring the superintendent of sewers to submit to the board of mayor and aldermen an account of the cost of constructing a sewer, and to report a list of the persons benefited, does not invalidate the assessment, the ordinance being directory, merely. *Id.*

5. The assessing board may divide the assessment into three classes, "direct benefit," "remote benefit," and "more remote benefit." *Id.*

BRIEFS AND NOTES.

Notice to petitioner of intention to construct sewer is unnecessary. 911.

DRUGGIST. See APOTHECARY.

DRUNKARDS.

1. Pub. Stat. chap. 244, § 24, declaring one convicted three times within six months of intoxication, etc., a common drunkard, does not make one coming within its terms renewedly liable to conviction for offenses previously punished. *State v. Flynn* (R. I.) 829.

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2. One charged under the above statute is entitled to a trial by jury upon any question of fact. *Id.*

DURESS.

1. Threats by a stranger, without the knowledge of the party, will not avoid a contract induced by them. *Fairbanks v. Snow* (Mass.) 160.

2. Where a wife alleged that she signed a note under duress by her husband, and there was evidence that she ratified it, a request to charge that it was immaterial whether the plaintiff knew when he received the note that it was signed under duress was properly refused. *Id.*

3. Where duress consists only of threats, the contract is only voidable. *Id.*

4. The ground upon which a contract is voidable by duress is that the party has been subjected to an improper motive for action. *Id.*

BRIEFS AND NOTES.

Threats of suicide by husband do not constitute. 161.

EASEMENT.

See DEED, 6.

1. The right to a partition fence is part of the estate in land. *Short v. Devine* (Mass.) 592.

2. The reservation of a right of way over land, whose line coincides with the division fence between the lands and others, cannot affect the right to a partition fence on the line. *Id.*

3. If an adjoining owner, having a right of access from any part of his lands to the way, assents to the erection of a partition fence, the statute in relation to such fences applies. *Id.*

4. In the absence of a custom to the contrary, it may be assumed that one receiving a right to pass through a neighbor's yard receives it under the same conditions as to entrance to the yard that owners generally impose upon themselves. *Id.*

5. The reservation in a deed of a right to pass through a yard does not imply a right to remove gates from the entrance. *Id.*

6. A private way over a railroad track may be acquired by an individual by prescription, notwithstanding Pub. Stat. chap. 112, §§ 195, 198, imposing a penalty on any one walking on a railroad track without the company's permission. *Turner v. Fitchburg R. Co.* (Mass.) 423.

7. Such right must be exercised subject to the superior right of the company to run its trains as it may determine to be proper for the general business of its road. *Id.*

8. Where plaintiff had a license from the officers of a town to use a reservoir for fishing and boating during his life, he cannot, by the use of this license, obtain an absolute title by prescription, to last forever. *Dunham v. New Britain* (Conn.) 389.

BRIEFS AND NOTES.

Manner of creation. 406, 407.

Creation by prescription. 423.

A "way of necessity" can be acquired by implied grant only when grantee has no other way to his ground. 669.

Similar easements may be claimed by different persons at the same time. 553.

ELECTIONS. See VOTERS AND ELECTIONS. EMBEZZLEMENT.

1. An indictment describing the property as a certain "number of pairs of shoes," is sufficient. *Com. v. Shaw* (Mass.) 803.

2. The defendant may be asked, on cross-examination, as to spending money in gambling, and as to how he obtained the money; such question should be confined to a period of time subsequent to the embezzlement. *Id.*

BRIEFS AND NOTES.

Indictment must describe property with certainty. 804.

EMINENT DOMAIN. See MUNICIPAL CORPORATIONS, III.; RAILROAD COMPANIES, 2-8; ROADS AND HIGHWAYS, II.; WATER COMPANIES, 1-4.

Opinion in support of, filed subsequently to, decision reported in 4 New Eng. Rep. 753, in reference to damages for land taken by Providence for a public park, under a special statute. *Aldrich v. Providence* (R. I.) 97.

BRIEFS AND NOTES.

Right of; must be clearly given. 894.

May be delegated to foreign corporation. 529.

Land dedicated to one public use cannot be used for another. 423.

Proceeding binds land whether owner is notified or not. 725.

Corporation taking private property, not complying with Act giving that power, is liable for damages. 894.

General rule is market value of land appropriated. 852.

ENTRY, WRIT OF. See MORTGAGE, 18, 28.

EQUITY. See APPEAL AND ERROR, 18-21; CLOUD ON TITLE; LACHES; PARTITION; SET-OFF AND COUNTERCLAIM; SPECIFIC PERFORMANCE.

1. A written instrument, failing to express the intention of the parties, will be reformed. *Minot v. Tilton* (N. H.) 54.

2. In absence of fraud or actual mistake, contract will not be reformed. *Fehlberg v. Gosine* (R. I.) 763.

3. Actions at law, wherein fraud may properly be tried, will not be enjoined. *Id.*

4. Statement in a bill of the evidence is not a statement of the case itself. *Id.*

5. The complainant must allege the facts, and, when necessary, may add that the allegations are true. *N. E. R., v. V.*

tion is upon information and belief. *Moser v. Storer* (Me.) 238.

6. Where the plaintiff in an equity suit postponed hearing on a motion for preliminary injunction in consideration of an agreement by the defendant which he failed to keep, plaintiff's remedy is in that suit, and not by action on contract. *Hove v. Salisbury* (Mass.) 247.

7. A case will be recommitted to the master only to prevent great injustice. *Re Howard & Leavitt* (Vt.) 105.

8. A rehearing may be granted on a petition, in the discretion of the court, even when the error alleged is simply one of law. *Shepard v. Taylor* (R. I.) 876.

BRIEFS AND NOTES.

Has no jurisdiction where there is adequate remedy at law. 312, 689, 861.

Avoidance of contract for fraud. 723, 728.

Grants no relief in contracts not maintainable in equity. 561.

Looks behind nominal parties, to real parties in interest. 744.

Facts specially pleaded should be such as to support decree. 925.

To outweigh answer responsive to bill, complainant must produce two witnesses, or one witness supported by corroborating circumstances. 860.

Decree must conform to pleadings. 860.

ERROR. See APPEAL AND ERROR.

ESCAPE.

1. The loss in fact sustained by the escape of a debtor through an officer's negligence is the measure of the officer's liability. *Slocum v. Riley* (Mass.) 279.

2. In such action, it is not sufficient for the plaintiff to show merely that he holds a note, barred by the Statute of Limitations, against such debtor. *Id.*

3. The fraudulent taking of an oath by a person under arrest on civil process, and obtaining a release thereby, does not constitute an escape, nor charge the sureties upon his bond for the prison limits, who participated in the fraud. Cited in *Everett v. Henderson* (Mass.) 497.

ESTATES OF DECEDENTS. See DESCENT AND DISTRIBUTION; DEVISE AND LEGACY; DOWER; EXECUTORS AND ADMINISTRATORS; WILL; WITNESS, 1-3.

ESTOPPEL. See ASSIGNMENT FOR BENEFIT OF CREDITORS, 3, 4; HUSBAND AND WIFE, 1; JUDGMENT, 1-3; MORTGAGE, 17; POOR AND POOR LAWS, 5; REPLEVIN, 8.

1. No estoppel in pais can be created against a town, except by its conduct on which a person relies. *Turney v. Bridgeport* (Conn.) 765.

2. Equitable estoppels are favored, and may be interposed in an action at law. Cited in *Milliken v. Dockray* (Me.) 861.

8. An estoppel results from conduct which was intended to induce, and has induced, another to act to his disadvantage. Cited in *Tyler v. Oddfellows Mut. Relief Assn.* 196.

BRIEFS AND NOTES.

Declarations must have been intended to mislead. 815.

Married woman, neglecting to assert claim to property when good faith required her to, cannot assert her claim when justice requires her to be silent. 248.

EVIDENCE.

- I. DOCUMENTARY; SECONDARY.
- II. PAROL.
- III. DECLARATIONS; ADMISSIONS.
- IV. EXPERTS; OPINIONS.
- V. HANDWRITING.
- VI. COMPETENCY; WEIGHT; IN GENERAL.

BRIEFS AND NOTES.

See ADULTERATION, 2-4; APPEAL AND ERROR, 9; ARREST, 8; ASSAULT AND BATTERY, 2; ASSIGNMENT, 1; BAWDY AND DISORDERLY HOUSES, 2, 8; BILLS AND NOTES, 16, 17; CARRIERS, 9, 10; CONSTITUTIONAL LAW, 1; CORPORATIONS, 18, 16; COVENANT, 7, 10; CRIMINAL LAW, III. a; EMBEZZLEMENT, 2; FORGERY, 1, 2; FRAUD AND FRAUDULENT CONVEYANCE, 2, 8; GAMING, 4; HOMICIDE; HUSBAND AND WIFE, 9, 10, 13; INSURANCE, 20; INTOXICATING LIQUORS, IV. c; LIBEL AND SLANDER, 6; LIMITATION OF ACTIONS, 15; LOGS AND LOGGING, 2; MALICIOUS PROSECUTION, 4; MASTER AND SERVANT, 7, 12, 18; MUNICIPAL CORPORATIONS, 21-23, 33; NEGLIGENCE, III.; PARTNERSHIP, 1; PLEADING, 8; RECEIPT, 4; TAXES, 2; TRESPASS; VOTERS AND ELECTIONS, 23; WILL, 4-6; WITNESS.

I. DOCUMENTARY; SECONDARY.

1. A servant delivering goods, and whose marks are transferred to the account books, must be a witness to prove the charges and delivery. *Miller v. Shay* (Mass.) 158.

2. Such book, although kept only by marks, is competent evidence. *Id.*

3. A copy of the record of an internal revenue collector, sworn to in court, is admissible. *State v. Hall* (Me.) 235.

4. Acts of public officers, not required by law to be recorded, are inadmissible as secondary evidence in absence of the record. *South Scituate v. Stoughton* (Mass.) 509.

II. PAROL.

5. Parol evidence is inadmissible to vary a written covenant, under the guise of showing the consideration. *Simanovich v. Wood* (Mass.) 190.

6. In an action by a mail contractor against a subcontractor for failure to perform his sub-contract, proof of a contemporaneous oral contract, that the plaintiff fraudulently promised to procure a change in the mail
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schedule, and that he did not thereafter do so, is inadmissible. *Knowlton v. Keenan* (Mass.) 589.

7. Where plaintiff sold land to a town, taking back a written agreement allowing him certain privileges in the property, in an action to reform the deed by inserting such privileges, parol evidence of conversations relating to the privileges is inadmissible, as the parol agreement was merged in the written one. *Dunham v. New Britain* (Conn.) 339.

8. Parol proof of extrinsic circumstances is admissible to apply a description to the subject-matter of a contract. *Bigelow v. Capen* (Mass.) 257.

9. Where an executor and legatee transferred, by writing under seal, all his interest in the estate to another legatee, parol evidence was admissible to prove the latter's personal promise to pay plaintiff \$400 for expenses on estate prior to assignment. *Jewett v. Distur* (Vt.) 101.

III. DECLARATIONS; ADMISSIONS.

10. The declarations of one deceased, from whom defendants in trespass claimed title, in disparagement of his title, are admissible against defendants. *Carpenter, J., dis-sents. Potter v. Waite* (Conn.) 40.

11. The statements of a vendor of personal property, explanatory of his possession after sale, are admissible against the vendee, to show fraud in the sale. *Dodge v. Goodell* (R. I.) 678.

12. The declarations of one having property in his hands attached as his, as to the ownership thereof, are evidence for the attaching creditor against a third party claiming it of the sheriff. *Id.*

13. Where a conspiracy to put property out of reach of an attaching creditor has been proved, evidence of the debtor's attempt to put the property out of his creditor's reach, and declarations of his feelings toward the attaching creditor, were admissible. *Id.*

14. In an action on a redelivery bond, declarations of one of the defendants in the original suit to the attaching officer, at the time of the levy, as to her unwillingness to give a receipt for the property on ground that she did not owe the debt, are admissible upon the issue as to whether the property belonged to her. *Cutlin v. Frazier* (Conn.) 627.

IV. EXPERTS; OPINIONS.

15. A question to a companion of the deceased, who jumped from a handcar in which they were both riding and escaped injury, as to whether the deceased had time to jump, is not objectionable as calling for an opinion. *Quinn v. New York, N. H. & H. R. Co.* (Conn.) 685.

16. Where an officer of the defendant railroad company testified that its rules as to giving notice to employees of the running of extra trains were sufficient, it was proper to ask him, on cross-examination, whether an additional rule was not made after the accident complained of. *Id.*

17. The question, "Who owned the goods

in the store at the time of the attachment," to one having knowledge of the facts, is competent. *Catlin v. Frazier* (Conn.) 627.

V. HANDWRITING.

18. The court should first find that the signature offered is genuine, and then submit it to the jury for comparison with the disputed signature. *Rosell v. Fuller* (Vt.) 217.

19. Photographs of the different signatures are admissible. *Id.*

VI. COMPETENCY; WEIGHT; IN GENERAL.

20. Evidence tending to prove or disprove a material issue should not be excluded. *Camp v. Camp* (Vt.) 140.

21. Where plaintiff, injured while temporarily operating a machine in a factory, testified that at the operator's request he had tended the machine during the latter's absence, a witness for the defendant can prove that he himself was requested by the operator to see to such work until his return. *Hoar v. Abbott* (Mass.) 808.

22. When the question is of the state of mind of a person during a particular time, evidence of what he said or did for a reasonable time before is admissible, if it shows a permanent or settled state of mind on the subject. *Com. v. Hill* (Mass.) 277.

23. How far back he shall be permitted to go is in the discretion of the trial judge. *Id.*

24. In the case of goods which are constantly manufactured and sold in the market, evidence of the cost has been received as having a direct tendency to show the value. Cited in *Patch v. Boston* (Mass.) 474.

25. In an action against a sheriff to recover the value of goods attached as the property of P, which plaintiff claimed, the defendant's offer to prove by the attorney who issued the attachment that the plaintiff's attorney called upon him the day the attachment was served and stated that P had told him (plaintiff's attorney) that a certain party other than the plaintiff was the owner of the attached goods, etc., was incompetent. *Pickert v. Hair* (Mass.) 555.

26. On the issue whether the goods in a store, attended to by a husband and wife, belonged to her alone, evidence that at different times goods were sold to her to supply the store is admissible. *Catlin v. Frazier* (Conn.) 627.

27. Plaintiff cannot, as of right, strengthen his direct testimony as to what his belief was, by swearing to other facts which would make it likely he believed as he said. *Marshall v. Boston & A. R. Co.* (Mass.) 172.

28. A fact proved by a legitimate inference is proved no less than when it is directly sworn to. Cited in *Doyle v. Boston & A. R. Co.* (Mass.) 457.

29. One cannot be proved to be guilty of an offense for which he is on trial by showing that at another time he committed a similar offense. Cited in *Sullivan v. O'Leary* (Mass.) 898.

30. In case four witnesses had equal opportunity for seeing, and equal capacity and desire to tell the truth, the court may call the attention of the jury to the quantity of testimony, and instruct that the testimony of three must outweigh that of one. *Park, Ch. J., and Carpenter, J., dissent. Littlebridge v. Barber* (Conn.) 599.

BRIEFS AND NOTES.

Rules of, are within legislative control. 710.
Admissibility of account book is question of law. 159.

Admissibility of memorandum made upon slate, or in chalk marks upon a cart, which are transferred to regular account book. 159.

Letters and deeds thirty years old, unblemished by alterations, prove themselves. 716.

Secondary evidence of destroyed paper is admissible. 278.

Parol; is inadmissible to vary written covenant. 189, 438, 540, 589, 723, 806.

Contemporaneous agreement of warranty cannot be engrafted on written instrument. 830.

To contradict consideration clause of deed. 191.

Admissible to explain latent ambiguity. 54, 149.

Admissible in case of doubt in description of deed. 406.

Date of written instrument may be controlled by. 900.

Admissible to show that deed absolute was intended as mortgage. 561.

Res gestæ; declarations. 804.

Of prior grantor in disparagement of title. 40.

Of vendor of personality in possession are evidence against vendee. 676.

Of value, by landowner to assessor, are not evidence against him. 474.

By party, may be introduced against him to prove what is relevant to issue. 474.

By attorney, are not admissible against client. 416, 556.

Res inter alios. 174.

Expert, defined. 686.

Railroad men are experts as to questions of railroad management. 686.

Rule as to admissibility of nonexpert's opinions. 687.

Witness cannot testify to conclusions drawn from facts. 622.

Handwriting; genuineness of paper produced as standard for comparison must first be determined by court. 217.

Diary taken from prisoner is not sufficient standard. 218.

Admissibility of photographs of different signatures. 218.

Weight of testimony of government witnesses is for jury. 188.

EXCEPTIONS. See CONTEMPT; TRIAL, 5, 6.

1. A party aggrieved by an erroneous ruling upon a demurrer may allege exceptions thereto. *McCallum v. Lambie* (Mass.) 274.

2. No exception lies to **findings of fact** by the court. *Stiles v. Sherman* (Mass.) 846.

3. The granting or refusal of a motion to **dismiss** an action, being a matter of discretion with the court, is **not a proper ground of exception**. *Duggan v. McCarthy* (R. I.) 887.

4. Exceptions to evidence will not be sustained unless **manifest error** has occurred. *Patch v. Boston* (Mass.) 478.

5. Exceptions will not be sustained for incompetent evidence admitted to prove a **fact which the conceded facts established**. *Hinckley v. Somerset* (Mass.) 875.

6. An exception is **not maintainable** on the ground that a **portion of a request**, assuming facts, if it had been separately made, **should have been granted**. *Murphy v. McNulty* (Mass.) 899.

7. An exception to a judgment upon a special verdict does **not reach back to a question not excepted to**. *Farrant v. Bates* (Vt.) 862.

BRIEFS AND NOTES.

No exception lies to findings of fact. 848.

EXECUTION. See INJUNCTION, 4.

An officer may amend his return after his term of office has expired; the **amendment** relates back to the original return. *Lake's Petition* (R. I.) 85.

EXECUTORS AND ADMINISTRATORS. See APPEAL AND ERROR, 4-6, 16; BENEFIT SOCIETIES, 5, 6; EVIDENCE, 9; LIMITATION OF ACTIONS, 9; NEW TRIAL, 5; PARTITION, 8; PARTNERSHIP, 2-8.

1. An **action against an administrator de bonis non** may be brought within two years from the time of his giving bond. *Eddy v. Adams* (Mass.) 426.

2. Pub. Stat. chap. 186, § 1, applies to administrators **de bonis non**, and bars actions **prematurely commenced**. *Id.*

3. Where an estate had not been exhausted in paying preferred claims, and there were funds of the estate not included in the inventory, and several of the sums paid out were not preferred claims, the action is not barred by Pub. Stat. chap. 186, § 5. *Id.*

4. Where intestate was under an **obligation to support** his mother during life at a particular place, his estate is **not liable for support** furnished at another place. *Dodge v. Benedict* (Vt.) 141.

5. The **funeral expenses of a wife** are a preferred charge upon her estate, where she leaves one, which it is not the husband's duty to pay. *Constantinides v. Walsh* (Mass.) 807.

6. The husband paying such funeral expenses can recover them from the wife's estate. *Id.*

7. The estate of a married woman is chargeable with funeral and probate expenses, and compensation to husband as administrator. *Moulton v. Smith* (R. I.) 761.

8. A bill for **medical services to a married woman** is a personal debt of the husband, and not chargeable upon her estate. *Id.*

9. Pub. Stat. chap. 189, § 4, allowing as part of funeral expenses the erection of a suitable monument, contemplates, where the estate is solvent, something more than an inexpensive stone to mark the grave. *Id.*

10. The **administrator of a deceased administrator** has nothing to do with bills presented to the former and **not paid**. *Id.*

11. **Proper charges paid by an administrator**, together with reasonable compensation, may be **enforced against heirs** and a **subsequent administrator**, who has received assets. *Id.*

12. **Neglect of administrator**, who died three years from appointment, to **settle accounts**, will **not bar suit by his administrator**, before settling his intestate's accounts, to have his claim for expenses paid by him, and compensation for services, declared a lien upon the estate. *Id.*

13. Where there is a surviving partner, an **allowance will not be made for the support** of the decedent's family out of **partnership property**. *Burroughs v. Knutton* (R. I.) 875.

14. An oral agreement with an administrator, that the **balance due on notes** payable to the estate should, before his final settlement, be **deducted from the maker's distributive share of the estate**, is not an agreement for an actual present settling off of one debt against another, and the notes are capable of passing by indorsement. *Gibson v. Lewis* (Mass.) 801.

15. **Fraud of the testatrix**, when obtaining orders **ascertaining distributees**, in omitting appellant, whom she knew was living and entitled to a share, by concealing such knowledge from the probate court, is inconsistent with the existence of the good faith essential to statutory protection. *O'Neil's Appeal* (Conn.) 601.

16. The disposition of testamentary matters in the **distribution of an estate** by the probate court is subject to **revision by the superior court**. *Id.*

17. Under the Act of 1885, § 197, the probate court, upon the application of an heir, must **ascertain heirs and distributees**, and make an order for distribution to them. *Id.*

18. An executor, occupying the testator's real estate, may **charge himself with a proper sum as rents and profits**, in which case the products of the land belong to him personally; but if he regards himself as bailiff, charging himself with such receipts, the products belong to him as executor. *Brigham v. Ellwell* (Mass.) 469.

19. The **income of real estate**, received by executors under an arrangement with devisees that they should manage the property for the benefit of the estate, is **accounted for as assets**. *Id.*

20. **Assent by the devisee to such occupancy is a question of fact**, and prevents him from claiming the rents and profits. *Id.*

21. An executor is not entitled to **commission for collecting his own debt**. *Bridge v. Bridge* (Mass.) 912.

BRIEFS AND NOTES.

Executor de son tort may show that he has made payments in rightful course of administration. 744.

Granting of administration letters is conclusive proof of death of intestate. 855.

Title of **administrator de bonis non** extends only to personal estate. 860.

Income of realty is to be accounted for as assets. 470.

Administrators must get in assets of estate with reasonable diligence. 744.

Personal representative takes estate subject to all equities to which deceased was subject. 880.

Rent collected belongs to heirs. 745.

Rule for determining liability of surviving partners by reason of their use of capital in business. 745.

Funeral expenses of wife, leaving estate, are not chargeable against husband. 808.

Liability of deceased stockholder is claim against his estate. 881.

Actions against; must be brought within two years. 437.

Not entitled to compensation for collecting own debt. 914.

EXPERTS. See EVIDENCE, IV.

FALSE IMPRISONMENT.

1. An arrest under a certificate issued on default of appearance for examination for taking poor debtor's oath, after insufficient service of notice, is illegal. *Lane v. Holman* (Mass.) 149.

2. The illegality of the arrest is not waived by taking such oath before another magistrate. *Id.*

3. Expenses incurred in so doing being voluntary, are not proper elements of damages. *Id.*

4. Officers making an arrest without a warrant, upon reasonable grounds of suspicion, are not liable for a subsequent wrongful imprisonment in which they took no part. *Bath v. Metcalf* (Mass.) 291.

5. A verdict may be found against several defendants jointly, where, after an arrest, they had reason to believe the plaintiff innocent, and prolonged his imprisonment for the purpose of sending him out of town. *Id.*

6. A verdict cannot be found against two or more defendants in such action unless they all participated in the same imprisonment, or were parties to a joint wrong. *Id.*

BRIEFS AND NOTES.

All participating in wrong, from first of imprisonment to last, are jointly liable. 292.

Measure of damages. 151.

FEEES. See WITNESS, III.

FENCES. See EASEMENT, 1-5.

A Return of fence-viewers, stating that N. E. R., V. V.

they gave reasonable notice of the hearing, is prima facie evidence of notice. *Ackers v. Andrews* (Me.) 850.

BRIEFS AND NOTES.

Fence-viewers cannot determine right of adjacent owners to partition fence. 851.

Fence-viewers' records are conclusive. 851.

FIRE INSURANCE. See INSURANCE, I.

FIREES. See RAILROAD COMPANIES, 9, 10.

FISH AND FISHERIES.

1. The State only can sue for a violation of the statute of 1878, providing that no person shall stake out for the cultivation of oysters any natural clam bed. *Clinton v. Buell* (Conn.) 233.

2. A proceeding to throw open to the public ground claimed to be a natural oyster bed cannot be maintained where the ground in question is a natural clam bed. *Id.*

3. On a complaint for unlawfully fishing in a great pond held by a town under a lease which was proved, where there was no evidence that the lease had been surrendered, and it appeared that the town was in possession and liable to pay the rent reserved, — a ruling that there was no evidence to be submitted to jury as to abandonment of the lease by the town was proper. *Com. v. Elliot* (Mass.) 541.

BRIEFS AND NOTES.

Fishing in a great pond which had been leased to town; abandonment of lease by town is question for jury. 542.

FORECLOSURE. See MORTGAGE, IV.

FORGERY.

1. Where the defendant was charged with forging and uttering certain receipted bills, evidence that he fabricated other similar unreceipted bills, and uttered them to the same parties, by continuous transactions extending later than the forgery of which he was convicted, is admissible. *Com. v. White* (Mass.) 450.

2. Evidence of knowledge that the instruments were forgeries was not made inadmissible by the fact that there is other strong evidence of knowledge in the case. *Id.*

3. The instruments being set out, there is no need for further allegation to show how they could be used as instrument of fraud, or that they were so used in fact. *Id.*

4. Where a receipt bears, beside the words "terms cash," the words "sight draft," the word "settled," followed by the signature, imports a discharge of money due for the price. *Id.*

FORNICATION. See DEFINITIONS, 2; INCEST, 1.

FRAUD AND FRAUDULENT CONVEYANCE.

I. FRAUD; MISREPRESENTATIONS.

II. FRAUD UPON CREDITORS.

BRIEFS AND NOTES.

See **APPEAL AND ERROR**, 11; **HUSBAND AND WIFE**, 3, 6, 19; **INSOLVENCY**, 5, 7, 9-11; **ROADS AND HIGHWAYS**, 19.

I. FRAUD; MISREPRESENTATIONS.

1. **Actual fraud** consists in deception practiced to induce another to part with property, and which accomplishes the end desired. *Judd v. Weber* (Conn.) 225.

2. Where one by **false representations induces a sale on credit**, a preconceived design not to pay is immaterial. *Id.*

3. **Evidence of false representations on the purchase of goods for which payment was made**, is admissible on the issue of fraud in thereafter obtaining goods for which payment was not intended to be made. *Id.*

4. A **representation of what is known to be false** may be none the less a fraud that it is made without any corrupt motive or intent. Cited in *O'Donnell v. Clinton* (Mass.) 436.

5. To lead one to suppose that you assent to an oral arrangement is to assent to it. *Id.* 483.

6. Where **testimony does not show that misrepresentations** alleged were in fact made, there is nothing for jury to pass upon. *Rogers v. Percy* (Mo.) 703.

7. It is not error to give a request to the jury that, if the defendant represented a horse free from disease, with knowledge that it had an incurable disease, he was guilty of fraud, and they should find for the plaintiff, where the charge supplies the defects in the request by stating that it must also be found that the defendant intended to defraud the plaintiff. *Bennett v. Gibbons* (Conn.) 620.

8. **Assignment of expectancy, procured by undue influence** from a woman whose mind was impaired by age, will be set aside where she did not understand its nature. *King v. Davis* (Vt.) 389.

II. FRAUD UPON CREDITORS.

9. **Transfers of property, and contracts, made directly between the husband and wife** are regarded as void. Cited in *Porter v. Wakefield* (Mass.) 492.

10. A **conveyance on consideration of blood or affection**, to children, or as a settlement to a wife, is not, as matter of law, fraudulent as to creditors. *Cook v. Holbrook* (Mass.) 563.

11. If made when the grantor is deeply indebted, it furnishes *prima facie* evidence of fraud, which is a question for the jury. *Id.*

12. A **voluntary conveyance with an intent to defeat a claim founded on a tort** is not within the statute against fraudulent conveyances, as the statute only relates to claims arising out of contract. Cited in *Green v. Adams* (Vt.) 135.

13. Rehearing in suit to set aside an alleged fraudulent conveyance,—reported in 8 New Eng. Rep. 367,—denied on the facts. *Anthony v. Boyd* (R. I.) 33.

BRIEFS AND NOTES.

False representations render contract voidable. 722.

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Party must have been misled by fraudulent representations.

Willful false statement is one evidence of fraud. 227.

Assignee of expectancy must show perfect fairness of assignment. 373.

In action of deceit, actual intention to defraud is necessary. 435.

Fraud is a conclusion of law. 34, 563; *contra*, 629.

Misrepresentation of law is no ground for avoiding release. 750.

Misrepresentation must be material to issue. 227.

Contract induced by fraud may be rescinded. 743.

Renewed statements of a former fraud do not constitute a new fraud. 33.

Fraudulent conveyance is good as between parties. 645.

Does not transfer title as against creditors. 313.

Whether voluntary conveyance is fraudulent is question for jury. 564.

Fraud must be specifically pleaded and proved. 243.

Latitude is allowed in admission of evidence. 622.

Evidence of fraudulent transactions with third persons is inadmissible on question of intent. 397.

Any fact bearing upon intent of party is admissible. 174.

FRAUDS, STATUTE OF.

1. An oral contract for the present sale of growing wood, with the privilege of entering the land to remove it, is not within the statute. *United Soc. Shakers v. Brooks* (Mass.) 432.

2. It is a sale of chattels, which changes the ownership as fast as the trees are severed from the realty. *Id.*

3. Where G's verbal offer to sell A a lot at 10 cents less per foot than he had paid was accepted, A paying 40 cents per foot on G's representation that he had paid 50, when he had paid only 40, assumpsit by A for the excess is not within Statute of Frauds, but on G's implied contract to refund money in excess of the contract price. *Arnold v. Garst* (R. I.) 334.

4. A contract within the statute can not be enforced, nor can the defendant avail himself thereof to avoid liability upon a quantum meruit. *Freeman v. Foss* (Mass.) 302.

BRIEFS AND NOTES.

Statute is strictly construed. 303.

Contract to be performed within year. 303.

One receiving grant of land on promise to pay for it cannot avoid payment by showing his promise was not in writing. 191.

Parol sale of land. 334.

GAMING.

1. A complaint under Stat. 1835, chap.

343, charging defendant with assisting and engaging in registering bets and selling pools, need not give a detailed description of the apparatus, etc., used, nor the method of its use, if it charges use for unlawful purposes. *Com. v. Ferry* (Mass.) 739.

3 A complaint that defendant was engaged "in business and employment" forbidden by statute is not bad for duplicity. *Id.*

8. Nor is an allegation in a single count that he registered bets and sold pools. *Id.*

4. Evidence as to business conducted in the room previous to offense charged is competent to show that room was kept for the unlawful purposes alleged. *Id.*

5. An instruction that it was essential to conviction that the jury find that the defendant, at the times named, "was present in such place as that named in the statute," is not rendered defective by the words, "that is, in a place similar to that named in the statute." *Id.*

BRIEFS AND NOTES.

Complaint charging registering of bets and selling of pools need not describe apparatus used. 739.

GIFT.

1. If a deposit in a savings bank, by one in his own name as the trustee for another, continues under the depositor's control until his death, his personal representatives are entitled to it on his death. *Alger v. North End Sav. Bank* (Mass.) 898.

2. If the depositor intends the money to be at the time of the deposit a gift to such other person, and declares the gift to him and he assents to it, the gift is perfect, although the depositor keeps the deposit book himself. *Id.*

8. A gift of all the testator's personality, enumerating the various classes, is general. Cited in *Tomlinson v. Bury* (Mass.) 256.

BRIEFS AND NOTES.

Actual delivery of thing capable of delivery must be made; and, in all other cases, some act equivalent to delivery. 898.

GUARANTY. See **BILLS AND NOTES, 11; LANDLORD AND TENANT, 1.**

1. Where the payee loaned the maker money on a note upon the guarantor's warranty of payment, it is a sufficient consideration for the warranty. *Lemmon v. Strong* (Conn.) 618.

2. A warranty of collectibility of a note until paid is conditional. *Id.*

8. Failure of suit against the maker of the note, brought seven years after the making of the note, which was payable on demand, establishes a breach of warranty. *Id.*

4. Allegation in an action against the maker and guarantor jointly, that a judgment had been recovered against the maker and not collected, is sufficient to authorize a judgment against the maker; *quære* whether there was not misjoinder. *Id.*

5. A guaranty to secure a running account. *M. E. R., v. V.*

at a bank, where consideration is separable, is terminated by the guarantor's death. *National Eagle Bank v. Hunt* (R. I.) 777.

6. Where a note is discounted prior to the guarantor's death, and after notice of such death the time of payment is extended, his estate is released from liability. *Id.*

7. An agreement in a continuing guaranty, that no extension should affect the liability of the guarantor thereunder, means an extension made while the guaranty is in force. *Id.*

BRIEFS AND NOTES.

Status of guarantor of note, so far as his right to demand and notice is concerned, defined. 483.

Guarantor of void contract cannot be held if promisee knows it is to be void. 246.

Continuing guaranty is revoked by death. 777.

GUARDIAN AND WARD. See **BEQUEST SOCIETIES, 12; HUSBAND AND WIFE, 17.**

Where, on death of an insane ward, the administrator took possession of the estate with consent of the guardian, whose conduct showed that he did not intend to retain a lien on the property for what was due him until after the sale thereof, when it appeared the estate was insolvent, but that he expected to be paid out of the avails of the sale, he lost whatever equitable lien he had. *Farr v. Putnam* (Vt.) 648.

BRIEFS AND NOTES.

Guardian must see that ward is protected in proceedings against him. 565.

Guardian has equitable lien upon ward's estate. 651.

HABITUAL DRUNKARDS. See **DRUNKARDS.**

HANDWRITING. See **EVIDENCE, V.**

HIGHWAYS. See **ROADS AND HIGHWAYS.**

HOMICIDE.

1. The right of accused to inspect testimony taken at an inquest, lodged with court clerk as prescribed by statute, may be enforced by mandamus. *Daly v. Dimock* (Conn.) 629.

2. Such testimony is open to inspection by the public. *Id.*

BRIEFS AND NOTES.

If person is killed by different instrument than that described in the indictment, there is no variance. 512.

HOUSES OF ILL FAME. See **BAWDY AND DISORDERLY HOUSES.**

HUSBAND AND WIFE.

I. IN GENERAL; TRANSACTIONS BY AND BETWEEN.

II. TORTS OF WIFE.

III. DIVORCE; MAINTENANCE; ALIMONY.

BRIEFS AND NOTES.

See **BANKRUPTCY; BENEFIT SOCIETIES, 9; DOWER; DURESS, 2; EXECUTORS AND ADMINISTRATORS, 5-8; FRAUD AND FRAUDULENT CONVEYANCE, 9, 10; LIEN, 7, 8; LIMITATION OF ACTIONS, 8; MORTGAGE, 2; NEGLIGENCE, 5; PRINCIPAL AND SURETY, 2, 3; WILL, 1; WITNESS, 4.**

I. IN GENERAL; TRANSACTIONS BY AND BETWEEN.

1. A wife by her silence, while her husband makes in her presence a chattel mortgage on her property, is estopped to dispute it, but not another made to the same mortgagee after its surrender. *Tracy v. Lincoln* (Mass.) 248.

2. A mortgage by a husband directly to his wife, to secure a valid debt due from him to her, will be sustained in equity. *Chadbourn v. Gilman* (N. H.) 65.

3. A pledge by a wife, of chattels, her separate property, for advances by husband, is void as against her creditors; and, upon divorce, the husband is chargeable under trustee process, at the suit of third parties, in an action against the wife. *Porter v. Wakefield* (Mass.) 491.

4. Where in case of a mortgage by a husband and wife of two parcels of land originally owned by him, one parcel had been conveyed to her before the mortgage, and the other conveyed to a third party after the mortgage, and his creditors claimed that they were void, execution against the husband was properly enforced by the sale of his equity of redemption in the parcels separately. *North v. Dearborn* (Mass.) 487.

5. General **assumpsit** is maintainable against a husband and wife upon their joint promise, made before or during coverture. *Reed v. Newcomb* (Vt.) 108.

6. A husband may labor gratuitously for his wife in the management of her property, and his creditors do not acquire any rights against her. *Stevens v. Fullington* (Vt.) 218.

7. By Pub. Stat. chap. 147, § 4, **washing by the wife** for a person other than her husband is presumed to be done on her separate account. *Seward v. Arms* (Mass.) 202.

II. TORTS OF WIFE.

8. Where a wife keeps a house owned by her, part of her separate property and occupied as the home of the family, as a resort for prostitution, against the husband's will, he cannot be convicted of maintaining the nuisance. *Com. v. Hill* (Mass.) 277.

9. Evidence that he used all means in his power to prevent the wife from so using the house is **admissible**. *Id.*

10. The presumption that acts by the wife in the presence of the husband were done by his command may be contradicted by evidence. *Id.*

11. A *qui tam* action, under Gen. Stat. p. 253, § 1, for placing obstruction in a highway, is maintainable against a wife.

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without joinder of her husband, provided the tort was committed by her without actual coercion by him. *Blakeslee v. Tyler* (Conn.) 598.

12. Where bars obstructing a highway enclosed the lands of the wife, and after they had been taken down she and her husband started together to put them up, and he said to her, as she was running ahead of him, "put them up," it is not actual coercion by him. *Id.*

III. DIVORCE; MAINTENANCE; ALIMONY.

13. In libel for divorce, evidence of sexual intercourse shortly before marriage, by the libellee, with the same person with whom she is charged with adultery after marriage, is **admissible**. *Brooks v. Brooks* (Mass.) 480.

14. **Condonation** is a defense for divorce for cruelty; voluntary cohabitation, after cruelty on the husband's part, is not always condonation. *Wilson v. Wilson* (R. I.) 682.

15. A wife will not be held to have condoned an offense not known to her. *Id.*

16. It is the duty of the party applying for a divorce to show his or her good faith by **withdrawing from cohabitation**. Cited in *Id.* 682.

17. Where the guardian of a spendthrift husband is not made a party to the wife's petition to probate court, under Pub. Stat. chap. 147, § 88, for an order prohibiting the husband from imposing any restraint on her, and for an order for support, that part of the decree requiring the guardian to pay money to her will be reversed, and that part prohibiting the husband from imposing restraint on her will be affirmed. *Kavanaugh v. Kavanaugh* (Mass.) 564.

18. Where, under a will, the husband has the right to appropriate the income coming to him for the support of his son; and the wife, who has obtained a decree against him for alimony, alleges the income is in excess of the amount needed for the son's support; and the statement of facts does not state what the income is or what is needed for the son's support,—the facts stated are not sufficient to enable her to reach the income in satisfaction of her decree. *Phelps v. Phelps* (Mass.) 892.

19. When a husband has committed a crime for which his wife will have a good cause for divorce, a transfer of his personal property, to defraud her of alimony in case of divorce, is void, under Rev. Laws, § 4155. *Green v. Adams* (Vt.) 185.

BRIEFS AND NOTES.

Husband may labor gratuitously for wife in managing her property, and his creditors acquire no rights against it. 218.

Where husband pays consideration and takes title in wife's name, she is regarded as trustee for him. 293.

Wife; contracts. 103.

Wife, by simply signing and sealing deed, does not bar her dower or convey title. 916.

Contracts between, of money loaned and paid at request, are nullities. 492.

Fraudulent transfers between. 65.

Husband must retain property enough to pay debts before conveying to wife. 218.

Joinder of, in action. 108.

When wife commits tort in connection with her own estate it is not implied coercion. 317.

Wife has right of action against husband for separate support. 246.

Divorce; condonation does not take place without full understanding of acts condoned. 682.

Distinction between condonation, as applied to adultery and cruelty. 682.

Evidence of other acts of adultery are inadmissible. 480.

Transfer of personality by husband to defraud wife of alimony is void. 185, 186.

INCEST.

1. An indictment that D committed fornication with his brother's daughter, and that he and she are "persons between whom marriage is prohibited," is sufficient. *State v. Dana* (Vt.) 108.

2. It was not necessary to allege that D knew of the relationship between them. *Id.*

3. Indictment is not bad because "incestuous" is spelled "incestous." *State v. Corville* (Me.) 854.

INDICTMENT. See BURGLARY; CRIMINAL LAW, I; EMBEZZLEMENT, I; FORGERY, 8; INCEST; INTOXICATING LIQUORS, IV. b; LEWD AND LASCIVIOUS COHABITATION; LOTTERY, 1.

INFANTS. See INTOXICATING LIQUORS, 15, 16; MUNICIPAL CORPORATIONS, 42-44; NEGLIGENCE, 6; PARENT AND CHILD.

1. In an action by a minor, by a next friend, to recover money paid by him for the purchase of a bicycle, the fact that he was present when his father demanded the money of the defendant, and himself carried the machine to the defendant's shop, and consented to action, warrants a finding that the contract was avoided by him, although he stated he was willing to stand by it. *Payne v. Wood* (Mass.) 533.

2. A bicycle is not a necessary. *Id.*

3. A power of attorney given by an infant is void. Cited in *Fairbanks v. Snow* (Mass.) 162.

4. An action can not be maintained on the promise of a minor, unless it has been ratified in writing upon maturity, except for necessities or real estate of which he retains the title. *Bird v. Swain* (Me.) 307.

5. Where a minor's promise is as to the soundness of a horse which he sold, an indorsement, after obtaining majority, upon a note taken in part payment, "The note being paid, I discharge the property thereby secured," is not a ratification in writing of the promise of soundness. *Id.*

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BRIEFS AND NOTES.

Bicycle is not a necessary article. 534.

Parent cannot whimsically disaffirm contract valuable to child. 534.

Infant receiving benefit from contract after maturity, thereby ratifies it. 308.

INJUNCTION. See EQUITY, 8.

1. Where a town proposed to remove a building from the complainant's lot and to grade the lot, thus throwing it open to public use, the complainant is entitled to an order restraining the threatened trespass. *Lucas v. North Kingstown* (R. I.) 335.

2. When a threatened violation of a city-building ordinance will not increase the danger from fire, it will not be enjoined. *Manchester v. Smythe* (N. H.) 62.

3. The danger of mischief or injury must be clearly made to appear. Cited in *Id.* 64.

4. The enforcement of a judgment will not be restrained when the grounds for relief might have been interposed as a defense in the action at law. *Muliken v. Dockray* (Me.) 860.

BRIEFS AND NOTES.

To restrain violation of city-building ordinance. 62, 68.

INNKEEPER.

1. Persons going into an inn to drink liquor are not guests, within the statute. *Com. v. Moore* (Mass.) 801.

2. Where regulations are brought to the notice of the guest, the fact that, after locking his door, he does not search for a bolt, is not evidence of negligence on his part, relieving the innkeeper from liability for a loss. *Spring v. Hager* (Mass.) 196.

BRIEFS AND NOTES.

Liability; what constitutes guest; notice to guest; negligence on part of guest, which releases innkeeper. 197, 302; Note, 196.

Guest need not bolt door of room, in order to recover for robbery. 197.

INSANE PERSONS. See GUARDIAN AND WARD; POOR AND POOR LAWS, 1-4.

INSOLVENCY. See ASSIGNMENT FOR BENEFIT OF CREDITORS; BANKRUPTCY; BILLS AND NOTES, 9; CORPORATIONS, 4-9; RECEIVER.

1. After composition papers are filed, a creditor may examine the debtor in relation to the agreement and the payment of the percentage; but not upon all matters as to his insolvency. *Messer v. Storer* (Me.) 238.

2. Where the debtor makes a false statement in his affidavit in composition proceedings, the creditor has a remedy at law. *Id.*

3. The discharge of debtor can not be denied for failure to keep proper books of account, where the master to whom the case was referred failed to find as a substantive fact that such books were not kept. *Re Howard & Leavitt* (Vt.) 105.

4. A discharge does not release the debtor from paying taxes. *Cape Elizabeth v. Skellin* (Me.) 690.

5. A transfer of property, to be void, must be made with a view to insolvency. *Carpenter, J.*, dissents. *Hayden v. Allyn & Blanchard Co.* (Conn.) 87.

6. It is not enough that the debtor knew he was insolvent. *Id.*

7. That the debtor returned goods to the vendors with the object of escaping insolvency does not warrant the conclusion that the transfer was void. *Id.*

8. "Insolvency," in the statute, means proceedings in insolvency. *Id.*

9. A payment from a debtor to a creditor, not in the ordinary course of business, is *prima facie* fraudulent, under the Insolvent Act. *Mathews v. Riggs* (Me.) 868.

10. Where the transaction gives the creditor reasonable cause to believe that the debtor is insolvent, the law considers it in fraud of the Insolvent Law. *Id.*

11. A creditor represented by his agent is chargeable with agent's knowledge of the insolvency of the debtor. *Id.*

12. A claim against an insolvent lessee's estate for a breach of covenant to pay rent is not a debt absolutely due within the statute; nor is such claim provable as damages from the surrender of the lease, which was terminated by re-entry by the lessor before the lessee's first publication of notice of insolvency. *Boudetich v. Raymond* (Mass.) 584.

13. Where an assignee, with knowledge of the pendency of a suit by the assignor, does not interfere, but attends the trial as a witness, it is evidence of his assent. *Herring v. Downing* (Mass.) 547.

14. An agreement that, in consideration of the debtor's working up stock transferred to the creditor, he should have the surplus of the proceeds after payment to the creditor, is founded upon good consideration, and an action for the surplus is maintainable. *Id.*

15. Where the purchaser at an insolvency sale, under an order of court, transferred the property to the assignee as trustee, and became responsible for a loan to the assignee to carry out the trust, reserving the right to receive what should remain after the payment of expenses and the execution of the trust, he is a necessary party to a suit by a creditor to compel the assignee to account, and to have the claim of the creditor making the loan extinguished. *First Nat. Bank of Northampton v. Crafts* (Mass.) 488.

16. Assuming that such loan was legally fraudulent furnishes no ground for extinguishing the claim of the creditor making it, where the claim was honestly made, and there was no evidence that the creditor received security or that the debt was diminished. *Id.*

17. The supreme judicial court can correct the decisions of a court of insolvency. *Taunton Nat. Bank v. Stetson* (Mass.) 260.

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18. A judge of insolvency need not be made a party to the proceedings. *Id.*

19. After the dismissal of a petition by the court of insolvency, the petitioner need not apply to that court for a further hearing before bringing his petition in the supreme judicial court. *Id.*

BRIEFS AND NOTES.

General inability to pay debts does not constitute insolvency. 419.

Preference; question of fact. 38, 89.

Intent to prefer is inferred from act of preference. 864.

Payment not in usual course of business is *prima facie* fraud, within Insolvent Law. 864.

Debtor must keep proper books of account to entitle him to discharge. 106.

Discharge does not release debts due State or United States. 691.

Court can annul discharge under composition. 240.

Claims may be expunged by appellate court. 439.

Claim for rent not yet accrued is not provable. 585.

Commissioners have law and equity powers in allowing or rejecting claims. 605.

INSURANCE.

I. FIRE.

II. LIFE.

III. FOREIGN COMPANIES.

BRIEFS AND NOTES.

See BENEFIT SOCIETIES.

I. FIRE.

1. Special agent of company to receive and forward applications, deliver policies, and receive premiums cannot vary terms of policy requiring written notice of removal of property. *Putnam Tool Co. v. Fitchburg Mut. Ins. Co.* (Mass.) 288.

2. The insurer under the original policy has an insurable interest which he can contract to protect. *Manufacturers F. & M. Ins. Co. v. Western Ins. Co.* (Mass.) 501.

3. Where a contract to reinsure stipulated that the policy was to be subject to the same conditions, etc., as are or may be adopted by the company reinsured, the company reinsuring binds itself by what might be adopted by the former company, properly pertaining to the risk it was reinsuring. *Id.*

4. Where the original policy provides that it should be void upon a change of title not assented to in writing by the company, the company reinsuring was bound by the assent in writing to this change, and also to the assignment of the policy, where the trustee to whom the policy was payable foreclosed the mortgage, and the property was bought in by an agent of the mortgage bondholders. *Id.*

5. Where it is provided that the policy should be void upon a sale of the property without the company's assent; and the assured conveyed by deeds duly recorded, receiving a

bond for reconveyance upon indemnity against liability as surety; the bond not being recorded, but the grantee, with the knowledge of the assured, giving a mortgage which was recorded, without seal, and nothing being paid upon it; and, after the destruction of the property, the mortgage was discharged and the property reconveyed,—the assured may recover upon the policy. *Bryan v. Traders F. Ins. Co. (Mass.)* 457.

6. A policy conditioned to be void upon alienation by sale or otherwise is not avoided by a mortgage. Cited in *Id.* 458.

7. A stipulation in a policy, that a house was to be "occupied all the year round," is satisfied if permanent occupation was resumed so long before the fire that the temporary absence of the occupant plainly appears to have no connection with the loss. *King v. Phoenix Assur. Co. (Mass.)* 887.

8. If matter misrepresented increases the risk, it may defeat the policy, although not made with intent to deceive. *Id.*

9. Overestimates of value in proofs of loss, not fraudulently made, will not avoid a policy, providing that it shall be void upon an attempt to defraud the company before or after loss. *Towne v. Springfield F. & M. Ins. Co. (Mass.)* 484.

10. Nor will such overestimates render proofs of loss insufficient as a written statement of loss to render the company liable. *Id.*

11. The neglect of the insured to furnish a detailed statement of loss, under a Massachusetts standard fire policy, will not of itself defeat the claim. *Id.*

12. A provision requiring the proof of loss to "set forth all other insurance in detail," is satisfied by setting out a copy of the description of the property insured by another policy, as stated therein. *Id.*

13. When goods in two separate buildings are covered by one policy, and are made distinct subjects of insurance, the proof of loss should state the damages to goods in each building. *Id.*

14. An insurance company can not be charged by trustee process for a loss under its policy until the proofs of loss have been furnished. *Nickerson v. Nickerson (Me.)* 798.

15. After the mortgagee of property damaged by fire has given the notice provided by the statute to the underwriter, he may furnish the preliminary proofs of loss. *Id.*

16. Such proofs may be waived by the underwriter; and waiver is a question for the jury. *Id.*

II. LIFE.

17. Where a policy provided that immediate notice of death should be given, the defense of failure to give such notice is not binding, where not set up in the answer. *Coburn v. Travelers Ins. Co. (Mass.)* 182.

18. Where the declaration alleged that death was caused by accidental means, under a denial thereof, the defense that

death was caused by intentional injuries is not open. *Id.*

19. The burden of negating the occurrence of conditions defeating the policy is not upon the party seeking to enforce the policy. *Id.*

III. FOREIGN COMPANIES.

20. When the loss of a license to a foreign insurance company is shown, the issue thereof may be proved by parol evidence, where the law does not require it to be recorded. *Lycoming F. Ins. v. Wright (Vt.)* 640.

21. Upon such proof, the copy of by-laws is presumed to have been filed with the secretary of state. *Id.*

22. In the Act of 1874, No. 1, prohibiting such company from doing business in the State unless it was "responsible by the laws of the State" in which it was situated for the neglects of its agents, the word "laws" includes not only statutory but common law. *Id.*

BRIEFS AND NOTES.

Agent authorized to receive applications and collect assessments cannot waive conditions. 289, 642.

Agent cannot waive provisions in policy. 185.

Company is liable for acts and neglects of its agents. 642.

Fire; construction preventing avoidance of policy is preferred. 815.

Policy avoided by substantial misstatement of facts. 838, 839.

Policy avoided by change of title without consent of company. 502.

There may be alienation of title avoiding policy, and still an insurable interest left. 458.

Avoidance by nonoccupancy. 838, 839.

Acceptance of premiums after knowledge of forfeiture is waiver. 818.

Essentials of proof of loss. 485.

Preliminary proofs of loss may be waived. 289, 798.

Life; policy is not invalidated by cessation of party's interest in life of insured. 195.

Any statement relating to risk is warranty. 889.

Sickness accompanied by delirium does not excuse nonpayment of premiums. 819.

Death resulting from intentional act of others does not avoid policy. 184.

Immediate notice of death provided for in policy means reasonable notice. 185.

Waiver of necessity of giving such notice is question for jury. 184.

INTEREST. See ASSUMPT, 2; DEVISE AND LEGACY, VIII.; MORTGAGE, 81.

INTERSTATE COMMERCE. See COMMERCE.

INTOXICATING LIQUORS.

- I. RECOVERY OF PRICE; DAMAGES.
- II. LICENSE; BOND.
- III. SEARCH AND SEIZURE.
- IV. KEEPING FOR SALE; SALE.
 - a. *In General; Sale to Club; Infants; Liability.*
 - b. *Indictments; Complaints.*
 - c. *Evidence.*

BRIEFS AND NOTES.

See COMMERCE; CRIMINAL LAW, 18-24; INN-KEEPER, 1; JURY, 1.

I. RECOVERY OF PRICE; DAMAGES.

1. Under a statute providing that the prices of liquors sold by orders in any town where they cannot be lawfully sold shall not be recoverable, **plaintiff sending into the State, to take orders, agents who knew that buyers intended to sell in violation of law, is chargeable with knowledge of agents, and cannot recover price.** *Fishel v. Bennett* (Conn.) 615.

2. That the agent had no authority to perfect sales does not alter the case.

3. Plaintiff having a fourth-class license can not recover for the sale of liquors made on the premises of his customers by his teamster. *Murphy v. McNulty* (Mass.) 399.

4. A notice: "I forbid you selling or delivering liquor to T. (Signed) T. J. R.," is sufficient, under Pub. Stat. chap. 100, § 25. *Taylor v. Carroll* (Mass.) 122.

5. The person notified selling liquor thereafter is liable for damages to the person giving the notice. *Id.*

6. A child of the person having such habit, although an adult, may sue for such damages. *Id.*

II. LICENSE; BOND.

7. The maintenance of curtains in windows, so as to interfere with the view of the interior of a building, is a violation of a license. *Com. v. Moore* (Mass.) 301.

8. The constitutional amendment of May 15, 1886, prohibiting the sale of liquors, did not take away the right of action upon a bond given upon an application for a license, under Pub. Stat. chap. 87. *Coggeshall v. Groves* (R.I.) 386.

III. SEARCH AND SEIZURE.

9. Pub. Laws, chap. 596, authorizing seizure of liquors, is not unconstitutional in not requiring the warrant to definitely describe the place to be searched and the thing to be seized. *Re Fitzpatrick* (R. I.) 675.

10. Nor is it an unauthorized exercise of legislative authority. *Id.*

11. A search and seizure warrant can be executed in the night-time, under the statute. *Com. v. Hinds* (Mass.) 155.

IV. KEEPING FOR SALE; SALE.

a. *In General; Sale to Club; Infants; Liability.*

12. The purchase of liquors by a bona fide club, and distribution among its members for money, is not a sale. *Com. v. Ewig* (Mass.) 177.

13. On a complaint for illegally selling liquors, evidence by the defendant that liquor on his premises belonged to a club of which he was a member, and that no member had any right to sell any, is competent in rebuttal of government witnesses that defendant had sold some to them. *Com. v. Geary* (Mass.) 711.

14. If a person pays for only part of liquor in a bottle which is passed to him for that purpose, and he retains possession of the entire contents, simply using a glass to taste the quality of the liquor, and takes it all away, there is a complete sale. *Id.*

15. An action under Pub. Stat. chap. 100, § 24, for penalty for sales of liquor to a minor, is barred within one year. *O'Connell v. O'Leary* (Mass.) 296.

16. The penalty cannot be recovered for sales to children who were only messengers of their mother in delivering the whiskey to her, and who drank none themselves. *Id.*

17. A servant cannot be convicted of an illegal sale of liquor on the premises, in the presence and under the control of his master. *Com. v. Godfrey* (Mass.) 281.

18. The burden of proving that an illegal sale by a servant was made by the master's authority or consent is upon the State, and is a question of fact. *Com. v. Hayes* (Mass.) 268.

19. One keeping liquor for sale is bound to know its kind and quality. *Com. v. Savery* (Mass.) 186.

20. If one keeps beer containing alcohol for sale without a license, intending that it shall not contain more than 8 per cent of alcohol, and by mistake buys beer containing more than this amount of alcohol, he may be said to keep it with intention of selling it, unless his intention is that the quantity of alcohol shall be ascertained by an analysis before the beer is exposed for sale. *Id.*

21. A defendant whose license has been revoked can not defend against a complaint for unlawfully keeping liquors upon the ground that he had no opportunity to be heard upon the revocation. *Com. v. Wall* (Mass.) 145.

22. The discretion of the board of aldermen in refusing a continuance is not reviewable in another proceeding, to which the board is not a party. *Id.*

23. Reasons of appeal from the sentence of a district court for keeping intoxicating liquors for sale in violation of Pub. Stat. chap. 596, amended by chap. 684, must be filed at least five days before the sitting of court, instead of the second day of the term. *Dennessy v. Webster* (R. I.) 388.

b. *Indictments; Complaints.*

24. An indictment for a liquor nuisance, describing the building as "a certain building occupied by the said H as a saloon, situated at the corner of D Square, in said G," is sufficient. *State v. Hall* (Me.) 235.

25. A complaint that defendant is guilty of **keeping a tenement for illegal sale of liquors is not uncertain.** *Com. v. Gallagher* (Mass.) 116.

26. Such complaint need **not** contain any other **negation of authority to keep or sell liquors.** *Com. v. Bruis* (Mass.) 119.

27. Where the complaint is **sworn to before a justice**, it will be presumed the court was not in session at the time. *Id.*

28. An **objection to the form of warrant** must be taken in the district court. *Id.*

29. A complaint **charging transportation of liquors from "place to place"** within the State is not sufficient. *State v. Lashus* (Me.) 851.

30. The complaint should **designate the places.** *Id.*

31. A complaint for sale to a minor must **set forth minority.** *Com. v. Fowler* (Mass.) 388.

32. A sale by a **unlicensed person to the agent of undisclosed principal** must be **charged to have been made to the agent**; otherwise if the principal be disclosed. *Id.*

33. An indictment **charging the keeping for sale** "of a quantity of **malt liquor** known as ale, to wit, ten gallons of ale," describes an offense against Gen. Laws, chap. 209, § 18. *State v. Jenkins* (N. H.) 67.

34. A complaint **charging the unlawful keeping of liquors for sale, with continuando** between certain dates, must be sustained by proof of acts at times specified. *Com. v. Purdy* (Mass.) 710.

35. A complaint for **unlawfully exposing and keeping liquors for sale is sustained by proof of keeping for sale** without proof of exposing. *Com. v. Tay* (Mass.) 712.

36. An indictment, that the defendant, having **control of a building, permitted the illegal sale of liquors**, is not sustained by proof that, on notice of sale, he did **not take possession** of the premises as provided by the Public Statutes. *Com. v. Wentworth* (Mass.) 586.

37. A **former conviction for keeping a tenement for illegal sale of liquors bars a complaint for keeping same tenement** for portion of time covered by former proceeding. *Com. v. Dunster* (Mass.) 115.

c. Evidence.

38. Stat. 1887, chap. 414, making **posting of liquor-tax receipts in premises evidence of keeping** premises for sale of liquors, is valid. *Com. v. Uhrig* (Mass.) 709.

39. The Statute of 1887, declaring that the **payment of the special tax as a liquor seller shall be prima facie evidence** that the party is a **common seller of liquors**, only means that such evidence is sufficient to justify the jury in finding him guilty, if satisfied thereof beyond a reasonable doubt. *State v. Intoxicating Liquors* (Me.) 852.

40. On the trial of a **complaint for keeping a tenement for the illegal sale of liquors**, under Pub. Stat. chap. 101, the **State need**

not prove an act of sale or offer for sale. *Com. v. Boyle* (Mass.) 259.

41. That the defendant **kept the premises for such illegal use** may be **proved** by other evidence than that of specific sales. *Id.*

42. On a complaint for illegally keeping liquors at S, where the **house is located on the line between S and C**, evidence showing what liquors were found in C, is competent. *Com. v. Downey* (Mass.) 288.

43. On trial for maintaining a liquor nuisance, circumstances attending the **discovery of whiskey in the defendant's bar-room** may be **proved.** *Com. v. Locke* (Mass.) 496.

44. From the presence of, and attempt to conceal, **liquor in such bar-room**, the jury can infer that it was **kept there for an unlawful sale.** *Id.*

45. If **liquor was kept in the defendant's bar-room for sale by his barkeeper**, the jury can infer that it was with the defendant's consent. *Id.*

46. On the trial of a **complaint for keeping a liquor nuisance between certain dates**, evidence of sales made to one who testified he had been a **drunkard** during the past year, and that he was known to have been such by the defendant, is **admissible.** *Com. v. McNeff* (Mass.) 896.

47. Evidence was **admissible** that the **defendant testified** in another case that he knew such person was frequently intoxicated, but had **never sold liquor to him while intoxicated**, although he had at other times. *Id.*

48. On the trial of a complaint for keeping intoxicating liquors, where there is a **conflict between a witness for the government and the defendant as to declarations** by the latter, an **instruction** that the government must prove its allegations beyond a reasonable doubt, and that the jury should consider the intelligence, memory, and accuracy of the government's witness, is sufficient. *Com. v. Christie* (Mass.) 211.

49. The refusal of the judge to instruct the jury to look with distrust upon **witnesses purchasing liquor for the purpose of making complaint**, sustained; the **weight** to be given to the **testimony** of such witnesses is for the jury. *Com. v. Ingersoll* (Mass.) 188.

50. Whether an **allegation** that the **person to whom a liquor sale was made was unknown to the complainant is sustained by the evidence** is a question for the jury, where the State's witness testified as to telling such person's name to the complainant, and the latter testified that he would not like to say whether the witness had done so or not. *Com. v. Pratt* (Mass.) 244.

51. Where **liquor was ordered from Millbury by a resident of Worcester**, and was delivered, paid, and receipted for in the latter place, it is sufficient evidence of a sale therein. *Com. v. Shurn* (Mass.) 170.

52. The **receipt for payment, signed by an agent for the defendant**, affords some evidence that the transaction was a sale by the defendant through his agent. *Id.*

53. Where the parties have refused to produce the receipt, a copy of it is admissible. *Id.*

54. Under a complaint charging the bringing of liquors into a non-license city, evidence is competent to show that the consignee intended to violate the law. *Com. v. Harper (Mass.) 117.*

55. It may be shown that the consignee was reported to be a liquor-dealer. *Id.*

BRIEFS AND NOTES.

Until revoked, license remains in full force notwithstanding illegal sale on premises. 897.

Notice not to sell; form and requisites. 123.

Liability of seller thereafter. 123.

Search warrant may be executed in night-time. 156.

Sale without delivery is not prohibited by statute. 884.

Agreement to sell liquor is not a sale. 884.

Sale to children, messengers of mother, will not support charge of sale to minor. 297.

Single sale is evidence of intent to keep for sale. 537; *contra*, 259.

Liability of master for illegal sales by a servant. 269, 270.

Bartender selling in violation of law, in proprietor's absence, may be convicted. 250.

Liquor-seller is bound to know quality of liquor he sells. 187.

Indictment; sufficiency. 58.

Form and requisites of complaint alleging maintenance of tenement for illegal sale of liquors. 117, 120.

Complaint charging keeping of tenement for illegal sale need not contain any allegation negating authority to keep or sell liquors. 120.

Complaint charging offense of keeping liquor, with a *continuando*. 711.

Evidence must be confined to acts done within time. 711.

Prosecutor must give good description of purchaser, and ignorance of name does not defeat process. 245.

Illegal sale to agent of undisclosed principal may be alleged as sale to agent or principal. 384.

Evidence of defendant's knowledge that party to whom he was selling liquor was habitual drunkard is admissible. 897.

Statute establishing rule of *prima facie* evidence is constitutional. 858.

Posting of tax receipts as evidence of keeping premises for illegal sale of liquors. 852.

Upon refusal to produce receipt for liquor, copy is admissible. 170.

JAIL AND JAILERS. See COUNTIES.

The governor may appoint persons to inquire into the management of the State prison; such persons cannot summon witnesses; their report is a privileged communication, and not actionable without proof of express malice. *Re State Prison Commission (R. I.) 99.*

N. E. R., V. V.

JOINT OBLIGORS. See RELEASE AND DISCHARGE, 1-3.

JOINT-STOCK COMPANIES. See CORPORATIONS, II.

JOINT TENANTS AND TENANTS IN COMMON. See PARTITION.

1. The object of Pub. Stat. chap. 179, §§ 6, 7, is to enforce a penalty against tenants in common or joint tenants who knowingly encroach upon the rights of their cotenants. *Jenkins v. Wood (Mass.) 448.*

2. Where the defendant owned half of the premises and the other half descended to the plaintiff as the heir of the wife of the defendant; and the defendant, believing that a child born during his marriage was born alive, and that he was tenant by curtesy of the other half of the premises, cut wood thereon; and, on a petition for partition, it was determined that the child was not born alive, and judgment was rendered against him,—an action of tort by the plaintiff, as tenant in common, for forfeiture under said statute does not lie; but under a stipulation fixing the value of the timber, a judgment was entered for damages. *Id.*

3. A tenant in common may recover from his cotenant his proportional part of the expense of improvements, used by them as a copartnership, when the realty is individual, and not firm, property. *Jordan v. Soule (Me.) 689.*

4. Where the lessee was to manage a farm and pay the lessor one half the amount of sales therefrom, they are tenants in common; and the lessee cannot sue the lessor for taking one half of the crop raised. *Connell v. Richmond (Conn.) 411.*

5. Under such agreement, the lessor may sue for the share of money received by the lessee for such portion of the crops as were sold by the latter; and nothing can be deducted for the cost of production. *Richmond v. Connell (Conn.) 418.*

BRIEFS AND NOTES.

Rights of cotenant of land rented on shares for crops sold by cotenant. 412-414.

JUDGMENT. See CONTRACT, 5.

1. The doctrine of estoppel by judgment is not applicable to a case ambulatory in its nature. *Dewey v. St. Albans Trust Co. (Vt.) 652.*

2. Parties. A's assignees for creditors filed a bill against B, A's partner, for an account. It appeared A had purchased securities in his own name with firm funds, and the master reported a balance due from A to B. The assignee sold the securities. *Held*, B was estopped by the decree from claiming them. *Hodges v. Bullock (R. I.) 95.*

3. When the defendant has a choice of setting up a matter of defense or of suing upon it in another action, if he chooses not to set it up in defense the judgment in that action does not bar a subsequent suit by him. Cited in *Hunt v. Brown (Mass.) 818.*

4. Where the defendant, personally served with the writ, enters an appearance, a judgment against him by default is not rendered in his absence, within Pub. Stat. chap. 187, § 22, providing for review, where a judgment has been rendered in the absence of the petitioner and without his knowledge. *Riley v. Hale* (Mass.) 895.

BRIEFS AND NOTES.

Res judicata. 81.

Questions in issue. 96.

Not conclude party prevented from availing himself of defense. 495.

Nor one not party to proceeding. 890.

JURISDICTION. See COURTS, 1, 2.

JURY. See CONSTITUTIONAL LAW, 8, 4.

1. On complaint for illegal keeping of liquors, it is no objection to a juror that he is a member of a Law and Order League, without proof that such association had initiated the prosecution. *Com. v. Burroughs* (Mass.) 250.

2. The party objecting to juror cannot subject him to a cross-examination. *Id.*

BRIEFS AND NOTES.

Defendant may make inquiry of juror as to connection with association founded to enforce law which he is charged with violating. 251.

Cannot act by majority. 596.

LACHES.

The defense of laches may be interposed by demurrer in equity. *Fogg v. Price* (Mass.) 521.

BRIEFS AND NOTES.

In equity. 561, 755.

LANDLORD AND TENANT. See APPEAL AND ERROR, 24, 25; INSOLVENCY, 12; JOINT TENANTS AND TENANTS IN COMMON, 4, 5; NEGLIGENCE, 8; SPECIFIC PERFORMANCE, 1; WATERS AND WATERCOURSES, 9, 10.

1. Where the guaranty of a lease is forged, the lessor may treat the lease as invalid. *Brooks v. Allen* (Mass.) 747.

2. Notice to quit for nonpayment of rent does not rescind the lease. *Id.*

3. The rescission of a lease to an individual will not relate back so as to make firm of which he is a member liable for use and occupation, prior to rescission. *Id.*

4. The contract of a firm for rent will not be implied from use and occupation had under an express contract with a partner. *Id.*

5. A landlord must try to get rent fixed by an appraisal which is provided for by the lease, and fail, before he can sue the tenant therefor. *Sherman v. Cobb* (R. I.) 671.

6. A tenant holding over without a new contract may be treated as a trespasser, or as a tenant for the same term as the previous one. *Providence County Sav. Bank v. Hall* (R. I.) 881.

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7. A tenant holding over by permission of his landlord is only liable for rent for the period of his occupation, unless he exceeds the permission; and if the landlord accepts a surrender from him, he is liable for rent only up to such acceptance. *Id.*

8. Where, after the service of a notice to quit the premises, the occupant exchanges the premises with another party, such occupancy of the premises is regarded as that of the person notified. *Pray v. Wadell* (Mass.) 898.

9. A misdescription, in the writ to recover the possession of the premises, as to the name of the street on which they are located, is not fatal, if they are clearly described. *Id.*

10. The only remedy of a lessee for the lessor's failure to repair a stable floor as agreed, within a reasonable time, is by action in contract. *Tuttle v. Gilbert Mfg. Co.* (Mass.) 163.

11. Whether a landlord, knowing the defective covering of a cesspool, had negligently omitted to inform the tenant, and whether the latter, falling into the same, was injured thereby by reason of want of proper examination, is a question for the jury. *Cowen v. Sunderland* (Mass.) 248.

12. Exception to rule that lessee can not maintain an action except under warranty by the lessor, stated. *Id.*

13. Where it appears the tenant could have prevented the fall of snow from the roof by using reasonable care, the landlord is not liable for an injury from its fall. *Clifford v. Atlantic Cotton Mills* (Mass.) 566.

14. A landlord is not liable for a personal injury from falling down the well of an elevator, occasioned by the unlocking of the elevator door by the tenant, who obtained the key without the landlord's knowledge. *Handyside v. Powers* (Mass.) 179.

15. The accident having occurred in a city which had never accepted the statute providing for the inspection of buildings, such Act does not apply to the case. *Id.*

16. Where a tenant enters into possession under a lease, the building is not under the landlord's control. *Com. v. Wentworth* (Mass.) 536.

17. The notice to a tenant at will may require him to quit at any time therein named. *Stickney v. Burks* (N. H.) 69.

BRIEFS AND NOTES.

Landlord is not liable for injury from fall of snow from house in tenant's possession. 566, 567.

Liability generally for dangerous condition of leased premises. 867.

Tenant is liable for defective premises only when he has entire control of same. 180.

Not liable for ordinary wear and tear of premises. 169.

Notice to quit is acknowledgment of relation of landlord and tenant. 749.

In tenancy at will. 69.

LEWD AND LASCIVIOUS COHABITATION.

An indictment under Rev. Laws, § 4241, that the defendant, "being a man," was found in bed with another man's wife "under circumstances affording presumption of illicit intention," is bad in not alleging what the illicit intention was. *State v. Miller* (Vt.) 787.

LIBEL AND SLANDER.

1. The report of persons appointed by the governor to inquire into the management of the State prison is a privileged communication, and not actionable without proof of express malice. *Re State Prison Commission* (R. I.) 99.

2. Where plaintiff advertised for sale as first quality, stockings made by defendant, defendant's publication that his stockings should not be judged by those sold by plaintiff, because they had been sold to him at a reduced price because damaged in the dye house, is not actionable in the absence of proof of special damage. *Boynston v. Shaw Stocking Co.* (Mass.) 727.

3. The declaration must show that the words applied to the plaintiff, the sense in which used, and how defamatory. General allegations and innuendoes are not enough. *McCallum v. Lambie* (Mass.) 274.

4. To recover damages for an injury to business, it must be alleged that the words were published concerning the plaintiff in his business relations. *Id.*

5. Where the words alleged to have been published do not indicate their application to plaintiff, and their meaning, as imputing what would expose him to hatred or ridicule, is not intelligible,—a demurrer to the declaration is properly sustained. *Id.*

6. In an action for slander, evidence that the defendant had slandered other persons some years before is inadmissible. *Sullivan v. O'Leary* (Mass.) 896.

BRIEFS AND NOTES.

Words injuring person's trade or business are actionable. 728.

But words not accusing him of crime or immorality, and not exposing him to public contempt or ridicule, are not. 275.

Plaintiff must show special damages. 728.

Question of libel is for jury. 727.

Utterance of similar slander concerning plaintiff is allowed and admitted in evidence on issue of actual malice; but evidence of different calumny of plaintiff is inadmissible. 897.

LICENSE. See EASEMENT, 8; INTOXICATING LIQUORS, II.

BRIEFS AND NOTES.

Coupled with interest, is irrevocable. 479.

Parol, is revocable. 516.

LIEN.**I. UPON ANIMALS.****II. MECHANICS'.****BRIEFS AND NOTES.**

See GUARDIAN AND WARD.

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I. UPON ANIMALS.

1. Pub. Stat. chap. 192, § 32, giving a lien upon domestic animals for their keeping, is strictly construed. *Hovess v. Newcomb* (Mass.) 568.

2. A party claiming such lien must prove that the animals were brought to his premises with the owner's consent. *Id.*

3. A mortgagor of animals is not the owner, within the statute. *Id.*

4. Consent is not inferred from the fact that the mortgagee leaves the property with the mortgagor, where the property is such as is usually cared for by the owner. *Id.*

5. A mortgage upon horses, providing that any lien of third persons affecting the property may be discharged before rendering the surplus to the mortgagor, does not imply consent to subject the horses to a lien for keeping. *Id.*

II. MECHANICS'.

6. A building erected by one in the possession of the land under a bond for a deed, should be attached as real estate to enforce a lien for labor in its erection. *Skellin v. Moore* (Me.) 857.

7. A mechanic's lien attaches to a wife's property for labor performed at her husband's request and with her knowledge. *Wheaton v. Trimble* (Mass.) 881.

8. Agency to bind the wife may be inferred from the fact that her husband had been intrusted with the general management of her property. *Id.*

9. A statement filed to secure a mechanics' lien, that the land was owned by a party named, to the best of plaintiff's knowledge and belief, is sufficient, where he innocently states his belief, although he is in error as to ownership. *McPhee v. Broderick* (Mass.) 520.

10. The petitioner, knowing the true owner and giving a wrong name in his certificate, loses his lien. *Id.*

BRIEFS AND NOTES.

Cannot be created on personal property without owner's consent. 570.

For labor performed by consent of owner; cases where consent is inferred from acts of parties. Note, 881.

Mechanics'; misstatement of owner's name in claim; effect. 520.

LIFE INSURANCE. See INSURANCE, II.

LIMITATION OF ACTIONS. See

BILLS AND NOTES, 1; CONFLICT OF LAWS, 4; EXECUTORS AND ADMINISTRATORS, 1-8; INTOXICATING LIQUORS, 15; MUNICIPAL CORPORATIONS, 10; SALE, 2.

1. The equitable right of a railroad company to land outside of its location will not prevent the acquisition of title by adverse possession. *Littlefield v. Boston & A. R. Co.* (Mass.) 883.

2. The six years' limitation against an action

on a note payable "on demand after date" begins to run on the day of its date. *Fenno v. Gay* (Mass.) 568.

8. The running of the statute upon a note is not suspended by its transfer to a married woman. *Taylor v. Slater* (R. I.) 755.

4. Where the defense to a suit on a note is the Statute of Limitations, the time the defendant resided outside the State will be deducted from the number of years the note has run. *Palmer v. Morse* (Me.) 309.

5. In computing the period of limitations, the time of the debtor's absence from the State is not to be excluded, unless it be of such a character as to work a change of his domicile. *Slocum v. Riley* (Mass.) 279.

6. Under the Connecticut Statute of Limitation, a creditor has six years after the debtor has come into the State in which to institute a personal action upon a simple contract against him. *Waterman v. Sprague Mfg. Co.* (Conn.) 632.

7. The creditor's remedy is not affected by the fact that, during the absence of the debtor from the State, he had real estate here open to attachment. *Id.*

8. One whose domicile was in New Hampshire when she executed a note, and so continued until her death, only making occasional visits to Massachusetts, did not come into the State during that time, within the meaning of the statute. *Converse v. Johnson* (Mass.) 548.

9. Under Pub. Stat. chap. 197, § 12, it was not intended that an executor or administrator should not collect debts by suits brought more than two years after their appointment, where debts were not barred by other provisions of the statute. *Id.*

10. The statute bar of twenty years for probate does not begin to run as to a will, fraudulently concealed, until it is discovered. *Deake's Appeal* (Me.) 848.

11. A statute providing that the time a will has been lost shall not constitute part of the twenty years does not affect pending cases. *Id.*

12. A new promise to pay a debt, before barred, does not create a new cause of action, but merely suspends the statute. *Taylor v. Slater* (R. I.) 755.

13. A replication to the plea of the statute need not allege that the defendant's promise to waive the statute was in writing. *Green v. Seymour* (Vt.) 867.

14. An action for a penalty may be limited to certain persons. Cited in *O'Connell v. O'Leary* (Mass.) 800.

15. Where the statute is set up in bar, the burden is on the plaintiff. *Slocum v. Riley* (Mass.) 279.

BRIEFS AND NOTES.

Adverse possession; duration. 59.

Title can be gained by prescription against municipality. 848.

In computing six years "next after" a day, that day is excluded. 568.

On contract to deliver goods, runs from time of demand. 468.

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Suspension of operation of statute by absence from State. 280, 310, 544.

Running of statute is not prevented by subsequent disability. 544.

Nor by coverture. 755.

Doctrine of "tacking" has not been adopted in Rhode Island. 681.

Removal of bar of statute by acknowledgment, new promise, or part payment. 633.

Acknowledgment of deed constitutes new promise, on which action will lie. 755.

Agreement not to take advantage of statute removes bar. 367.

It is not necessary to allege promise was in writing. 367.

Application of statute in equity. 419.

Statute is strict defense. 280.

Right to plead statute is personal. 633.

LIQUORS. See INTOXICATING LIQUORS.

LOGS AND LOGGING. See MILLS AND DAMS, 1.

1. Where the defendant floated logs down the Connecticut River, not in rafts, and obstructed the plaintiff's landing place on the river, by which persons had access to his public house, he is liable for damages to the plaintiff. *French v. Connecticut R. Lumber Co.* (Mass.) 294.

2. Evidence of diminution of visitors to the plaintiff's house, and in receipts and profits, is competent upon the question of damages. *Id.*

8. The plaintiff is not restricted in his recovery to expenses in removing the obstruction. *Id.*

BRIEFS AND NOTES.

Driving loose logs down river is negligence. 295.

LOTTERY.

1. An indictment under Pub. Stat. chap. 209, § 1, for promoting a lottery, in statutory language, is sufficient. *Com. v. Sullivan* (Mass.) 718.

2. A game in which a price is paid for the chance of a prize is a lottery. *Id.*

3. Whether a definitely described game is a lottery is a question of law. *Id.*

4. Where transactions occurring on a certain day were parts of one continuous lottery, the State need not elect some transaction complete in itself on which to go to the jury. *Id.*

MALICIOUS MISCHIEF.

1. Throwing a missile at a car, whether in use or not, violates Pub. Stat. chap. 112, § 206. *Com. v. Carroll* (Mass.) 430.

2. Description of cars as bearing certain marks and name, coupled with identification that cars so marked belonged to the company whose name they bore, is competent to prove ownership. *Id.*

3. Refusal to instruct jury in definition of the word "stone" is not error. *Id.*

4. An **allegation** that the defendant willfully **threw a stone** at a street car is not **sustained by proof** that he threw wood. *Com. v. McCarthy* (Mass.) 511.

BRIEFS AND NOTES.

Throwing missile at street car; requisites of indictment. 511.

MALICIOUS PROSECUTION. See POOR DEBTOR, 6, 7.

1. One acting in good faith in following the **advice of an attorney** is not liable for an action for malicious prosecution. *Donnelly v. Daggett* (Mass.) 282.

2. Whether there is **probable cause** is a **question of law** only when the facts are undisputed. *Id.*

3. It is question of law whether there is a **sufficient want of probable cause**. *Id.*

4. Evidence pertinent to the question of **malice** may show a want of probable cause. *Id.*

5. The **remedy** for causing an arrest by maliciously bringing a suit upon a false charge is an action on the case. Cited in *Everett v. Henderson* (Mass.) 496.

6. An action of trespass for the arrest or for false imprisonment will not lie. *Id.*

BRIEFS AND NOTES.

Probable cause is question of law, where evidence is undisputed. 283.

MANDAMUS. See HOMICIDE; MUNICIPAL CORPORATIONS, 19.

BRIEFS AND NOTES.

Relator must clearly establish a legal right, and that there is no legal remedy. 106, 680.

MANUFACTURING COMPANIES. See CORPORATIONS, III.

MARRIED WOMAN. See HUSBAND AND WIFE.

MASTER AND SERVANT. See ASSIGNMENT, 2; ASSUMPSIT; EVIDENCE, 21; INTOXICATING LIQUORS, 17, 18.

1. A **servant** injured by **falling through** an unguarded **opening** in a floor, **unknown** to him, can maintain an action against the master who had knowledge thereof. *Maguire v. Little* (R. I.) 666.

2. Where a **master** **promised to replace defective appliance**, but failed to do so, and two weeks thereafter the servant was injured thereby, an instruction that the master was guilty of **negligence** was properly refused; it is for the jury to decide whether the servant has assumed the risk in the meantime. *Counsell v. Hall* (Mass.) 462.

3. The master need only give such **instructions** as are reasonably necessary to enable the **servant** to understand the perils of his employment. *Ciriack v. Merchants Woolen Co.* (Mass.) 728.

4. A **servant** **assumes the risk of known dangers**. *Id.*

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5. It must be assumed that a twelve-year old boy knew the danger of contact with revolving cog-wheels in a room where he had been employed for two months. *Id.*

6. A subcontractor of a **carpenter**, remaining at work until it was so dark that he could not see in the passage through which it was necessary for him to pass, cannot recover from the contractor for injuries by falling through an **opening in the floor**, as the cause of injury is deemed to have been an ordinary **risk of the business**. *Murphy v. Greeley* (Mass.) 751.

7. Evidence as to **usage of builders as to openings in floors** of buildings in process of construction, and that the plaintiff was an experienced carpenter, is **competent** upon the question whether he exercised due care. *Id.*

8. A **servant, aware of the danger**, injured by machinery in motion near where he is at work, can not recover. *Goodnow v. Walpole Emery Mills* (Mass.) 719.

9. **Negligence of master in using unsuitable machinery**, if such machinery is in common use, is not made out by proof that safer machinery for same purpose was in common use. *Id.*

10. A **petition for damages from defective machinery** must allege that the defects were unknown to the servant, and were dangerous; or, if a promise to repair had been made, that reasonable time had elapsed before the master repaired as promised. *Whalen v. Whipple* (R. I.) 665.

11. A **railroad company** is liable to a **brakeman of another road**, injured by the defective construction of its **station-house**, which the latter road uses. *Nugent v. Boston, O. & M. R. Co.* (Me.) 865.

12. Where the brakeman was injured, while ascending a side ladder on a freight car, by contact with the station awning, **testimony is admissible** in his behalf that **no other awning** on the line of the road came so near a moving car. *Id.*

13. The plaintiff may show by experienced brakeman that **side ladders** on freight cars are so constructed that **ascending one requires undivided attention**. *Id.*

BRIEFS AND NOTES.

Relation may be proved by circumstantial evidence. 534.

Master must furnish safe machinery. 729. Liable for injuries from defective machinery. 686.

Servant assuming risk cannot recover. 685, 720, 752.

Employee continuing in employment after notice of danger cannot recover if injured. 464.

Railroad company giving permission to another railroad to use part of its track is liable for injury to latter's servant for defective construction of its stations. 866.

Brakeman need not know of all defects in line. 867.

Master is not liable for injuries caused by negligence of **fellow servants**. 686.

Foreman of room in mill is fellow servant with hands employed under him. 729.

Night watchman is not fellow servant with track repairer. 687.

MAXIMS.

1. Actus dei nemini nocet. *Moulton v. Smith* (R. I.) 763.

2. Caveat emptor. *Giroux v. Steedman* (Mass.) 885.

3. Omne majus in se minus continet. *Gravel Hill School District v. Old Farm School District* (Conn.) 128.

4. Doctrine of *respondere superior* is founded on the supposed benefit to the master of the act of the servant. Cited in *McKenna v. Kimball* (Mass.) 525.

BRIEFS AND NOTES.

Caveat emptor. 885.

Curia diligentibus non dormientibus subvenit. 848.

Ex dolo malo non oritur actio; ex turpi causa non oritur actio. 495.

Expressio unius est exclusio alterius. 156.

Falsa demonstratio non nocet. 728.

Ignorantia legis non excusat. 174.

Lex non præcipit inutilia. 542.

Nemo ex delicto consequi potest actionem. 495.

Omnia præsumuntur rite et solemniter esse acta. 210.

Respondere superior. 499.

Ignorance is no excuse for violation of statute in civil action. 449.

Party cannot take advantage of own wrong. 297.

MECHANICS' LIEN. See LIEN, II.

MERGER. See DESCENT AND DISTRIBUTION, 1, 2; MORTGAGE, III.

MILLS AND DAMS. See WATERS AND WATERCOURSES, 7.

1. A milldam owner on a floatable stream in Maine need not construct expensive locks or sluices to enable loosely constructed rafts of logs to pass without being broken up. *Foster v. Searsport Spool & Block Co.* (Me.) 286.

2. The owners of a mill dam, so long as it stands, must vent the waters for mill-owners below, so that each shall have natural flow of stream, except so far as the flow is modified by successive riparian proprietors. *Stevens v. Kelley* (Me.) 871.

BRIEFS AND NOTES.

Dam cannot be maintained for any purpose other than that of raising water for working watermill. 872.

One erecting dam must give public good channel for running rafts. 286.

Injury to raceway is injury to mill. 407.

MISTAKE. See ACTION OR SUIT, 1.

N. E. R., V. V.

MORTGAGE.

I. VALIDITY; IN GENERAL; NOTES.

II. DEED ABSOLUTE AS.

III. RIGHTS OF PARTIES; REDEMPTION; MERGER; ASSIGNMENT.

IV. FORECLOSURE.

V. CHATTEL.

BRIEFS AND NOTES.

See ATTACHMENT, 11-18; BILLS AND NOTES, 14; CONFLICT OF LAWS, 3; CORPORATIONS, 3, 4, 14; DEVISE AND LEGACY, 25; HUSBAND AND WIFE, 1, 2, 4; INSURANCE, 15; PLEDGE AND COLLATERAL SECURITY, 1; SET-OFF AND COUNTERCLAIM, 5.

I. VALIDITY; IN GENERAL; NOTES.

1. A mortgage to secure a liability is invalid against creditors if the liability is not truly stated in the condition, or its validity not verified. *Phillips v. Johnson* (N. H.) 85.

2. Where a mortgage by a husband and wife to secure his debt included her land, and she relinquished all her title in the premises to the grantee, the mortgage only included a life estate in the wife's land. *Allendorf v. Gaugengig* (Mass.) 915.

3. In a suit upon a mortgage, the defendant may show fraud of the mortgagee affecting the consideration. *Ladd v. Putnam* (Me.) 700.

4. A defense going to the entire consideration may be tried upon the main issue, but if it is only partial, it must be heard upon a motion for a conditional judgment. *Id.*

5. Renewal or substitution of note described in a mortgage may be shown, and the security applied to the renewed or substituted note. *Bigelow v. Copen* (Mass.) 257.

6. It does not invalidate a mortgage given as security for the payment of notes that the obligation really secured was one of indemnity for indorsement of the notes described therein. *Id.*

7. Where mortgage notes for purchase money were placed in the hands of a third party, under an agreement that they were not to be used for the mortgagee's benefit until the land should be measured and the defects in the title made good, and decreased in case of deficiency at a certain rate per acre, —the amount is only to be reduced by the value of the number of acres, deficiency at the fixed rate, and not to the amount to which the actual number of acres conveyed would come at that price per acre. *Dooley v. Potter* (Mass.) 731.

8. Where the mortgagor waived such agreement, an objection by the holder of a second mortgage that there was nothing due on the first mortgage, because the agreement had not been complied with, was without force. *Id.*

9. A note is not to be excluded from the mortgage debt because the time at which it is payable is incorrectly stated in the mortgage. *Id.*

II. DEED ABSOLUTE AS.

10. A deed given to secure the performance

of a duty is a mortgage, although the bond to reconvey is not recorded. Cited in *Bryan v. Traders F. Ins. Co.* (Mass.) 458.

11. A deed absolute given to secure a debt is a valid mortgage between the parties; and, upon payment of the debt, a reconveyance shall be ordered. *Still v. Bussell* (Vt.) 644.

12. Where plaintiff permitted defendant's testator to acquire possession of his property, by means of execution and foreclosure sale, under agreement that he should apply rents in payment of claims against plaintiff, and thereupon should convey the property to the latter; and shortly before the testator died he admitted, in the presence of defendant, that he had been fully paid out of the rents, and plaintiff demanded reconveyance; and testator devised his realty to defendant,—equity will treat the transaction as a mortgage, and decree reconveyance. *Cullen v. Carey* (Mass.) 560.

III. RIGHTS OF PARTIES; REDEMPTION; MERGER; ASSIGNMENT.

13. A mortgagor can not cut and sell hay after foreclosure, although in possession. *Perley v. Chase* (Me.) 811.

14. A mortgagee having possession is accountable for rents and profits. *Still v. Bussell* (Vt.) 644.

15. The presumption is that improvements to preserve property from destruction were made by the holder of the equity of redemption in the interest of the equity. *Moors v. Wyman* (Mass.) 579.

16. The purchase by the mortgagee of the equity of redemption satisfies the mortgage debt to the extent of the value of the premises so acquired. *Clark v. Jackson* (N. H.) 79.

17. The mortgagee is not estopped from claiming that the property is of less value than the debt. *Id.*

18. A writ of entry may be maintained upon a mortgage of other land given to secure the same original debt. *Id.*

19. A prior mortgagee, without knowledge of subsequent incumbrances, may release his security without applying the value of the equity released in the reduction of his debt. *Lewis v. Hinman* (Conn.) 770.

20. A third mortgagee can not require a second mortgagee to redeem the first mortgage; but he can redeem from the second mortgagee, and be subrogated to the latter's right of redemption. *Id.*

21. A second mortgagee may redeem the first mortgage, and hold it against parties subsequent in interest; but such parties cannot redeem and hold it against him. *Id.*

22. Where the owner of an equity of redemption in one of several parcels of mortgaged land makes payment and receives a release, it is a discharge. *Id.*

23. Where the owner of an equity in some of such parcels makes payment, intending a merger as to a part of his parcels, the presumption is that the merger was intended as to all of them. *Id.*

24. A bill to redeem should offer to pay the balance due the mortgagee, on accounting. *Still v. Bussell* (Vt.) 644.

25. The mortgagee is not allowed costs on false issues raised by his answer. *Id.*

26. One obtaining from the mortgagee an assignment of such mortgage cannot recover back the consideration money therefor upon the ground of mistake in regard to the value of mortgagee's interest, there being no warranty or fraud on latter's part. *Sears v. Leland* (Mass.) 268.

IV. FORECLOSURE.

27. By foreclosure, the mortgagee elects to treat the mortgagor's possession as a disseisin. *Perkins v. Eaton* (N. H.) 59.

28. To a writ of entry to foreclose a mortgage a former judgment was pleaded. Replication, that one of the mortgage notes then due was not included in the judgment. Rejoinder, that the judgment included the sum due on all the notes. The plaintiff having demurred to the rejoinder, the demurrer was overruled. *Brown v. West* (N. H.) 80.

29. On claim of title under foreclosure by entry and three years' possession, the oath of witnesses and the certificate of entry may be administered by the notary public. *Murphy v. Murphy* (Mass.) 125.

30. To correct a conditional judgment in foreclosure, rendered for a sum greater than due, the remedy is by motion to bring forward the action at trial term. *Bean v. Conway Sav. Bank* (N. H.) 84.

31. Where a decree in foreclosure allows interest from its date, it is proper to include interest on the costs from the date of the decree until the foreclosure is complete. *Dooley v. Potter* (Mass.) 781.

32. When the foreclosure becomes perfected, the mortgage, if the premises are of sufficient value, thereby becomes paid. Cited in *Perley v. Chase* (Me.) 812.

33. The Act of 1838 (Rev. 1875, p. 858, § 2), providing that a mortgagee may recover the deficiency on foreclosure, is not repealed by Laws 1878, chap. 129, providing for an appraisal of the mortgaged property by appraisers, and that the mortgagee shall recover only the difference between the value of the property as fixed by the appraisal and the amount of his claim, except where the appraisal is made under a later statute. *Windham County Sav. Bank v. Himes* (Conn.) 919.

34. The provisions are not inconsistent, but alternative. *Id.*

35. That part of the latter Act providing that no suit for deficiency shall be brought against one not a party to the foreclosure suit repeals so much of the former Act as allowed suit against those not parties. *Id.*

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36. A mortgage of personal property obtained under a conditional sale is valid, although the sale is liable to be defeated by nonperformance of the condition. *Sears v. Leland* (Mass.) 268.

87. Where a chattel mortgage refers for a description of the property to a former mortgage, which is expressly subject to an unrecorded mortgage, the mortgagee only takes the mortgagor's right of redemption from the former mortgage. *Eaton v. Tuson* (Mass.) 160.

88. An agreement, on an assignment of a chattel mortgage, to pay one half of the amount collected above a certain sum, cannot be construed as one half of the net excess after paying expenses. *Logan v. Dockray* (Mass.) 806.

89. Where personal property is mortgaged by a single instrument to two mortgagees to secure distinct debts, they are trustees for each other, without survivorship between them. *Clarke v. Robinson* (R. I.) 680.

40. If one of the debts is paid in part, the mortgagees will hold as trustees for each other *pro rata*. *Id.*

41. The complainant in a suit to redeem a chattel mortgage need not pay other debts owing to the mortgagee. *Id.*

42. In replevin for mortgaged chattels by the holder of a first mortgage, a tender of the amount due him by the holder of a second mortgage is not available, unless the money is brought into court. *Roberts v. White* (Mass.) 726.

43. An allegation that a certain sum should be deducted from the plaintiff's mortgage, and that the defendant should pay only the balance to him on the return of the replevied property, is not an equitable defense, under Stat. 1888, chap. 238, § 14. *Id.*

44. Facts occurring since the commencement of replevin should be availed of by a bill to redeem the goods. *Id.*

BRIEFS AND NOTES.

Validity; failure to truly state liability assumed. 86, 87.

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Deed absolute as. 457.

Parol evidence is admissible to show that deed absolute was intended as. 561.

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Mortgagee is entitled to compensation for services in selling security. 580.

Mortgagor in possession is entitled to rents. 649.

Right of mortgagor in possession to crops when harvested. 811.

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The equity of redemption is indivisible. 681.

Full payment is condition precedent to redemption. 645.

Part payment of debt allows redemption of whole. 681.

Purchase of equity of redemption by mortgagee extinguishes mortgage debt to value of property acquired. 79.

Tender is good without bringing money into court. 726.

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Doctrine of merger. 771, 772; Note, 776. Assignment. Note, 776.

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Foreclosure treats possession of mortgagor as disseisin. 60.

Mortgagee can recover deficiency. 930.

Oath and certificate of entry may be sworn to before notary. 125.

Unrecorded chattel mortgage is not valid against third parties with notice. 160.

MUNICIPAL CORPORATIONS.

I. ORDINANCES; IN GENERAL.

II. CONTRACTS; PUBLIC WORKS; OFFICERS.

III. EMINENT DOMAIN; STREETS.

IV. DEFECTIVE WAYS; PERSONAL INJURIES.

BRIEFS AND NOTES.

See CERTIORARI, 2, 4; DRAINS AND SEWERS; ESTOPPEL, 1; INJUNCTION, 1, 2; POOR AND POOR LAWS; TROVER AND CONVERSION, 8; VOTERS AND ELECTIONS, 1.

I. ORDINANCES; IN GENERAL.

1. The charter of Lynn does not require publication as a condition precedent to the validity of its ordinances. *Com. v. McCafferty* (Mass.) 886.

2. Where the defendant walked upon a sidewalk, having upon his shoulders an oilcloth worn like a vest, on which was printed: "Lasters on strike. All lasters are requested to keep away from S until present trouble is settled," is a violation of an ordinance forbidding the carrying on any sidewalk of any placard or sign for the purpose of displaying the same. *Id.*

3. Such ordinance is not unreasonable, and is valid. *Id.*

4. The enforcement of an ordinance forbidding fishing and boating upon a lake supplying a city with water will not be restrained, notwithstanding the right of fishing and boating were acquired by a license forming part of the consideration of the land purchased for a reservoir. *Dunham v. New Britain* (Conn.) 889.

5. Where a town makes application for the lease of a pond within its limits, notice of hearing provided by Pub. Stat. chap. 91, § 18, is not required. *Com. v. Eliot* (Mass.) 541.

6. The individual property of an inhabitant of a town may be levied upon to satisfy executions against it. Cited in *Turney v. Bridgeport* (Conn.) 769.

II. CONTRACTS; PUBLIC WORKS; OFFICERS.

7. Where a committee recommended the location on which Memorial Hall in Milford was afterwards built, and reported that the price should not exceed \$20,000, the acceptance of the report by the town meeting did not limit the town to the expenditure of \$20,000 for the building. *Shaw v. Milford* (Mass.) 475.

8. Where the town meeting voted that \$8,000 should be raised by taxation and \$20,000 borrowed, the prohibition against the committee's contracting for extra work beyond the amount of the appropriation, if circumstances should require it, was not implied. *Id.*

9. The committee could act by an agreement of the individual members separately obtained. *Id.*

10. A vote authorizing a town treasurer "to hire money for the use of the town" does not authorize the renewal of existing notes; nor will such renewal prevent the running of the Statute of Limitations against the original indebtedness. *Abbott v. North Andover (Mass.)* 499.

11. Parties dealing with town agents must take notice of their powers. *Turney v. Bridgeport (Conn.)* 765.

12. Where a town limits an appropriation for specific purposes, committee appointed to carry that purpose into effect can not involve the town in additional expense. *Id.*

13. A town cannot contract except by town meeting or under the provisions of a statute. *Id.*

14. Mere occupation of a school building by a town will not render it liable for unauthorized excess in the cost of its erection.

15. Ratification by a town of unauthorized acts of its agent must be made in lawful manner. *Id.*

16. Where a town's trustee of the United States surplus revenue money purchased a farm upon which was a mortgage to secure a note payable to said trustee or his successor, and discharged the mortgage without payment of the note, or record of said discharge, it was a breach of his trust. *Woodbury v. Bruce (Vt.)* 214.

17. A vote by a town meeting, referring to selectmen the matter of the sale of certain lands, does not extend to a subsequently elected board of selectmen. *Litfield v. Boston & A. R. Co. (Mass.)* 838.

18. Where a town meeting voted that a tax collector should give a bond to the satisfaction of the treasurer; and by another vote fixed its amount at \$6,000,—under Pub. Stat. chap. 20, the treasurer had only to judge of the sufficiency of the sureties on the bond. *Briggs v. Hopkins (R. I.)* 875.

19. Where the tax collector filed his bond, and took it away upon the treasurer's refusal of it, and it did not appear that the treasurer's refusal was because the sureties were unsatisfactory, mandamus will issue to compel the treasurer to give a copy of the assessment and warrant of collection, but only on condition that the collector refiles the bond given. *Id.*

III. EMINENT DOMAIN; STREETS.

20. Under the Statute of 1885, chap. 377, the street commissioners must assess damages for land taken for a new court N. E. R., v. v.

house in Boston. *Patch v. Boston (Mass.)* 472.

21. Evidence of the cost of addition to the building is not admissible as an element of the market value of the whole property. *Id.* 478.

22. An opinion by an occupant of a house of its value is competent evidence against him, without proof of his qualification to judge of its value. *Id.*

23. The value of land so taken may be shown by the price at which similar property in the same vicinity was sold a few months after the taking. *Id.*

24. Pub. Laws, 1864, chap. 521, providing for transfer of turnpike roads to towns, does not imply that proceedings for accepting the road shall be subsequent to its conveyance. *Gardiner v. Johnston (R. I.)* 759.

25. The vote by the town council to receive the report of the committee appointed to survey and report the grade for the street, and that the grade be placed as stated therein, must give direction to the surveyor. *Id.*

26. Where such direction is not given, the establishment of the grade does not entitle an abutting owner to damages. *Id.*

27. Where, for anything appearing in the declaration, the injury to realty from water, gravel, etc., may have been caused merely by a change of grade by a town, necessary to fit the roads for use as highways, a demurrer will be sustained. *O'Rourke v. Bain (R. I.)* 825.

IV. DEFECTIVE WAYS; PERSONAL INJURIES.

28. A city, compelled by its charter to keep its streets in repair, is not liable for injuries to one traveling on a street, by a sled being used for coasting, contrary to an ordinance which was not enforced. *Weller v. Burlington (Vt.)* 658.

29. A municipality is liable for an injury received through insufficient railing upon a highway, if it had reasonable notice of the defect. *Hinckley v. Somerset (Mass.)* 875.

30. That the plaintiff's horse was frightened by an object in or out of the limits of highway makes no difference. *Id.*

31. Knowledge of defect may be inferred from the length of the time during which it has existed. *Id.*

32. A conversation about the defective way, between persons not officers of the town, is not competent evidence to show show notice to the town. *Id.*

33. Notice to a town of a defect in a highway is notice of that condition of things which constitutes a defect, although the authorities may think that it does not constitute a defect. *Id.*

34. There is no occasion to prove actual notice to a town of its own acts. *Id.*

35. Mere proof of notice to an inhabitant does not establish requisite notice. *Id.*

36. The existence of a defect, through an accumulation of ice, for nine days in a

frequented sidewalk, patrolled by policemen, and several times passed by selectmen, is evidence of notice of the defect. *Fortin v. Easthampton* (Mass.) 162.

87. In an action for injuries from falling on an icy sidewalk, where there is no evidence as to how long it had existed, or that any city officer knew of it, or could have known by reasonable diligence, a verdict will be directed for the defendant. *Stanton v. Salem* (Mass.) 429.

88. Where a defect in a highway existed two months prior to injury, the town is chargeable with notice. *Davis v. Guilford*, (Conn.) 818.

89. Where, about thirty days prior to the accident, actual notice of the defective highway was given to a selectman, the fact that the plaintiff also gave evidence tending to impute knowledge by the town of such defect is on reason for a new trial. *Id.*

40. Where a party injured from a defective highway lived more than ten days in a condition in which it was possible for him to have given notice, a notice by his son, as executor, within thirty days after his decease is insufficient. *Nash v. South Hadley* (Mass.) 200.

41. In an action for personal injuries by a defect in a way, where the notice pointed to a particular place defectively constructed; and the proof was that water would accumulate and gully out a channel across the way; and the plaintiff broke through the ice,—the jury would be authorized to find there was no intention to mislead, and that the defendant was not misled, in stating the cause of the injury. *Liffin v. Beverly* (Mass.) 525.

42. It is not negligence, as matter of law, for parents to send a twenty-months' old child into the street for air and exercise, in the charge of an eight-year old child. *Bliss v. South Hadley* (Mass.) 124.

43. Children using a street for air and exercise may be considered travelers. *Id.*

44. The fact that they stopped for a few minutes to watch other children at play does not deplete them of their right as travelers. *Id.*

45. A request to rule that the plaintiff could not recover for a defect in a highway because he was driving a blind horse on a dark night, was properly refused; such fact is a question for the jury. *Brackenridge v. Nicholson* (Mass.) 171.

46. In an action for damages from a defective highway by a passenger in a carriage, having no control over the driver, the negligence of the driver is no defense. *Noyes v. Boscairen* (N. H.) 70.

BRIEFS AND NOTES.

Annexation. 127.

Distinction between towns existing by special charter and ordinary towns, in respect to obligations and liabilities. 658.

Ordinance takes effect from passage. 387.

Is to be published. 387.

N. E. R., V. V.

Ordinance; police power. 64.

Building ordinance; violation; injunction, 63, 68.

Within the ancient offense of nuisance was exhibition of caricatures which caused crowds to collect and obstruct way. 387.

Manner of conveyance of lands by town. 387.

In construing town records, words used receive their popular signification. 385.

Only liable for acts of agents whom it controls. 559.

Not liable for nonfeasance or malfeasance of corporate officers. 658.

Committee of town are its agents. 476.

Their declarations, within scope of authority, binding. 476.

In eminent domain proceedings, every requisite must be complied with and appear upon record. 382.

In Boston, street commissioners assess damages for laying out ways. 472.

What constitutes defect in highway. 319.

Must keep streets and sidewalks in good condition. 658.

Liability for injury occurring from insufficiency of barrier on street. 376.

Liability for injuries from ice and snow on sidewalk. 429; Note, 429.

Whether ice is defect is question for jury. 429.

Notice of defect is inferred from position or place of existence, and length of continuance. 168.

To show notice of defect, evidence of another similar accident is admissible. 377.

Evidence of similar accidents not admissible. 72.

Notice of defect; requisites. 537.

Sufficiency of notice of death from injuries from defective highway is determined by court. 201.

Children have a right to go into the street of a city for air and exercise. 125.

Negligence of driver of carriage in which plaintiff is carried is no defense. 71.

One driving unsafe horse, which contributes to accident, defect in highway is not sole cause. 171.

One driving horse of imperfect vision is not guilty of contributory negligence. 172.

It is question for jury whether it is safe for a woman to drive a spirited horse. 172.

NAME. See CRIMINAL LAW, 6, 7.

BRIEFS AND NOTES.

Whether names are sounded alike is question for jury. 355.

NAVIGABLE WATERS. See LOGS AND LOGGING; MILLS AND DAMS.

NAVY. See ARMY AND NAVY.

NEGLIGENCE.

I. IN GENERAL; CONTRIBUTORY (See *Infra*, II.)

II. RAILROAD CROSSINGS.

III. EVIDENCE.

IV. DEATH.

BRIEFS AND NOTES.

See CARRIERS, 11; CEMETERIES; EVIDENCE, 15, 16, 21; INNKEEPER, 2; LANDLORD AND TENANT, 11, 14, 15; MASTER AND SERVANT; PHYSICIAN AND SURGEON; PRINCIPAL AND AGENT, 6; RAILROAD COMPANIES, 9-18.

I. IN GENERAL; CONTRIBUTORY. (See also *infra*, II.)

1. Where both parties have contributed to the injury, no damage can be recovered. *Knowles v. Crampton* (Conn.) 414.

2. If damage occurs by a rear team's attempt to pass the advance team, without fault on the latter's part, the former is liable for the consequences. *Id.*

3. The lessors of a pier are liable for an injury received by a longshoreman engaged in discharging a cargo thereon, caused by a dangerous defect which existed at the time of the demise. Cited in *Nugent v. Boston, O. & M. R. Co.* (Me.) 871.

4. In an action against a railroad company for a personal injury from the defective construction of a station-house, the question of contributory negligence, although depending upon undisputed facts, is for the jury, when fair-minded men might arrive at different conclusions. *Id.* 865.

5. Where the defendant, who with his wife boarded with her tenant in her house, had charge of the repairs, and directed a dangerous hole to be uncovered in a passageway at the rear of the house, into which a city servant, removing ashes from the house, fell and was injured, he is liable. *Toomey v. Sanborn* (Mass.) 549.

6. Where an eight-year old child on her way to school sat down on a sidewalk, with her feet in the gutter, to sharpen a lead pencil, and defendant's team hit her, the question whether she was exercising such care as was reasonably to be expected of her was for the jury. *O'Shaughnessy v. Suffolk Brewing Co.* (Mass.) 535.

II. RAILROAD CROSSINGS.

7. One who starts to cross a railroad track without looking for approaching trains, unless he has good reason for not looking, is guilty of contributory negligence. Cited in *Allerton v. Boston & M. R. Co.* (Mass.) 828.

8. This rule applies to persons crossing a double-track railroad, who have started immediately after the passage of one train without looking for the approach of another. *Id.*

9. A traveler disregarding the warning of the approach of a train, and crossing the track, without a sufficient excuse, does so at his own risk. *Granger v. Boston & A. R. Co.* (Mass.) 821.

N. E. R., V. V.

10. Where the deceased was half way across a railroad track before there was any warning, which was first received when the gates were shut, and the gateman shouted "stop," and deceased whipped his horse, the gateman shouting to him to come on and opening the gate in front of him, the court cannot say that going on under these circumstances was gross negligence. *Doyle v. Boston & A. R. Co.* (Mass.) 454.

11. The plaintiff must allege and prove that the defendant's negligence contributed to the injury, but the statute does not require direct evidence. *Id.*

12. Where evidence as to the due care exercised by the plaintiff, injured by collision with cars while crossing a tramway, was conflicting, her negligence is a question for the jury. *Cleaves v. Pigeon Hill Granite Co.* (Mass.) 507.

13. The fact of a collision at a crossing, between an engine and a traveler, is not conclusive evidence that the traveler was wanting in due care. Cited in *Id.* 509.

III. EVIDENCE.

14. In an action to recover for personal injuries, the admissibility of a section of the human body, to show there were no ribs in the place described by the plaintiff, is in the trial court's discretion. *Knowles v. Crampton* (Conn.) 414.

15. A declaration by a father is inadmissible against a daughter in an action by her for personal injuries. *Id.*

16. Part of a letter written by the father by the daughter's authority, which states the facts, is admissible; but the part relating to a compromise is inadmissible, and, if not divisible, will exclude the whole. *Id.*

IV. DEATH.

17. Where the plaintiff's intestate was not found until ten minutes after the injury; was then unconscious, and died immediately thereafter; and there is no evidence of conscious suffering, or any loss or expense before death by reason of the accident, — nominal damages only are recoverable. *Mulchev v. Washburn Car Wheel Co.* (Mass.) 287.

18. The continuance of life after accident is the test by which it is determined whether an action survives. Cited in *Id.* 288.

19. In an action for death from the negligence of a railroad company, under Pub. Stat. § 213, the declaration must allege that the accident occurred at a crossing, or was caused by a collision with an engine of the defendant company. *Allerton v. Boston & M. R. Co.* (Mass.) 825.

BRIEFS AND NOTES.

Owner of land is liable to licensee for injury from defective condition. 550, 866.

One exploding fireworks in public street is liable to one injured thereby. 857.

Railroad company is liable for fires communicated by locomotives of lessees. 206.

Railroad trains have right of way at crossings. 821.

Traveler at crossing must stop, look, and listen for approaching train. 823.

Plaintiff must prove that statutory signals required at crossings were not given. 455.

When **question for court**. Note, 462.

Question for court where facts are undisputed. 197, 819, 455, 866.

Is question for **jury** where facts are disputed. 719, 823.

Evidence of repairs after accident is admissible. 686.

Plaintiff has burden of proof. 507, 729.

Contributory, defeats recovery. 507.

It is negligence, as matter of law, to leave car while in motion; to go between two moving cars; to cross track without looking for train; to leave horse and carriage in street without any one to watch them; to sign application without reading it; to drive up road covered with water. 819.

Is question for jury. 867.

Infants; degree of care required of. 124, 125, 535, 780.

Contributory, of child, is left to jury. 535.

Partial **intoxication** may be considered in determining question of due care. 172.

Cases relating to the **deaf and dumb**. 172.

No recovery where **death** immediate. 286.

Plaintiff must prove that intestate endured suffering. 287.

Consciousness may be inferred from a state of health and wakefulness. 288.

NEGOTIABLE INSTRUMENTS. See **BILLS AND NOTES.**

NEW TRIAL. See **CRIMINAL LAW, IV.; WILL.**

1. A new trial will **not** be granted for the admission of **immaterial and incompetent evidence**. *Miller v. Shay* (Mass.) 158.

2. The **admission of competent evidence is not ground** for a new trial because rendered unnecessary by the concession of the other side. *Schramm v. Boston Sugar Refining Co.* (Mass.) 721.

8. New trial will be granted when it is clear that the **jury were under some misapprehension or bias**. *Thayer v. Eaton* (Me.) 798; *S. P.* cited in *Dexter v. Canton Tollbridge Co.* (Me.) 705.

4. A new trial will not be granted on the plaintiff's motion for an alleged error, when the **proposed correction is inconsistent with the declaration** in the plaintiff's writ. *Littlehale v. Littlefield* (Me.) 808.

5. Where the writ describes the defendant as an administrator, but declares against him personally, and the verdict is that his intestate promised, a new trial will **not** be granted if the **evidence sustained the verdict, provided the plaintiff elects to amend his declaration**. *Perkins v. Hix* (Me.) 859.

6. If an **averment** is filed in such case, and the judgment is rendered on the verdict, **neither party should recover costs**. *Id.* N. E. R., v. v.

7. A new trial will **not** be granted for **newly-discovered evidence, when the witness was at the trial and examined upon the subject to which such evidence related**. *Achorn v. Andrews* (Me.) 850.

8. In an action for personal injuries, a new trial will not be granted for **newly-discovered evidence tending to show that damages were excessive**, unless such excess plainly appears thereby. *Burlingame v. Cones* (R. I.) 664.

9. **Counter-affidavits** may be received on a motion for a new trial. *Id.*

10. Upon the dismissal of an appeal from a justice for lack of a bond, an order for a **new trial** in the common pleas can **not** be obtained on a petition to the supreme court. *Brayton v. Dexter* (R. I.) 670.

BRIEFS AND NOTES.

Granted where **jury** were influenced by improper motive. 811, 852.

Will be granted where **jury** is biased or improperly influenced. 811.

Juryman cannot testify as to how jury reached certain verdict. 851.

Will be granted where verdict is clearly against weight of evidence. 811, 819.

Will be granted where contradictory instructions were given. 416.

Motion must be filed within two days after verdict. 851.

NONSUIT. See **COSTS, 1.**

NOTARY PUBLIC. See **BREACH OF THE PEACE, 1; MORTGAGE, 29.**

NOTES. See **BILLS AND NOTES.**

NOTICE. See **ARREST, 1; FENCES; INTOXICATING LIQUORS, 4, 5; LANDLORD AND TENANT, 2, 8, 17; MUNICIPAL CORPORATIONS, 11, 29, 32-36, 38-41; PARTNERSHIP, 1; POOR DEBTOR, 1, 3-5; TRUSTS, 1.**

NUISANCE.

1. The ordinary **ringing of a church bell**, which so affects a sick person near by as to aggravate his disease, is not a sufficient cause for an action for damages. *Rogers v. Elliott* (Mass.) 844.

2. **Sliding in a street, accompanied by boisterous conduct liable to frighten horses** traveling therein, may be a public nuisance; but one damaged thereby must show that it was the proximate cause of his damage to enable him to recover from one creating it. *Jackson v. Castle* (Me.) 857.

3. A **declaration for damages for obstructing a public way** may be either in trespass or trespass on the case. *Holmes v. Corthell* (Me.) 793.

4. The **declarations should allege special damage** to the plaintiff. *Id.*

5. One suffering special damages from a public nuisance may **recover from the person who created or continued it after request to abate it**. *Id.*

BRIEFS AND NOTES.

Obstruction of public highway is public wrong. 798.

Public nuisance cannot be maintained by prescription. 817.

Reasonable use of right is not nuisance, although it be annoyance to another. 844.

Noise constituting annoyance to person, such as to materially interfere with comfort of life, is nuisance to him. 844.

When private individual incurs special damage from nuisance he can sue for damages. 881.

OFFICE AND OFFICER. See CIVIL SERVICE; COUNTIES; DEFINITIONS, 4; ESCAPE; EVIDENCE, 3, 4; MUNICIPAL CORPORATIONS, II.; ROADS AND HIGHWAYS, IV.; SCHOOLS AND SCHOOL DISTRICTS, 2-5.

1. After the election of a tax assessor by ballot has been declared and recorded, another person cannot be elected the next day. *State v. Phillips* (Me.) 242.

2. The power of removing police officers, constables, and watchmen is commensurate with that of appointment. *Quinn v. Portsmouth* (N. H.) 52.

3. The presumption is that a public officer has performed his duty. Cited in *Lycoming F. Ins. Co. v. Wright* (Vt.) 643.

4. The doctrine of respondeat superior does not apply to a public officer employing agents in the discharge of a public duty. *McKenna v. Kimball* (Mass.) 538.

BRIEFS AND NOTES.

Officer once elected cannot be arbitrarily removed. 242.

Power of removal. 58.

Power of changing salary of public officers. 428.

Individuals dealing with officer must take notice of his authority. 848.

Presumption of performance of official duty. 156.

Public officer is liable for negligence of servants. 524.

Acts of *de facto* officer are valid as to public. 139.

OPINIONS. See EVIDENCE, IV.

ORDERS.

1. The acceptance of a non-negotiable order, without consideration for the acceptance, is not binding. *Hunt v. Williams* (R. I.) 98.

2. In an action on an order payable out of the funds to be received from a contract, and accepted "when there is money in my possession" from such contract, the drawee can show that money received by him was not the drawer's money. *Id.*

ORDINANCES. See MUNICIPAL CORPORATIONS, I.

PARENT AND CHILD. See PRINCIPAL AND AGENT, 1; SEDUCTION.

1. An infant living with his uncle, who N. E. R., V. V.

stands in *loco parentis* to him, can not recover for services, in absence of express contract. *Taft, J.*, dissents. *Ormsby v. Rhoades* (Vt.) 129.

2. In the absence of any statutory provision, a stepfather need not maintain his stepchildren, and consequently is not entitled to their earnings or the control of their persons. Cited in *Id.* 180.

BRIEFS AND NOTES.

Infant cannot recover for services from one standing in *loco parentis*, in absence of express contract. 129, 180.

PAROL EVIDENCE. See EVIDENCE, II.

PARTITION.

1. Equity has jurisdiction of partition of personal property owned by tenants in common. *Spaulding v. Warner* (Vt.) 220.

2. Where a division is impracticable, a sale and accounting will be decreed. *Id.*

3. An administrator neglecting to present claims of the estate to offset creditors' claims is estopped from pleading them in a subsequent suit by the same parties. *Id.*

BRIEFS AND NOTES.

Sale is not ordered if property is divisible. 220.

Party is never compelled to take real estate against his will. 220.

PARTIES. See ACTION OR SUIT, 3, 4; INSOLVENCY, 15-18; REPLEVIN, 4; TRUST, 7.

PARTNERSHIP. See ATTACHMENT, 3, 4; EXECUTORS AND ADMINISTRATORS, 18; LANDLORD AND TENANT, 3, 4.

1. To prove notice to plaintiff of withdrawal of C from a firm, letters sent him by the remaining partner, headed as follows: "E, under firm name of C, B, & Co.," were admissible. *Swift v. Carr* (Mass.) 512.

2. Where surviving partner continues to use capital of deceased partner, the latter's representatives may demand interest on capital used or profits earned by its use. *Robinson v. Simmons* (Mass.) 743.

3. Profits should usually be divided according to the capital, after deducting such share as is attributable to the skill and services of the surviving partner. *Id.*

4. The withdrawal by the representatives of a part of their capital diminishes *pro rata* their proportion of the profits. *Id.*

5. Amounts applied by surviving partner to payment of debts of deceased partner go to the reduction of the capital of the latter. *Id.*

6. An agreement by the representatives to allow deceased partner's interest to remain in new firm, changes their shares from capital to debt of new firm. *Id.*

7. Where surviving partner pays representatives nearly all of capital to which they were entitled, and litigation arises in reference to balance, for which representatives are largely responsible, surviving partner should

not be compelled to pay profits, attributable to their nominal capital in business subsequent to payment, but interest thereon is all that is equitably called for. *Robinson v. Simmons* (Mass.) 748.

8. In suit against surviving partner to settle balance due representatives, decree to pay them balance is proper. *Id.*

9. In an action by the survivor of two partners, on a receipt to collect a note, there can be no recovery if the defendant had accounted to the deceased partner. *Bowell v. Fuller* (Vt.) 217.

BRIEFS AND NOTES.

Cannot commit crime. 561.

Remedy to enforce payment of money due from one partner to another. 689.

To prove notice of dissolution, letter-heads of new firms are admissible. 518.

Surviving partners are not entitled to compensation. 744.

Duty of surviving partner to wind up firm and to distribute firm funds. 748.

PAYMENT. See **BILLS AND NOTES**, 12; **DEVISE AND LEGACY**, VIII.

1. A general payment by one owing both secured and unsecured debts should be applied to the latter. *Still v. Buzzell* (Vt.) 644.

2. One compromising with his debtor on condition of payment before a certain date, and having in his hands at the time fixed for payment sufficient moneys of the debtor which he may apply to the compromise, is deemed to have received the same in discharge of his debt. *Giesse v. Franklin* (Conn.) 925.

BRIEFS AND NOTES.

Definition. 858.

Substitution of one simple contract for another is not. 858.

Receipted bill of parcels does not necessarily imply payment. 451.

Voluntary, is not recoverable. 290.

PENALTY. See **HUSBAND AND WIFE**, 11, 12; **INTOXICATING LIQUORS**, 15, 16; **JOINT TENANTS AND TENANTS IN COMMON**, 1, 2; **LIMITATION OF ACTIONS**, 14.

BRIEFS AND NOTES.

Qui tam actions must be brought in county where offense is committed. 297.

Plaintiff must allege facts essential to support action. 449.

PHOTOGRAPHS. See **EVIDENCE**, 19.

PHRASES. See **DEFINITIONS**.

PHYSICIAN AND SURGEON.

A surgeon unskillfully treating a patient is liable to him. Cited in *Nugent v. Boston, C. & M. R. Co.* (Me.) 869.

PLEADING. See **ASSAULT AND BATTERY**, 1; **ATTACHMENT**, 9, 10; **CRIMINAL LAW**, N. E. R., V. V.

II.; **EQUITY**, 4, 5; **GUARANTY**, 4; **INSURANCE**, 17-19; **LACHES**; **LANDLORD AND TENANT**, 9; **LIBEL AND SLANDER**, 8-5; **LIMITATION OF ACTIONS**, 13; **MASTER AND SERVANT**, 10; **MORTGAGE**, 24-28; **NEGLIGENCE**, 11-19; **NUISANCE**, 8, 4; **SET-OFF AND COUNTERCLAIM**.

1. A complaint that plaintiff made a plan for certain houses and procured bids therefor at defendant's request, upon an agreed compensation upon estimated cost of houses, stating percentage, is not demurrable because a previous request by defendant to make plans was not averred, nor that any estimated cost was ever made, nor by whom such cost was to be estimated. *Lambert v. Sanford* (Conn.) 608.

2. As the action was upon an express contract set forth in the complaint, defendant could not show that the contract had never been made, and that an entirely different contract existed between the parties. *Id.*

3. Plaintiff could offer in evidence certain estimates and bids made by builders, which he had obtained for defendant, under the contract between them. *Id.*

4. The distinction between trespass and trespass on the case is abolished by Rev. Stat. chap. 82, § 15, and a declaration in either form is good. Cited in *Holmes v. Corthell* (Me.) 794.

5. Trespass joined with trover is bad on demurrer, unless it appears from the declaration that they are for the same cause of action. *Templeton v. Clogston* (Vt.) 102.

6. A defense upon a fact not included in the allegations necessary to support the plaintiff's case must be set out in precise terms in the answer. *Coburn v. Travelers Ins. Co.* (Mass.) 182.

7. The court may allow an answer, filed after demurrer, to be withdrawn, and the demurrer will stand unaffected by the answer. *Fogg v. Pries* (Mass.) 521.

8. A general demurrer to the entire declaration is bad, if either count is sufficient. *Langley v. Metropolitan L. Ins. Co.* (R. I.) 334.

9. A general demurrer does not raise the question of duplicity in a replication. *Green v. Seymour* (Vt.) 867.

10. The amendment of a defective special denial of the genuineness of a signature declared on is in the court's discretion. *Haw v. Kerwin* (Mass.) 806.

11. A variance between the pleading and proof is not fatal where the defendant is not induced thereby to omit any preparation for defense. *Davis v. Guilford* (Conn.) 818.

BRIEFS AND NOTES.

In general; pleadings are admissions as against pleader. 766.

Bill embracing distinct matters affecting distinct parties is multifarious. 581.

Tender and general denial cannot be pleaded together. 180.

Necessary matters of description must be proved as alleged. 591.

Declaration for personal injuries. 818, 835.

Consideration of contract must be set forth with contract. 548.

Trespass and trover joined is bad. 102.

Demurrer admits facts well pleaded. 355, 598.

Cannot be partly good and partly bad. 819.

Must be special to mere formal defects. 812.

Declaration defective only in matter of form may be taken advantage of only by demurrer. 414.

Is overruled by filing of answer. 522.

Overruled, admits cause of action. 604.

Amendment is in discretion of court. 807.

Variance. 83.

Contract must be proved as declared on. 548.

PLEDGE AND COLLATERAL SECURITY. See HUSBAND AND WIFE, 8.

1. A bill of parcels containing no word of defeasance, intended merely as security, if accompanied by delivery, is only **pledge**, and not a mortgage. Cited in *Shaw v. Billoway* (Mass.) 468.

2. A private sale of goods pledged for advances will be deemed **lawful**. *Moore v. Wyman* (Mass.) 579.

BRIEFS AND NOTES.

There must be delivery to pledgee, and continued possession by him. 580.

Where collateral security is received for debt with power to convert it into money, this is specifically applicable to payment of debts. 801.

Pledgee may sell without judicial process, upon giving notice to debtor. 581.

POLICEMAN. See OFFICE AND OFFICER, 2.

POOR AND POOR LAWS.

1. **Insanity**, after the commencement of legal residence, does not affect the acquisition of a settlement. *Topsam v. Williams-town* (Vt.) 646.

2. While, under Rev. Laws, § 2818, time spent in a lunatic asylum in settlement cases is not computed, it is computed when the insane person is not in an asylum, although under guardianship. *Id.*

3. One so idiotic as so be incapable of "coming to reside" is treated as a **transient pauper**. Cited in *Id.* 648.

4. Under Pub. Stat. chap. 87, § 49, the price of support of a pauper at the county insane asylum need not be certified by the county commissioners to the town of his settlement. *Newburyport v. Oreadon* (Mass.) 707.

5. Estoppel from denying the legal settlement of a pauper, arising against town, on notice to remove pauper to itself, is limited to an action thereon between the towns giving and receiving notice. *South Scituate v. Scough-ton* (Mass.) 609.

6. The acts of town overseers in removing a pauper thereto are incompetent as admissions on the part of the town. *Id.*

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7. Where an inhabitant of a town has incurred expenses for relief of a pauper, the town must pay the same after notice and request to the overseers. *Cunningham v. Frankfort* (Me.) 790.

8. Where an overseer of the poor agreed with a married woman, who was then living with her husband and continued to live with him, to pay her for taking care of a pauper, and the town, with her knowledge, paid her husband for such support, she cannot recover therefor. *O'Keefe v. Northampton* (Mass.) 166.

9. The liability of a town for the support of paupers is purely statutory. *Id.*

BRIEFS AND NOTES.

Old residence continues until acquisition of new one. 647.

When one overseer can act for others so as to bind town. 167.

POOR DEBTOR. See FALSE IMPRISONMENT, 1-8.

1. The original notice of desire to take a poor debtor's oath may be given to the creditor's attorney, under Pub. Stat. chap. 162, § 182. *Callaghan v. Whitmarsh* (Mass.) 262.

2. The order for oath must state the hour and day fixed for the hearing of the application. *Sanborn v. Piper* (N. H.) 51.

3. Under Pub. Stat. chap. 162, § 18, service of notice of examination of judgment debtor must be made as many hours before the beginning of the third day from the day fixed for the examination as there are miles of travel. *Lane v. Holman* (Mass.) 149.

4. The meaning of the statute is that the time allowed for traveling shall be allowed at the rate of one hour for each mile. *Id.*

5. Unless the creditor is properly and seasonably notified, the opportunity for examination may be lost. Cited in *Sanborn v. Piper* (N. H.) 59.

6. The wilful falsity of the plaintiff's affidavit, upon which the defendant was arrested, is not a defense to an action on a poor debtor's recognizance given to obtain a release upon such arrest. *Boerett v. Henderson* (Mass.) 493.

7. The defendant's remedy in such case is to obtain, under the statute, an early hearing, or, after the case is ended in his favor, to sue for malicious prosecution. *Id.*

BRIEFS AND NOTES.

Falsity of plaintiff's affidavit is no defense to action on poor debtor's bond. 494.

Not liable for mistake of officer. 262.

POWERS. See COVENANT, 4; DEVISE AND LEGACY, V.; INFANTS, 8.

PRACTICE. See ACTION OR SUIT; APPEAL AND ERROR; CRIMINAL LAW; EVIDENCE; EXCEPTIONS; NEW TRIAL; PLEADING; TRIAL; WITNESS; WRIT AND PROCESS.

PRESUMPTION. See BILLS AND NOTES, 8; DEATH.

PRINCIPAL AND AGENT. See CORPORATIONS, 5, 11, 12; INSOLVENCY, 11; INSURANCE, 1; INTOXICATING LIQUORS, 1, 2; REPLEVIN, 2, 8.

1. **Agency for jury.** Where a curbing was erected around a burial lot under a written contract with the son of the defendant, who was an aged man, and possessed of considerable property, and had signed a request to the superintendent of the cemetery to allow the curbing; and the son told the defendant of the contract with the plaintiff, and was his general agent for the transaction of business,—the jury was justified in drawing the inference that the son acted for the father in the matter, notwithstanding their testimony to the contrary. *Ford v. Linehan* (Mass.) 808.

2. An **agent cannot buy** the property of his principal. Cited in *Randall v. Lautenberger* (R. I.) 780.

3. The **indorsement of a bill of lading** to an **agent**, to enable him to obtain the goods from the carrier, does **not transfer title**. *Moors v. Wyman* (Mass.) 579.

4. The **custody of the agent** is that of the principal. *Id.*

5. The **knowledge of an agent** is that of the principal. Cited in *Mathews v. Riggs* (Me.) 865.

6. **Agent.** One entering into a valid agreement to conduct business for another, "without accountability for errors of judgment," is **liable for losses from his negligence**. *Giess v. Franklin* (Conn.) 925.

7. An **agent charging himself with an unauthorized discount on the sale of his principal's goods, and compromising his claim** against the principal with other creditors at a certain per cent, can **not have the discount deducted from his claim** before the computation of the per cent thereon. *Id.*

BRIEFS AND NOTES.

Agency is question of fact. 381, 809.

Notice of agency may be implied from circumstances. 384.

Agency may be proved by circumstantial evidence. 524.

Principal cannot accept part and reject part of contract made by agent. 765.

Acts of agent to bind principal must be within scope of authority. 498, 822.

Ratification of unauthorized act of agent. 609.

Ratification by corporation may be implied from its conduct. 766.

Knowledge of assent is that of principal. 722, 864.

Agent is liable for negligence in discharge of duties. 925.

Transfer of land by agent must be by deed in principal's name. 835.

PRINCIPAL AND SURETY. See WITNESS, 1.

1. Where the sheriff released the defendant on receiving a bond not valid as a bail bond; *N. H. R., V. V.*

which the plaintiff repudiated, and, on payment of the judgment against the defendant by the sheriff, assigned the judgment and bond to him,—such assignment is not an acceptance of the bond by the plaintiff, so as to make it effective against the sureties. *Bell v. Pierce* (Mass.) 545.

2. The **coverture of the principal promisor** at the time of promise, where known to the surety, will **not discharge him**. *Winn v. Sanford* (Mass.) 245.

3. There is no distinction between the promise of a married woman, which is void, and that of a minor, which is voidable, as to the obligation of a surety. *Id.*

4. Exception to the rule that the **surety's liability** is limited by that of his principal, stated. *Id.*

PROCESS. See WRIT AND PROCESS.

PROMISSORY NOTES. See BILLS AND NOTES.

PUBLIC OFFICER. See OFFICE AND OFFICER.

QUANTUM MERUIT. See ASSUMPSIT; FRAUDS, STATUTE OF, 4.

QUIA TIMET ACTIONS. See CLOUD ON TITLE.

RAILROAD COMPANIES. See CARRIERS; EASEMENT, 6, 7; LIMITATION OF ACTIONS, 1; MASTER AND SERVANT, 11-18; NEGLIGENCE, II.; STATUTES, 6; WRIT AND PROCESS, 1.

1. A railroad company can **not**, without statutory authority, **divest itself of any duty** imposed by its charter or the general laws of the State, by **leasing its road to another**. Cited in *Nugent v. Boston, C. & M. R. Co.* (Me.) 870.

2. **After a route has been constructed and operated for twenty years, a landowner cannot object to use of his land** because of a failure of the company to furnish a plan. *Abbott v. New York & N. E. R. Co.* (Mass.) 527.

3. Power to take land by eminent domain may be given to a **foreign corporation**. *Id.*

4. The **adverse use of a way across a three-rod location of a railroad, begun before widening, could not, after widening, ripen into a right of way across it without a fresh start**. *Id.*

5. When the **location of a railroad identifies the land, the statute is satisfied, although the owner's name is not stated therein**. *Brock v. Old Colony R. Co.* (Mass.) 794.

6. It will be presumed that the **landowner was notified of the proceedings**. *Id.*

7. All **landowners need not be notified personally by name**. *Id.*

8. The **failure of the company to furnish the landowner with plan of location will not affect its title to the land**. *Id.*

9. The **remedy at common law for damages from sparks escaping from a locomotive is by action on the case, and is not barred**

within six years. *Newton v. New York & N. E. R. Co.* (Conn.) 614.

10. A railroad company, free from negligence, is **not liable** for damages from fire kindled from sparks from locomotives. Cited in *Id.* 615.

11. Where plaintiff's horse escapes into the highway, without his fault, and is **killed upon a crossing** by a train run in a negligent manner, he can recover. *Clark v. Boston & M. R. Co.* (N. H.) 48.

12. **Unlawful rate of speed over a crossing** is evidence of negligence. *Id.*

13. A **statute regulating speed** across highways in the compact part of a town applies to railroads extending into an adjoining State. *Id.*

BRIEFS AND NOTES.

Filing location is **taking land** for public purposes. 529.

Measure of damages upon appropriation of land. 428.

Public may acquire prescriptive right to **highway across railroad location**. 428, 424, 580.

Liability for fire caused by sparks escaping from locomotive. 614.

Injury to animals; unlawful rate of speed. 48, 49.

Lessors failing to construct cattle-guards are liable for injury to animals by lessee operating road. 867.

RECEIPT. See FORGERY, 4; RELEASE AND DISCHARGE, 4, 5.

RECEIVER.

A receiver represents the general creditors of an insolvent corporation. *Dewey v. St. Albans Trust Co.* (Vt.) 652.

BRIEFS AND NOTES.

Is representative of parties. 654.

RECORD. See APPEAL AND ERROR, II.; CRIMINAL LAW, 88, 89.

REFERENCE. See ARBITRATION AND REFERENCE.

REHEARING. See EQUITY, 7, 8.

RELEASE AND DISCHARGE. See MORTGAGE, III.; SHIPS AND SHIPPING, 2-5.

1. A release under seal of one of joint obligors presents a complete defense to an action against them upon an agreement under seal for the payment of money. *Hale v. Spaulding* (Mass.) 437.

2. A release to one of joint obligors releases all. Cited in *Id.* 438.

3. But this result is avoided when the instrument is so drawn as to show a contrary intention. Cited in *Id.*

4. Receipt "in full of all demands for damages sustained on a highway" is an agreement in full payment for damages, and can not be varied by an inconsistent oral contract. *N. E. R., v. V.*

temporaneous agreement. *Squires v. Amherst* (Mass.) 148.

5. A **misunderstanding** of the legal import of the agreement is **not ground for avoidance**. *Id.*

BRIEFS AND NOTES.

Release of one joint obligor releases all. 437.

Writing, "in full of all demands for damages sustained on highway," constitutes. 149.

RELIGIOUS SOCIETIES.

1. The majority of pew-owners may control a congregational meetinghouse, and making of repairs thereon, etc., at a meeting of the corporation duly called therefor. *Mayberry v. Mead* (Me.) 692.

2. An assessment is void where the assessors add an overlay to the sum raised, and assess it upon the pews. *Id.*

BRIEFS AND NOTES.

Cases where identity of church has been established by its relation to the society or parish. 210.

REMAINDER. See DEVISE AND LEGACY, IV.

REPLEVIN. See CARRIERS, 6; LIEN, I.; MORTGAGE, 42.

1. One delivering goods to another at an agreed price on credit, the term of which depends upon monthly sales of the same without agreement for return, can not replevy them. *Blanchard v. Fitzpatrick* (Mass.) 550.

2. The owner of liquors, kept by him for sale in a saloon, under a license to his agent, may replevy them when attached as the agent's property. *Barron v. Arnold* (R. I.) 663.

3. Such owner is not estopped from asserting his title, where the debt under which the attachment was levied was contracted before the agent went into the saloon. *Id.*

4. One of joint owners of a chattel cannot maintain replevin for it without joining his co-owners. *Corcoran v. White* (Mass.) 891.

5. The supreme court has original jurisdiction of replevin when the value of the property in the writ is greater than \$13.83, although it may upon trial prove to be less. *Adams v. Spalding* (N. H.) 47.

BRIEFS AND NOTES.

Not lie where defendant has lien on property. 569.

Plaintiff must have right of property and of possession. 562.

All joint owners of chattel must join. 892.

Amount in controversy; supreme court jurisdiction. 47.

RES JUDICATA. See JUDGMENT, 1-3.

REVIEW. See APPEAL AND ERROR, 7; JUDGMENT, 4.

BRIEFS AND NOTES.

Petitioner must satisfy court that he has not been guilty of laches. 896.

ROADS AND HIGHWAYS.

- I. DEDICATION.
- II. LAYING OUT.
- III. COMMISSIONERS; ACTS OF.
- IV. DISCONTINUANCE; OBSTRUCTION.
- BRIEFS AND NOTES.

See DEED, 7; HUSBAND AND WIFE, 11, 12; MUNICIPAL CORPORATIONS, III, IV.; TAXES, 7; WATERS AND WATERCOURSES, 1-8.

I. DEDICATION.

1. To make a highway by dedication, the owner of the land must assent to its appropriation for such use, and it must be so used by the public. *Union Company v. Peckham* (R. I.) 668.

2. Assent is inferred from acquiescence in public use. *Id.*

3. An unequivocal dedication takes place immediately. *Id.*

4. An intention to dedicate is implied by the opening of a thoroughfare. *Id.*

5. Dedication, once complete, is not revocable during public use. *Id.*

II. LAYING OUT.

6. A highway may be laid out wholly within town limits, when it connects with another highway. *Wells v. County Comrs.* (Me.) 805.

7. It may be located over a previously existing town way. *Id.*

8. An Act providing for the laying out of a highway across the tide waters of a river confers jurisdiction to county commissioners to make the location. *Id.*

9. Where objections involving questions of fact are made to acceptance of the report of a committee on the location of a highway, and they are overruled, exceptions taken thereto must show that the facts were found in favor of the excepting party. *Id.*

10. A petition for a way must describe it so as to notify interested parties what is asked for. *Puckard v. Androscoggin County* (Me.) 847.

11. It may describe alternative locations and termini. *Id.*

12. In laying out a way, substantial compliance with the line indicated in the petition is all that is required. Cited in *Id.* 847.

13. In laying out a road, selectmen need not find the road to be of common necessity. *Blakeslee v. Tyler* (Conn.) 815.

14. Payment of damages to a landowner is presumed after seventy years. *Id.*

15. In proceedings to lay out a town way, where other courses have no uncertainty, a description of one course as "41½° east," instead of "north 41½° east," does not render the description uncertain. *Carr v. Berkley* (Mass.) 514.

16. Where selectmen filed the layout of a town way with the town clerk at the proper time, and, after warrant for town meeting was issued, filed, within two days of such meeting,

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a duplicate of the paper before filed, with the statement: "and we report the boundaries to town meeting,"—this final report is properly before the meeting. *Id.*

III. COMMISSIONERS; ACTS OF.

17. Where a town, without accepting Stat. 1871, chap. 158, or Pub. Stat. chap. 27, § 74, from year to year elects road commissioners, the persons elected are commissioners *de facto*, the validity of whose elections can not be inquired into collaterally. *Clark v. Easton* (Mass.) 557.

18. Such commissioners are public officers, for whose acts the town is not responsible. *Id.*

19. Where the road commissioners, knowing the landowner's inability to read, presented him with a receipt in full of all demands; and he stated, on accepting the money, that he signed the receipt for the land only; and the commissioners said "that would be all right;" and, upon discovering that the receipt was in full for all demands, he repudiated it and left the money with the county treasurer,—an instruction in a petition for an assessment of damages, that the intent to defraud the petitioner was not necessary, but that it was necessary to show some conduct misleading him, was sufficiently favorable for him. *O'Donnell v. Clinton* (Mass.) 433.

20. Where the town claims the benefit of the arrangement made through commissioners, it takes it with all its defects. *Id.*

IV. DISCONTINUANCE; OBSTRUCTION.

21. Upon application under Gen. Stat. § 2985, to superior court for reversal of order by town selectmen discontinuing highways, the only issue is whether the highways were of common convenience and necessity. *Scott v. Southbury* (Conn.) 597.

22. A report of committee that a road was necessary for plaintiff and a few of his neighbors is not necessarily decisive of the question of common convenience. *Id.*

23. Petitioner failing to offer evidence upon the question of the common convenience and necessity of the highway cannot be heard upon appeal in that regard. *Id.*

24. Upon report of committee, in absence of irregular conduct on their part, the duty of the court is to dismiss the application, with costs. *Id.*

25. A prescriptive right to maintain bars across a highway is not established where they were kept there without claim of right, and the defendant's application to selectmen for permission to do so was denied. *Blakeslee v. Tyler* (Conn.) 815.

BRIEFS AND NOTES.

Dedication must be made by owner of land, and accepted. 669.

Existence of highway may be proved by long use by public. 816.

Powers of commissioners in laying out. 805.

Substantial observance of route indicated in petition is all that is required. 847.

Highway cannot be laid out along turnpike. 305.

Highway may be built over water crossed by aid of bridges. 518.

Power and duty to grade and regrade highways remains in highway surveyors. 760.

Road commissioners, when exercising their powers in laying out highways, are public, and not town, officers. 484.

Town is not liable for acts of. 558.

Discontinuance; common convenience and necessity. 597.

Gates interfering with use of way are obstruction. 598.

For obstruction, party injured may have action for damages. 832.

Putting fence across private way is no violation of statute. 815.

RULES OF COURT. See COURTS, 8.

SALE. See AUCTION AND AUCTIONEER; EVIDENCE, 11; FRAUD AND FRAUDULENT CONVEYANCE, 2, 8, 7; FRAUDS, STATUTE OF, 1, 2; MORTGAGE, 86; REPLEVIN, 1; TROVER AND CONVERSION, 1.

1. An instrument, in consideration of advances, consigning for sale personal property, as security for a note,—the proceeds of the sale to be delivered on demand,—is a mere power of sale, with an agreement to deliver the property on demand, or their proceeds in case of sale. *Shaw v. Siloway* (Mass.) 466.

2. Such note, maturing more than six years prior to action thereon, is barred by the Statute of Limitations. *Id.*

3. The title to property does not pass until the parties intend it shall. *Cleaves v. Washburn* (Me.) 788.

4. Where the price is to be paid in labor, and the purchaser is to have no ownership until he has fully performed it, he cannot maintain trover for the value of the property until he can show performance of the contract. *Id.*

5. Upon a sale for cash, payment is a condition precedent to passing of title, which may be waived by the vendor. *Peabody v. Maguire* (Me.) 694.

6. An unrestricted delivery waives a condition that payment is to be made before the title passes, although the seller has an undisclosed intent not to waive the condition. Cited in *Id.* 699. See *contra*, cited in *Warren Mfg. Co. v. Norwich B. D. & P. Co.* (Conn.) 919.

7. Where a contract for the sale of cloths to be delivered in certain specified quantities provided that the vendee should not at any one time owe for more than a certain specified number of pieces; that goods sent to be finished should be on account of vendor, and vendee should give instructions and pay bills for finishing, but not to remove at any one time more than the number of pieces to which his indebtedness at any one time was limited,—the title to the goods sent to the finisher continues in the vendor, and are not liable, when in the finisher's possession, to attachment as

the property of the vendee. *Warren Mfg. Co. v. Norwich B. D. & P. Co.* (Conn.) 917.

8. A written contract, not executed in a form to make a conveyance of interest in land, which is expressed to be an agreement to take, cut, and remove timber, which is to be paid for in the form of bark, lumber, and timber, is an executory contract, which passes no title in the standing timber. *United Society of Shakers v. Brooks* (Mass.) 432.

9. Where any operation, as surveying, measuring, or the like, remains to be performed in order to ascertain the price or the quantity to be delivered, the contract is incomplete, and the property does not pass. Cited in *Id.* 433.

10. A voluntary purchaser of such interest in property as another may have, can not complain that it is of less value than anticipated, where the seller made no misrepresentations. *Sears v. Leland* (Mass.) 263.

11. The sale of articles to be selected cannot be rescinded because, before sale, there may have been an honest expression of opinion that when the articles are selected they will be of a better quality than they proved to be. *Schramm v. Boston Sugar Refining Co.* (Mass.) 721.

12. The difference between the contract price and market value, at the time and place of delivery, is the measure of damages for vendee's failure to accept. *Id.*

13. Where personalty is sold with warranty, and a bill of sale is made not containing a warranty, which is afterwards amended so as to express it, an action for a breach of the warranty may be maintained thereon. *Spalding v. Conant* (Mass.) 829.

14. Where farmers sell meat, giving no representation of quality, there is no implied warranty of its fitness for food. *Giroux v. Stedman* (Mass.) 884.

BRIEFS AND NOTES.

One may sell milk that a cow may yield during the coming year. 898.

Title does not pass until performance of condition precedent. 789.

Where payment is condition precedent, title does not pass until payment. 551, 697.

Assignee of goods c. o. d. has no right of property until payment. 562.

Where vendor reserves *jus disponendi*, no title passes even if there is actual delivery. 917.

Question of title is governed by construction of contract. 917.

Conditional sale remains such until contract is fulfilled. 551.

Absolute or conditional delivery depends upon intention of parties. 551.

Unqualified delivery waives seller's rights. 696.

Whether delivery passes title depends upon intention with which made. 918.

Warranty arises from sales of food for domestic consumption. 885.

SATISFACTION. See ACCORD AND SATISFACTION.

SCHOOLS AND SCHOOL DISTRICTS.

1. After rejection by town meeting of application to **transfer territory from one school district to another**, the superior court may order the transfer of a part only of the territory described in the notice and warning. *Gravel Hill School Dist. v. Old Farm School Dist.* (Conn.) 127.

2. A **failure to elect a school committee at the annual meeting** does not create a vacancy, but leaves the district legally officered as to committee. *Roswell v. School Dist. No. 19* (Vt.) 139.

3. There is an implied promise of a school district to **pay a de facto committee for boarding a teacher**, when he acted in good faith and the district stood by in silence. *Id.*

4. Where a town appoints no agent to take care of its **school building and lot**, the school committee are by statute required to **keep it in good repair**. *McKenna v. Kimball* (Mass.) 523.

5. Where the committee voted to remove a **tree from the lot**, and it was afterwards **cut down** by two men acting under orders from the person employed, the **committee is not responsible to one upon whom the tree fell**. *Id.*

BRIEFS AND NOTES.

Alterations and annexations. 127.

SEAMEN. See ARMY AND NAVY; SHIPS AND SHIPPING, 2-5.

SEARCH AND SEIZURE. See INTOXICATING LIQUORS, III.

The certificate of a magistrate, that complainant for search and seizure made solemn **affirmation that the complaint was true**, is sufficient. *State v. Devine* (Me.) 854.

BRIEFS AND NOTES.

Complaint made upon affirmation is sufficient. 854.

SEDUCTION.

An **uncle, standing in loco parentis to a niece, can recover damages** for her seduction. Cited in *Ormsby v. Rhoades* (Vt.) 180.

SERVICE. See WRIT AND PROCESS.

SET-OFF AND COUNTERCLAIM. See VENDOR AND PURCHASER, 3.

1. In an **action by the assignee of a cestui que trust** against the trustee, to recover the income of the trust, a **claim against the cestui que trust for money loaned can not be set off**, in the absence of an agreement creating an equitable lien. *Abbott v. Foote* (Mass.) 889.

2. Where the **account of a trustee, crediting himself with the application of income on his own debt against a cestui que trust**, is allowed without notice to the latter or his assignee, the **assignee is not bound**. *Id.*

3. The trustee's **right of set-off against the cestui que trust can not be adjudicated in the probate court**. *Id.*

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4. Courts of **equity follow courts of law** in matters of set-off, unless there is equitable lien. Cited in *Id.* 891.

5. Where mortgaged property passes to a mortgagee on foreclosure, and its value is less than the debt, the difference can **not be first presented in offset in one court, and then, if there is a balance, in a subsequent suit in another court**. *Spaulding v. Warner* (Vt.) 220.

BRIEFS AND NOTES.

Debt due intestate from heir cannot be set off from distributee's share as heir. 890.

SHIPS AND SHIPPING.

1. U. S. Stat. 1884, chap. 121, § 18, did not, prior to the Stat. 1886, chap. 21, extend the limitation of responsibility therein provided for to the **owners of fishing vessels**; and their common-law liability remains. *Simpson v. Story* (Mass.) 464.

2. A **release under U. S. Rev. Stat. § 4553, by a shipping master and seaman, need not be under seal**. *Rosenberg v. Doe* (Mass.) 750.

3. Where the execution of the release before the shipping commissioner is established, **absence of his seal does not deprive the release of its effect**. *Id.*

4. One who has signed such release can **not deny his assent on ground of undisclosed state of mind** for which no one else was responsible. *Id.*

5. **Common law makes no exception in above principles in favor of seamen**. *Id.*

BRIEFS AND NOTES.

Common-law liability of owners of fishing vessels. 465.

Shipping release, not under seal, is invalid. 750.

SLANDER. See LIBEL AND SLANDER.

SOCIETIES. See BENEFIT SOCIETIES; RELIGIOUS SOCIETIES.

SPECIFIC PERFORMANCE.

1. A **covenant in a lease that the lessee shall have the refusal of the premises when offered for sale, but which does not fix the price, will not be specifically enforced**. *Fogg v. Price* (Mass.) 531.

2. Where personal property is contracted to be delivered to a trustee in aid of a mortgage, **equity has jurisdiction of a bill for specific performance, although there is a remedy at law for its breach**. *Chafee v. Sprague* (R. I.) 880.

3. An **executory contract for the transfer of stock as collateral security for a trust deed will not, after the death of the debtor-contractor insolvent, be enforced in equity to the injury of his general creditors**. *Id.*

STATE AND STATE OFFICERS. See FISH AND FISHERIES.

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS. See
LIMITATION OF ACTIONS.

STATUTES. See CORPORATIONS, 10; MORTGAGE, 33-35; MUNICIPAL CORPORATIONS.

1. In construing an Act of Congress, its title, the objects to be accomplished, the arrangement of the statutes amended, the mode in which the embarrassing words were introduced, as shown by the journals, the history of the times, and prior legislation upon the same subject,—may all be considered. Cited in *Simpson v. Story* (Mass.) 465.

2. Specific provisions govern general provisions in other parts of the law. Cited in *Marshall v. Wadsworth* (N. H.) 69.

3. A statute in derogation of common law is strictly construed. Cited in *Hovess v. Newcomb* (Mass.) 570.

4. Penal statutes are strictly construed. Cited in *Jenkins v. Wood* (Mass.) 450.

5. A penal statute, imposing a forfeiture, may be remedial in a certain sense. Cited in *O'Connell v. O'Leary* (Mass.) 300.

6. A statute making a railroad company liable for the consequences of the lawful use of its property is not penal. *Newton v. New York & N. E. R. Co.* (Conn.) 614.

7. Remedial statutes are liberally construed. Cited in *Congdon v. Congdon* (Vt.) 108.

8. A statute requiring the plaintiff, non-suited, to pay the costs of the first action before bringing another action, should be liberally construed on behalf of the defendants. *Smith v. Allen* (Me.) 702.

9. Statutes should always have a prospective operation, unless the intention of the Legislature is clearly expressed that they shall apply to past transactions. Cited in *Deake's Appeal* (Me.) 850.

10. The repeal of a statute does not take away a right of action which may be prosecuted independently of the statutes. *Coggeshall v. Groves* (R. I.) 336.

BRIEFS AND NOTES.

Construction; is for court. 402.
Contemporaneous is best construction. 708.
Defeating purpose of statute not adopted. 47.
Rule as to construction of words and phrases. 47.

Every word is presumed to have been intended to have some force and effect. 455.

Considered prospective only. 849.

Giving costs, strictly construed. 199.

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Penal, strictly construed. 297, 815, 449.

May be penal in one part and remedial in another. 298.

Both penal and remedial should be construed strictly. 851.

Remedial, liberally construed. 204, 658.

Repeal by implication is not favored. 538.

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STREETS. See **ROADS AND HIGHWAYS.**

SUNDAY.

1. There can be a recovery for services on Sunday in **shaving** an old man in his own house who could not shave himself. *Stons v. Graves* (Mass.) 258.

2. The word "**baker**," as used in the Statute of 1886, chap. 82, allowing bakers to keep open their shops certain hours on Sunday, means one whose occupation is to bake bread. *Com. v. Crowley* (Mass.) 401.

3. One keeping a shop for the sale of groceries, other articles, and bread which he did not make, is not a baker, although he sometimes sold a few cookies and gingersnaps made by his wife. *Id.*

4. A **complaint for keeping a shop open** need not negative statutory exceptions. *Com. v. Shannishan* (Mass.) 118.

BRIEFS AND NOTES.

Shaving and hair cutting are not works of necessity. 258.

Complaint need not negative statutory exceptions. 119.

SURVIVORSHIP. See **DEATH, 3; DEVISE AND LEGACY, IV.**

TAXES. See **INSOLVENCY, 4; MUNICIPAL CORPORATIONS, 18, 19.**

1. Rights in a **water reservoir** are real estate, and **taxable** in the town where situated. *Winnepisogee Lake C. & W. Mfg. Co. v. Guilford* (N. H.) 88.

2. Upon the **value of such rights**, evidence that they may be exercised for the benefit of mills in another town is competent. *Id.*

3. An **educational corporation** where young men whose education has been neglected are furnished board and instruction for the purpose of their physical training and practical study of agriculture, in connection with manual labor on the farm owned by it, at a smaller charge and less than the cost of their education, is **entitled to exemption**. *Mt. Hermon Boys School v. Inhabit. of Gill* (Mass.) 148.

4. Acts 1849, chap. 96, § 4, incorporating the trustees of "**Smith Charities**," and providing that no part of the funds of the corporation shall be **exempted** from taxation, and apportioning the taxes among eight towns named therein, of which Northampton is one, is not in violation of the State or Federal Constitution. *Northampton v. Hampshire County* (Mass.) 175.

5. It is a general rule in Massachusetts that **personal property** is to be **taxed** where the owner resides. *Id.*

6. The **personal list** required by Rev. Stat. § 381, to be lodged in the town clerk's office, neither signed nor certified by the listers, is invalid, and taxes paid under protest are recoverable. *Bundy v. Wolcott* (Vt.) 216.

7. Highway surveyors can **not arrest** the body to enforce the collection of a **highway tax**. *Marshall v. Wadsworth* (N. H.) 61.

BRIEFS AND NOTES.

Taxation and protection are reciprocal. 175.
Water rights are taxable in town where situated. 90.

Personalty is taxable at residence of owner. 178.

Exemption; property of educational corporation. 143.

Erroneous assessment may be revised on certiorari. 911.

Collector cannot arrest body to enforce collection of highway tax. 68.

TENANTS IN COMMON. See JOINT TENANT AND TENANTS IN COMMON.

TENDER. See MORTGAGE, 42.

THREATS. See CRIMINAL LAW, 5; DURESS, 1, 8.

TOWNS. See MUNICIPAL CORPORATIONS.

TRESPASS. See ASSAULT AND BATTERY; BANKRUPTCY, 2; INJUNCTION, 1; MALICIOUS MISCHIEF; MALICIOUS PROSECUTION, 6; NUISANCE, 8; PLEADING, 4, 5.

In trespass on the freehold, **evidence** is not admissible to show that fence-viewers established a boundary line, but is admissible on the question of exemplary damages. *Camp v. Camp* (Vt.) 140.

BRIEFS AND NOTES.

Admissibility of evidence to show that fence-viewers established boundary line. 140.
 License must be specially pleaded. 140.

TRIAL. See CRIMINAL LAW, III.

1. Parties can not submit a case upon an imperfect statement of facts, with an agreement that if, upon any facts, the plaintiff's case can be maintained, the case can be referred to a master to determine the existence of such facts. *Phelps v. Phelps* (Mass.) 392.

2. Parties submitting questions of fact to the law court, must be content with the decision thereof, without a review of the testimony in the opinion. *Johnson v. Merrithew* (Me.) 855.

3. Questions of law arising at the trial should be heard in the law court in the district where the trial was had, and the mandate of the law court should be sent to the clerk of the court whence the exceptions came. *Backus v. Cheney* (Me.) 795.

4. The rejection of evidence, afterwards supplied, is no ground of error. *Davis v. Guilford* (Conn.) 818.

5. Defendant cannot take exception to evidence in reply to his evidence upon the same matter. *O'Donnell v. Clinton* (Mass.) 433.

6. No exception lies to the admission of competent evidence because admitted out of order. *Dodge v. Goodell* (R. I.) 678.

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7. Plaintiff having in his possession a writing which he declined to produce on defendant's request, and which he offered in evidence on its identification by defendant, but which was excluded on defendant's objection, it is proper to charge jury to lay paper and fact of refusal to produce it out of consideration of case. *Bennett v. Gibbons* (Conn.) 620.

8. A judge should not stop a witness merely because he had formed an unfavorable opinion as to his truthfulness. *Quinn v. New York, N. H. & H. R. Co.* (Conn.) 685.

9. Where there is evidence sufficient to go to the jury as to an issue of fact, there can be no complaint that the question was submitted to them. *Marble v. Mellen* (Mass.) 272.

10. The court may express its opinion on the character and weight of the evidence. *Rowell v. Fuller* (Vt.) 217.

BRIEFS AND NOTES.

When court can direct verdict. 819, 860.
 Case not submitted to jury upon mere scintilla of evidence. 585.

All questions of horse lore are left to jury. 172.

Allowing paper to go to jury is within discretion of court. 299.

Erroneous instruction may be qualified by others. 769.

Court may give jury in one charge all the law the facts of the case demand. 768.

Court should not charge jury as to matters of fact, but may state testimony and law. 271.

Charge not called for by evidence is error. 416.

Charge on particular point may be omitted, when not requested. 769.

Request of abstract legal proposition may be refused. 416.

Request assuming facts is not granted. 303, 464.

TROVER AND CONVERSION. See PLEADING, 5; SALE, 4; WITNESS, 2.

1. That vendor took a cow, to which he held the title until a note for the purchase price was paid, from the premises of a married woman, considering that her husband had the right of redemption, is not such evidence of possession in the wife as enables her to maintain trover for its value. *Lewis v. Beckler* (Me.) 690.

2. Where an officer arrests a person for beating a drum in violation of a city ordinance, and detains the drum after the trial, trover lies against him for its value, after demand. *Thatcher v. Weeks* (Me.) 859.

3. In trover against a town by the subcontractor of a public building for the conversion of sheds, etc., where the town had notified him to remove the property from its lands, and upon his refusal made such removal, recognizing his right of property, there can be no recovery for the value of the property. *Shea v. Milford* (Mass.) 479.

BRIEFS AND NOTES.

To constitute conversion, there must be wrongful taking or detainer or assumption of ownership. 788.

Taking of goods by officer under replevin writ is not tortious. 160.

Trover is maintainable by one in possession of personality against all wrongfully interfering therewith. 690.

If owner enters and takes possession of crops he is liable in trover or trespass. 412.

Plaintiff must have right of possession as well as of property. 860, 789.

When goods have been tortiously obtained, it is sufficient evidence of conversion. 160.

TRUSTEE PROCESS. See ATTACHMENT.

TRUSTS. See DEVISE AND LEGACY, V. 24; SET-OFF AND COUNTERCLAIM, 1-3.

1. Notice to the trustee, and acceptance by him, are not essential to a voluntary trust as against the settlor. *Minot v. Tilton* (N. H.) 54.

2. A trust once established is irrevocable except with the beneficiary's consent. *Id.*

3. One acquiring all possible interest in a trust fund is entitled to a decree terminating the trust. *Whall v. Converse* (Mass.) 828.

4. Where hostility between the trustee and the beneficiary has arisen since the creation of the trust, partly by the trustee's fault, and would naturally pervert his judgment, he may be removed without further proof of misconduct; removal rests largely in the justice's discretion. *Wilson v. Wilson* (Mass.) 442.

5. One entitled to income under a will may apply for the removal of the trustee. *Id.*

6. A trustee can not buy the property of his principal. Cited in *Randall v. Lautenberger* (R. I.) 760.

7. In suits concerning trust property, the cestui que trust are necessary parties. *First Nat. Bank of Northampton v. Crafts* (Mass.) 488; *S. P.* cited in *Dewey v. St. Albans Trust Co.* (Vt.) 656.

8. The right of the cestui que trust to follow trust funds or hold the trustee responsible is alternative. *Hodges v. Bullock* (R. I.) 95.

BRIEFS AND NOTES.

Purchase of property with another's money, taking title in own name, causes resulting trust to arise in favor of former. 443.

Revocation. 55.

Trustee removed, even though not guilty of misconduct, when it is essential to due exercise of trust. 443.

Trustee takes estate commensurate with trust. 576.

Not compelled to do what law forbids him to do. 893.

Cannot purchase trust property. 489.

Right of cestui que trust to follow misapplied trust funds. 96.

TURNPIKE COMPANIES. See MUNICIPAL CORPORATIONS, 24.

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ULTRA VIRES. See CORPORATIONS, 15.

UNDUE INFLUENCE. See FRAUD AND FRAUDULENT CONVEYANCE, 8.

VARIANCE. See CRIMINAL LAW, 6; MALICIOUS MISCHIEF, 4; PLEADING, 11.

VENDOR AND PURCHASER. See COVENANT.

1. Where there was a defect in the vendor's title, and he made no offer to carry out the contract or any demand upon the vendee, he can not recover for a breach of the agreement. *Langley v. Douray* (Mass.) 284.

2. Where the vendee was to purchase as if the premises were free from incumbrance, but, being unable to pay the purchase money in full, it was agreed that the money should be applied on the mortgage and his debt; and, the land depreciating in value, he refused to complete the payments and the land was sold in foreclosure, he can not recover either on covenants against incumbrances or warranty. *Beecher v. Baldwin* (Conn.) 418.

3. The vendee could at most recover but nominal damages in an action on a covenant against incumbrances; and the vendor's plea of set-off of notes given for the purchase money, which exceed the value of the property at the time of eviction, is a full answer to his claims. *Id.*

4. Where the description in the record of a mortgage suggests a mistake, it puts a purchaser upon inquiry. *Levis v. Hymas* (Conn.) 770.

BRIEFS AND NOTES.

Rights of vendee upon discovery of defects in vendor's title. 264.

VENUE. See ACTION OR SUIT, 5-7.

VILLAGES. See MUNICIPAL CORPORATIONS.

VOTERS AND ELECTIONS.

1. Under Pub. Stat. chap. 10, § 11, ballots for city officers enclosed in envelopes are illegal, although other ballots proper to be enclosed in envelopes are cast at the same time.—and need not be transmitted to the city clerk by the election officers. *State v. Collins* (R. I.) 666.

2. On the trial of an indictment for altering a ballot, secondary evidence of what the ballot was is admissible. *Con. v. McGurty* (Mass.) 273.

3. Evidence that the ballot came from the box used in the election warrants the inference that it has been duly cast. *Id.*

4. The cancellation of a ballot by a mechanical device is not essential to ensure the counting of it. *Id.*

5. Lines drawn across a name upon a ballot are sufficient to support a charge of altering it. *Id.*

6. A ballot cast for a candidate is cast "for any officer" within the meaning of the statute. *Id.*

7. That the defendant's fraud did not

succeed, and the ballot was counted and returned for the person over whose name the lines were drawn, is no defense to an indictment. *Id.*

WAIVER. See APPEAL AND ERROR, 14, 15; BENEFIT SOCIETIES, 7; CARRIERS, 7; CONTRACT, 5; DEFINITIONS, 7; FALSE IMPRISONMENT, 2; INSURANCE, 16; LIMITATION OF ACTIONS, 18; MORTGAGE, 8; SALE, 5, 6; WRIT AND PROCESS, 3, 4.

A waiver may be proved either directly or circumstantially, like any other fact, and is a question for the jury. Cited in *Peabody v. Maguire* (Me.) 699.

BRIEFS AND NOTES.

Definition. 695, 798, 848.

There is no waiver of right without knowledge of facts on which right is based. 723.

Is question of fact. 848.

WARRANTY. See SALE, 18, 14.

WATER COMPANIES. See TAXES, 1, 2.

1. A corporation authorized to acquire the waters of a certain brook in a certain place, and "other water sources," may purchase water sources outside of such place. *Woodbury v. Marblehead Water Co.* (Mass.) 504.

2. Stat. 1888, chap. 163, is not void for want of provisions for compensation to owners of land taken. *Id.*

3. The description of land to be taken not setting out its width, and vague as to termini, is not sufficiently accurate. *Id.*

4. Filing, within time, a second description in aid of the first is sufficient, if it identifies the land. *Id.*

5. The remedy for damages for the construction of a dam along the shores of Spring Pond, and for overflowing the plaintiff's land, is not under the Act creating the Salem and Danvers aqueduct, which authorized taking of waters in such pond by subterranean pipes, and which Act contemplated the maintenance of dams for reservoirs, and provided for compensation only for taking the water, nothing being said about flowing the lands of other people. *Pickman v. Peabody* (Mass.) 394.

WATERS AND WATERCOURSES.

See DRAINS AND SEWERS; LOGS AND LOGGING; MILLS AND DAMS; ROADS AND HIGHWAYS, 8; WATER COMPANIES, 5.

1. In constructing and repairing highway, the public has the rights of a landowner as regards watercourses within the highway limits. *Nealley v. Bradford* (Mass.) 515.

2. Where a natural watercourse is almost within the highway limits, the fact that plaintiff owns the fee to the centre of the highway will give him no right to the water as against the public. *Id.*

3. The right to convey a natural stream, whose source and outlet are in a highway, in an artificial drain within the highway, is not distinguished from the right to carry surface water. *Id.*

4. Right to flow, controverted in proceed-

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ings upon complaint for flowage, must be established before the appointment of commissioners, who cannot determine that question. *Hubbard v. Great Falls Mfg. Co.* (Me.) 794.

5. Where adjoining landowners made agreement as to the portion of a division fence to be built by each; and the defendant, to close an opening made by the plaintiff, built a high board fence two or three feet beyond the agreed place of division, which was near the place where the greater part of the surface water flowed, the usual flow of which was prevented by such fence,—no action lies by plaintiff for the injury. *Chadseyne v. Robinson* (Conn.) 408.

6. Where the plaintiff charged that the defendant, owing him a duty to maintain a dyke at a particular place, neglected to do so, a finding by the court that it was the defendant's duty to do so, but uncertain as to the exact length of the line to be maintained, will not be recommitted for such uncertainty. *Schwab v. Charles Parker Co.* (Conn.) 849.

7. If a dam is maintained by authority of a statute providing a method for the recovery of damages occasioned by the dam, an action on the case is not maintainable. *Williams v. Camden & R. Water Co.* (Me.) 352.

8. Damages to the date of the writ are only recoverable for diverting the water from its natural course. *Id.*

9. A lessee, with the exclusive right of cutting and carrying ice from a pond, may sue a stranger for cutting ice. *Richards v. Gauffret* (Mass.) 398.

10. He can also sue the lessor if he interferes with his rights. *Id.*

BRIEFS AND NOTES.

Waters navigable in fact are navigable waters. 868.

Riparian owner on navigable lake holds to ordinary water line. 868.

Riparian owner is entitled to seaweed cast upon shore, and may maintain trespass for entry upon shore to carry off wreck. 864.

Obstructing landing-place of summer resort is natural cause of ensuing loss of business at such resort. 294.

State holds title to land between high and low water mark in navigable waters. 868.

Littoral rights on unnavigable streams. 872.

Landowner may obstruct surface water by preventing it from coming upon his land. 404.

Owner of higher land cannot compel owner of lower land to receive it. 405.

Landowner cannot overflow lands of his neighbors. 872.

Adverse use of artificial aqueduct for twenty years gives right thereto. 558.

Public have no common right of bathing in sea. 364.

WILL. See DEVISE AND LEGACY; LIMITATION OF ACTIONS, 10, 11.

1. The fact that, at a date when a woman ex-

ecuted a will, a **married woman** was incompetent to **make a will**, may be considered in connection with other evidence as showing that she was a widow, and competent to make a will. *Haddock v. Boston & M. R. Co.* (Mass.) 715.

2. **Signing of will by testatrix and witnesses** in the presence of each other is a sufficient **publication** of it, where the person who drew it announced that it was her will. *Denny v. Pinney* (Vt.) 639.

3. Where **one of the three witnesses was dead**, and **another testified to signing**, the proponent need not produce the other who is out of reach of process, nor his deposition. *Id.*

4. In an action to establish a will, the proponent has the **burden of proving testatrix's capacity**, and contestant of proving **undue influence**. *Id.*

5. **Evidence of contestant**, that the **testatrix was weak in body and mind**, and that of proponent in rebuttal, relating to her health, activity, and **ability to labor**, are **admissible**. *Id.*

6. On the contest of a will on the ground of **mental weakness and undue influence**, **evidence** is admissible that the real estate devised was acquired by the earnings of the testator's wife and daughters, introduced in connection with evidence that the testator, when of sound mind, promised to make over the real estate to his wife by will. *Beattie v. Thomason* (R. I.) 337.

7. Where **evidence as to the testator's mental condition is contradictory**, a new trial will not be granted. *Id.*

8. Where a will is impeached for imbecility of mind of the testator, together with fraudulent practices by the devisees, the intrinsic evidence of the will itself, arising from the **injustice of its provisions**, is **proper for the consideration of the jury**. Cited in *Id.* 338.

9. There is **no limit to time** in which a will of real estate can be admitted to **probate**. *Haddock v. Boston & M. R. Co.* (Mass.) 715.

BRIEFS AND NOTES.

Omission of attestation clause does not invalidate will. 848.

Will of real estate may be probated at any time. 716.

Proponent must produce and examine all attesting witnesses. 639.

WITNESS.

I. COMPETENCY.

II. CREDIBILITY; EXAMINATION, ETC.

III. FEES.

BRIEFS AND NOTES.

See EVIDENCE; TRIAL, 8.

I. COMPETENCY.

1. In an action by a surety who paid the note **against the estate of a deceased surety** on the same note, the **maker may testify** that the plaintiff was only surety for N. E. R., v. V.

the deceased. *Canfield v. Bentley's Adm.* (Vt.) 736.

2. Where the defendant in **trover** claimed title to the property as the legatee of his father, the **plaintiff, claiming to have left it with the testator merely for his use**, is a **competent witness** in this respect in his own behalf. *Walling v. Newton* (Vt.) 215.

3. The **plaintiff in real action, claiming title in his own right**, and who is not party as "heir of deceased," is a **competent witness**. *Johnson v. Morritheo* (Me.) 855.

4. A **husband and wife cannot testify as to conversations** between them relating to business done by one as agent of the other. *Com. v. Hayes* (Mass.) 268.

II. CREDIBILITY; EXAMINATION, ETC.

5. In an action by assignee to recover a payment to the bank by an insolvent, where the whole transaction was between the insolvent and its president and cashier, their **cross-examination** by the plaintiff rests in the sound discretion of the lower court. *South Danvers Nat. Bank v. Jackson* (Mass.) 444.

6. Discretion as to **cross-examination** should not permit the introduction of evidence having **no legitimate bearing on the issues**, and likely to improperly influence the jury. *Sullivan v. O'Leary* (Mass.) 896.

7. A witness, on cross-examination, admitting signing and swearing to a **complaint**, and identifying a copy thereof, its contents are **admissible to contradict him**. *Com. v. Snes* (Mass.) 249.

8. The plaintiff may use his account book as an aid to his memory. *Miller v. Shay* (Mass.) 153.

9. **Conviction of a witness of felony or misdemeanor may be shown to affect his credibility**. *Com. v. Ford* (Mass.) 595.

10. The **credibility of witnesses is for the jury**. *Com. v. Moore* (Mass.) 301.

III. FEES.

11. A witness **attending on request** is entitled to his fees. *Barber v. Parsons* (Mass.) 199.

12. But where **three cases are heard together**, and the **witnesses are examined in but one case**, they are not entitled to more than one traveling fee. *Id.*

13. **Separate requests for travel and attendance** entitle the witnesses to be paid in each case. *Id.*

14. If the witnesses, appearing in obedience to a subpoena, were **requested to remain as witnesses in all the other cases**, they are **entitled to be paid for attendance in each case**. *Id.*

15. If **one case is tried before the trial of another is begun**, the attendance of the witnesses should not be taxed in the former case after the trial therein is finished. *Id.*

BRIEFS AND NOTES.

Competency; parties. 737.

Party may testify where estate of deceased party is not affected or interested, and where matter is collateral. 216.

Husband and wife cannot testify as to private conversations with each other. 269.

Examination of adverse party. 445.

May be compelled to answer any question, unless it exposes him to criminal charge. 897.

Cross-examination is in discretion of court. 820, 445, 898.

Credibility is for jury. 302.

Conviction of crime may be shown to affect credibility. 596.

Witness may be contradicted upon material point. 250.

Fee; attendance. 199.

WORDS AND PHRASES. See DEFINITIONS.

WRIT AND PROCESS. See APPEAL AND ERROR, 2; ARREST; ASSIGNMENT, 3; EXECUTION; INTOXICATING LIQUORS, III.; SEARCH AND SEIZURE.

1. Service of a writ upon the defendant, named as a railroad company, by leaving a N. E. R., v. V.

copy with its clerk, will not be set aside for want of proof that it is a corporation, upon a motion to dismiss on the ground of illegality of service, not specifying any error or method of its correction. *Nye v. Burlington & L. R. Co. (Vt.)* 373.

2. Processes irregularly obtained may be set aside, and acts done under them are deemed to have been done illegally. Cited in *Everett v. Anderson (Mass.)* 495.

3. In order to waive the service of a paper there must be an intention to waive a known right. *Goldenberg v. Blake (Mass.)* 285.

4. In cases of doubt, the question of waiver is for the jury. *Id.*

5. A direction in a warrant to serve it, without limitation as to the hour of the day, is a direction to serve it in the night-time as much as in the daytime. *Com. v. Hinds (Mass.)* 155.

BRIEFS AND NOTES.

Execution of writ in night-time. 156.

Return is conclusive only between parties. 831.

Waiver of service is question for jury. 286.

Conclusiveness of return. 357.

Ex. J. M.

